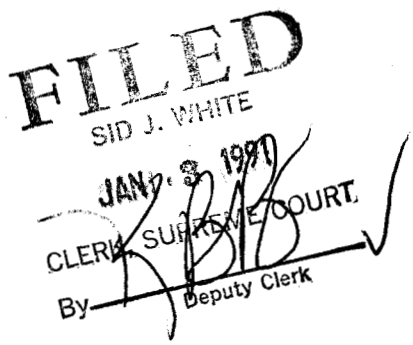
IN THE SUPREME COURT OF FLORIDA



IN RE:

APPELLATE COURT RESPONSE
TO ANDERS BRIEFS,

CASE NO. 76,483

_____/

PETITIONER'S SUPPLEMENTAL REPLY BRIEF

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PRELIMINARY STATEMENT

This case addresses the propriety of appeals invoking Anders after pleas of guilty or nolo without reservation. The more comprehensive issue of whether persons who appeal after pleas of guilty or nolo contendere without reservation have any right to direct appeal has been placed before this court in the State's petition for writ of prohibition (filed December 19, 1990) styled State of Florida v. District Court of Appeal of Florida, First District, case no. 77,099. A copy of that petition is attached as Appendix A.

The State's reply herein is limited to issues raised by its argument based on subject matter jurisdiction. Since Respondent Fennell appealed after his conviction by a jury, this reply does not apply to him. Unless noted otherwise,

use of the term "Respondents" refers only to Respondents Coupe and Williams. Petitioner will be referred to as the State. Respondents' supplemental answer brief will be cited as (supp. answer, [page no.]).

STATEMENT OF THE CASE AND FACTS

The State adopts the statement of the case and facts in its initial brief, except to emphasize that neither Respondent Coupe nor Respondent Williams moved to withdraw their pleas before the trial courts.

SUMMARY OF ARGUMENT

Respondents have no right, as a matter of state law, to appeal any matter arising before their pleas of nolo without reservation. Consequently, they cannot use federal law to circumvent limits placed on their right to appeal by §924.06(3), Florida Statutes, as interpreted by this Court.

Restated, Respondents cannot invoke Anders,[1] which requires the appellate court to review the entire record,[2] when they have no state-law right to appeal matters arising before their pleas. By allowing Respondents to invoke Anders and thereby enlarge their statutory right of appeal,

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[1] Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967).

[2] See State v. Causey, 503 So.2d 321, 322 (Fla. 1987) ("At the very least, however, pursuant to Anders, . . . the appellate court must examine the record to the extent necessary to discovery any errors apparent on the face of the record.").

the First District exceeded its subject matter jurisdiction. For this reason, in addition to those advanced in the State's initial brief, the First District's order below must be quashed as to Respondents. Their appeals must proceed as if Anders had not been invoked.

ARGUMENT

WHETHER ARGUMENT ON THE MERITS PRECLUDES ANDERS PROCEDURES IN CRIMINAL APPEALS

First, the State agrees that its argument based on subject matter jurisdiction was not raised until its brief in reply to Respondent Williams. Recognizing that subject matter jurisdiction can be raised at any time, the State was obligated to raise its argument as soon as it became apparent. Not wanting to benefit from unfair surprise, the State did not oppose Respondents' motion to file a supplemental answer.

Second, the State here does not contend that Respondents Coupe and Williams have no right to appeal. Under §924.06(3), Florida Statutes, as interpreted by this Court in Robinson v. State, 373 So.2d 898 (Fla. 1979);[3] Respondents have a right to appeal four matters arising "contemporaneously with" the entry of the plea: "(1) subject

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[3] For this appeal, the State does not ask this Court, nor is it necessary, to revist Robinson. See, however, the State's petitioner for writ of prohibition in State of Florida v. District Court of Appeal of Florida, First District, case no. 77,099, at p. 13-25. The State's petition is attached as Appendix A.

matter jurisdiction, (2) the illegality of the sentence, (3) the failure of the government to abide by the plea agreement, and (4) the voluntary and intelligent character of the plea." Id. at 902.

Here, Respondents acknowledge (supp. answer, p. 3) that they have appealed the legality of certain aspects of their sentences. They neglect to mention that neither Respondent moved to withdraw his plea below, as required by Robinson, supra at 902-3 (rejecting argument that an appellant has a right to "a general review of the plea," adhering to principle that an appellant must identify to the reviewing court the grounds for appeal, and refusing to "eliminate both the necessity for a defendant to move for a withdrawal of his plea and the obligation to show a manifest injustice").

Contrary to Respondents' descriptions, this appeal has not become "somewhat chaotic." (supp. answer, p.3). The State's point is simple: under §924.06(3) and Robinson, Respondents have no right to appeal matters arising before their plea. See Robinson, supra at 903 ("Other grounds advanced for review concern court rulings preceding the plea which appellant concedes are not subject to appeal."). Respondents cannot circumvent this fact by invoking Anders, thereby compelling the First District to review the entire record for facial error. State v. Causey, 503 So.2d 321, 322 (Fla. 1987).

By allowing the Respondents to invoke Anders and compelling itself to review the entire record, the First District circumvents the limitations on rights to appeal established by §924.06(3). In so doing, the court exceeds its subject matter jurisdiction.

Respondents cite no federal case, involving Anders, that compels the result they urge. In effect, Respondents believe that Anders somehow creates a right of appeal where none exists as a matter of state law. Respondents cite no authority, and are simply wrong.

Respondents error is made manifest by their argument at page six. They maintain appellate counsel, when facing an appeal of no merit, must do certain things pursuant to Anders. Respondents overlook a crucial point. They must have a right to appeal, under state law, before the Anders obligation arises. If there is no state right to appeal pre-plea matters, Anders does not, and cannot, obligate state courts to discern error as to matters arising before the plea.

In fact, Respondents partially concede this point when they observe (supp. answer, p. 6):

> When a defendant files an Anders brief, therefore, the court is still obligated to conduct its independent review of the whole [e.s.] record, but only the record as it concerns the plea itself and post-plea proceedings, which would certainly include sentencing.

This observation is troubling. Initially, Respondents cite no federal authority for their position. If the appellate court must review the whole record, pursuant to Anders, how can it ignore any facial, pre-plea error? What happens, for example, if the court discovers an indictment that improperly joins unrelated charges? Would this "facial" error be subject to judicial response, simply because of Anders? No - objection to the error was waived by the defendant's plea.

The opinion below expresses willingness to accept Anders briefs, thereby compelling review of the entire record, when appellants have pled guilty or nolo without reservation, and have not moved below to withdraw their pleas. This violates §924.06(3) as well as the teaching of Robinson. The mere fact that Respondents did not include pre-plea hearings in their records on appeal does not obviate the error in the opinion below.

Respondent Coupe raises a false issue by anticipating the State's position as to his appeal. This Court need not reach the issue of whether an illegal sentence is always subject to direct appeal. Coupe should not be able to directly appeal his sentence - since it is within the statutory maximum - absent a motion to withdraw below.

However, even this point is secondary. The crucial point is that a right to appeal pre-plea matters must exist as a matter of state law, before Anders can be invoked to

compel appellate court review of the entire record. Moreover, since Respondents argued sentencing errors on the merits, appellate court review of the "whole" record as to sentencing is superfluous.

Finally, Respondents discuss "policy issues." (supp. answer, p. 8). They ignore the fact that the Legislature, as the branch of government constitutionally charged with resolving matters of public policy, expressly limited most post-plea appellants to collateral attack. The State does not wish to deny all review to an appellant with a meritorious sentencing issue. Rather, such appellants must first raise the issue below through a motion to withdraw or be limited to collateral relief.

Respondents Coupe and Williams, by not moving to withdraw their pleas below, had no right to direct appeal even under Robinson. Assuming they had rights to appeal issues arising contemporaneously with or after their plea, they still cannot obtain judicial review of pre-plea matters by invoking Anders.

CONCLUSION

Coupe and Williams' direct appeals should be dismissed altogether, without prejudice to seek collateral relief before the trial court. At the least, this Court should quash the opinion below, grant the State's motions to strike the Anders portions of their initial briefs, and direct the First District accordingly.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Kathleen Stover, Assistant Public Defender, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301, this 3d day of January, 1991.

Charlie McCoy
Assistant Attorney General