Original
76-576

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA

Appellant,

vs. CASE NUMBER 76,576

JOSEPH BEACH,

Appellee.
_____/

ON APPEAL FROM THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA
CERTIFIED QUESTION

PETITIONER'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

PAGE

TABLE OF CITATIONS

(Continued)

CASE PAGE

STATUTES AND CONSTITUTIONS

OTHER SOURCES

PRELIMINARY STATEMENT

Petitioner was the prosecuting authority in the trial court and the appellee in the First District Court of Appeal, and will be referred to as "petitioner" or "the state" in this brief. Respondent was the defendant in the trial court and the appellant in the First District Court of Appeal, and will be referred to as "respondent" in this brief. The record will be referred to as "R" followed by appropriate page number in parenthesis. Exhibits listed in the appendix will be referred to as "Ex." followed by the appropriate letter in parenthesis.

STATEMENT OF THE CASE AND FACTS

Petitioner, State of Florida, on February 13, 1989 charged Respondent Joseph Beach with one count of lewd and lascivious assault on a child under sixteen years of age, in violation of section 800.04, Florida Statutes. Respondent entered a plea of nolo contendere to the charge. (R 12) Prior to sentencing, Respondent filed a motion to correct guidelines scoresheet, alleging therein that "the defendant states that prior uncounseled convictions may not be included on a guidelines scoresheet where he is indigent and did not waive his right to counsel." (Ex. B) Numerous prior misdemeanor convictions were listed on respondent's presentence investigation report. (Ex. C) Respondent attached to the motion a sworn affidavit, alleging as follows:

> 3. I was not provided or offered counsel in connection with the following convictions listed in the presentence report:
> a. 11/3/80 Duval Co. DUI
> b. 8/4/82 Wakulla Co. Driving while license suspended or revoked, no tag.
> c. 10/26/86 Marion Co. Drive while license suspended or revoked.
> d. 11/27/88 Wakulla Co. Camping in a closed area.

(Ex. D)

During an April 20, 1989 hearing on the motion, Respondent testified as follows:

> MR. HARVEY: Would you tell the Judge, did you have a lawyer in the Polk County cases?
> THE DEFENDANT: No. It was back in '83. I don't think I did in one of them.

MR. HARVEY: Do you know or not?
THE DEFENDANT: I don't know for positive, for sure.
MR. HARVEY: Then we won't proceed on that.
THE COURT: I have two Polk County cases.
MR. HARVEY: Yes, sir. I'm not proceeding on either one of those, Judge.
THE COURT: All right.
MR. HARVEY: So, there's three that he tells me and he has sworn under oath that he did not have a lawyer.
THE COURT: That's Duval in '80; Wakulla in '82, August 4th of '82.
MR. HARVEY: And Marion County in '86.
THE COURT: All right. That's October 26 of '86.

(Ex. E)

Following argument by counsel, and submission of memoranda of law on the issue of which party bears the initial burden when a defendant contests prior misdemeanor convictions as uncounseled, and therefore invalid for purposes of scoring on the guidelines scoresheet, the trial court ruled that respondent's affidavit was insufficient to shift the burden of proof to the state to prove that the prior misdemeanor convictions were counseled, or that respondent had validly waived his right to counsel in those cases. (R 55) The trial court sentenced respondent within the guidelines to four and one-half years incarceration to be followed by five and one half years probation. (R 59,14) Deletion of the three challenged prior misdemeanor convictions from the scoresheet would have resulted in a 15-point reduction in respondent's guidelines score, and would have placed him in the two and one-half to three-and one-half year guidelines range. (Ex. F).

The district court reversed respondent's sentence upon a finding that his affidavit was sufficient to place the burden on the state to show the prior convictions either were counseled, or that respondent knowingly waived his right to counsel. (Ex. A) The court certified the following question as one of great public importance for purposes of review by this court:

> IS THE DEFENDANT'S STATEMENT UNDER OATH THAT HE WAS NOT PROVIDED OR OFFERED COUNSEL AT THE PROCEEDINGS RESULTING IN PRIOR CONVICTIONS SUFFICIENT TO PUT THE STATE TO THE BURDEN OF PROVING THAT SUCH CONVICTIONS WERE IN FACT COUNSELED OR THAT COUNSEL WAS KNOWINGLY WAIVED?

SUMMARY OF ARGUMENT

The court should answer the certified question in the negative. A defendant who challenges the scoring of prior misdemeanor convictions in a subsequent conviction should bear the burden of establishing by a preponderance of evidence that he had a right to counsel in the prior proceedings, that he was not provided counsel, and that he did not knowingly waive his right to counsel.

ARGUMENT

WHETHER THE DEFENDANT'S STATEMENT UNDER OATH THAT HE WAS NOT PROVIDED OR OFFERED COUNSEL AT THE PROCEEDINGS RESULTING IN PRIOR CONVICTIONS IS SUFFICIENT TO PUT THE STATE TO THE BURDEN OF PROVING THAT SUCH CONVICTIONS WERE IN FACT COUNSELED OR THAT COUNSEL WAS KNOWINGLY WAIVED?

The court should answer the certified question in the negative.

"The finality of a judgment is not to be lightly overturned, as a duly entered judgment of conviction and sentence is to be presumed valid." State v. Caudle, 504 So.2d 419, 421 (Fla. 5th DCA 1987), citing State v. Harris, 356 So.2d 315 (Fla. 1978). A defendant who attacks the validity of a prior conviction has the burden of proving the alleged grounds by a preponderance of evidence. Allen v. State, 463 So.2d 351, 364 (Fla. 1st DCA 1985). Courts have defined the preponderance of evidence standard as evidence which as a whole shows that the fact sought to be proved is more probable than not. State v. Morales, 460 So.2d 410, 415 (Fla. 2d DCA 1984). See also Black's Law Dictionary 1281 (5th Ed. 1979).

The court in Allen v. State, 463 So.2d 351 (Fla. 1st DCA 1985) held that when a defendant challenges prior convictions on grounds that the trial court failed to properly ascertain whether the defendant knowingly and voluntarily waived his constitutional rights, mere conclusory assertions are insufficient to meet the defendant's burden to show that the prior convictions are invalid. The court stated as follows:

> The defendant's initial burden of proving denial of constitutional rights because the defendant was not made aware of those rights by the court is usually met by producing records of the prior proceedings. In addition, the defendant must prove by competent evidence that there was, in fact, no knowing and voluntary waiver of those rights on his part. It is not sufficient to simply make the bald assertion that a waiver was not a knowing and intelligent one; rather the defendant must prove specific facts showing in what respects the rights were not understood or not voluntarily waived.

Courts have held that "[a]n uncounseled conviction in which there was no waiver of counsel will not support ... an increased term of imprisonment on a subsequent conviction." Harrell v. State, 469 So.2d 169, 171 (Fla. 1st DCA 1985). See also Smith v. State, 498 So.2d 1009 (Fla. 2d DCA 1986); Pilla v. State, 477 So.2d 1088 (Fla. 4th DCA 1095). In Pilla, the court cited to Baldasar v. Illinois, 446 U.S. 222, 64, L.Ed. 2d 169, 100 S.Ct. 1585 (1980). In a 4-1-4 opinion, four members of the court in Baldasar held that an uncounseled prior misdemeanor conviction, which was valid under Scott v. Illinois, 440 U.S. 367, 59 L.Ed. 2d 383, 99 S.Ct. 1158 (1979), could not later be used under an enhanced penalty provision to obtain an additional term of imprisonment on a subsequent charge. In Scott v. Illinois, a majority of the court concluded that actual imprisonment, as opposed to the authorization of imprisonment as a possible penalty, was the line defining the constitutional right to appointment of counsel. Justice Blackman dissented in Scott v. Illinois, stating that he believed the bright line delineating the

right to counsel was whether the accused was prosecuted for an offense punishable by more than six months' imprisonment. In his concurring opinion in Baldasar, Justice Blackman concluded that under the bright line rule he had enunciated in Scott, a prior misdemeanor conviction could not be used to enhance a subsequent conviction if the defendant in the prior misdemeanor conviction was prosecuted for an offense punishable by more than six months' imprisonment. Because Baldasar, in Justice Blackman's view, had a right to counsel in the prior misdemeanor conviction, and he had not waived that right, the prior conviction could not be used to enhance a subsequent conviction. Courts have viewed the holding in Baldasar as limited by Justice Blackman's concurring opinion. See Allen v. State. In Leffew v. State, 518 So.2d 1376 (Fla. 2d DCA 1988), the court held that nine of the defendant's 14 prior uncounseled convictions were properly scored on the guidelines scoresheet because the defendant in those cases was not subject to imprisonment for more than six months, and did not serve any jail time. The district court distinguished Baldasar on grounds that the defendant in that case was subject to a jail sentence of more than six months in the prior conviction, although he did not actually serve any jail time. The court in Leffew stated that, in determining whether prior uncounseled misdemeanor convictions may be scored for guidelines purposes in a subsequent conviction, "[T]he key is that an uncounseled conviction may not be used for enhancement if the defendant in fact had a right to counsel in the prior proceedings." Id at 1378.

A defendant challenging the scoring of prior uncounseled misdemeanor convictions should be required as a threshold matter, on authority of Baldasar, Allen, and Leffew, to show that he had a right to counsel in the prior cases. If the defendant had no right to counsel because he was not prosecuted for an offense carrying a penalty in excess of six months' jail time, and the defendant served no jail time, it matters not, for purposes of scoring the prior misdemeanor convictions, whether the defendant was "not offered or provided counsel." If the defendant was not entitled to counsel, then the trial court had no obligation to advise him of his right to counsel, to provide counsel, or to determine whether the defendant knowingly chose to waive his right to counsel.

If the defendant shows that he had a right to counsel in the prior convictions, and alleges that counsel was not provided, he should be required to establish by a preponderance of evidence either that he was not made aware of or did not waive his right to counsel in the prior cases. See Hamm v. State, 521 So.2d 354 (Fla. 2d DCA 1988). The court in Harrell v. State, 469 So.2d 169 (Fla. 1st DCA), review denied, 479 So.2d 118 (Fla. 1985), held that when a defendant alleges that counsel was not provided and he did not waive his right to counsel, the state must show by a preponderance of evidence that the defendant was represented or waived representation. The court did not hold that the burden is on the state in the absence of such initial allegations by the defendant. In Allen, the court held that, when a defendant

assails prior convictions as unconstitutional, "a conviction is rendered unreliable and void only if there is competent evidence to support a determination that the defendant in fact did not make a knowing and intelligent waiver." Id. at 362. The court in that case refused in one instance to set aside a felony conviction which was reclassified because of a prior uncounseled conviction because the defendant did not expressly allege that his waiver of counsel was not voluntary and intelligent. The court in State v. Caudle, supra, relying upon Harrell and Allen, found that the defendant's allegations that he did not recall being advised of his constitutional rights in two prior convictions were insufficient to place the burden on the state to establish that the prior convictions were reliable, stating that "[a]lthough the rights provided by the constitution are a shield against violations of due process, surely a defendant must be required to claim that his armor was defective before forcing the state to surrender its sword." Id. at 423. The court also noted that "[a]lthough uncounseled convictions are inherently suspicious, nonetheless as a starting point a defendant must first swear that he was not advised of his rights and did not waive counsel." Id. at 422. In Croft v. State, 513 So.2d 759 (Fla. 2d DCA 1987), the court held that the defendant failed to make out a prima facie case sufficient to shift the burden to the state under the following circumstances:

> The appellant's testimony that to the best of his recollection he had never been offered an attorney, had never been represented by

> counsel, and had never waived his right to counsel was insufficient in this case to constitute a prima facie showing that any of the appellant's convictions had been obtained in violation of his constitutional right to counsel. His testimony does not begin to approach an affirmative allegation that he specifically remembered having been denied his right to counsel on one or more particular occasions or that he had made any unknowing or involuntary waivers of counsel .... Since the appellant did not meet his burden, the state was not required to go forward with contrary evidence to show either that the appellant was afforded all constitutional rights or that he had made valid waivers thereof.

Id. at 761.

The district court in this case relied upon State v. Troehler, 546 So.2d 109 (Fla. 4th DCA 1989), in finding respondent's allegations sufficient to shift the burden to the state. The court in Troehler defined a defendant's burden under these circumstances as that of producing evidence. The defendant in Troehler, in addition to testifying that he was not represented by counsel in a prior conviction, obtained a police record of his prior conviction which was silent as to the existence of waiver of counsel. Relying upon principles enunciated in Burgett v. Texas, 389 U.S. 109, 88 S.Ct. 258, 19 L.Ed. 2d 319 (1967), the court in Troehler stated that "[i]f the record does not indicate that counsel has been waived or the logical corollary, that counsel was present, there is created a presumption that the defendant was denied counsel." Id. at 111. The court held that Troehler's allegations, accompanied by a silent record, were sufficient to shift the burden to the state to prove either that Troehler was represented by counsel, or knowingly waived his right.

In this case respondent submitted a sworn statement that he was not offered or provided counsel in three prior misdemeanor convictions. Unlike the defendant in Troehler, he did not present any records to support his allegations. In that the state also did not produce any records pertaining to the prior convictions, the presumption stated in Troehler was not triggered in this case. Moreover, respondent's contention that his prior misdemeanor convictions were uncounseled was not a challenge to the truthfulness of statements contained on the presentence investigation report which indicated the existence of the prior convictions. Thus, those decisions holding that the state must corroborate information contained on a presentence investigation report when the defendant disputes the truth of statements contained therein are inapplicable to this case. See Delaine v. State, 486 So.2d 39 (Fla. 2d DCA 1986), and cases cited therein.

The sworn statement in this case, alleging only that respondent was neither offered nor provided counsel, under the above analysis did not begin to approach an affirmative assertion that respondent's convictions were unreliable for purposes of scoring in the subsequent conviction in the absence of additional allegations. A defendant who challenges prior misdemeanor convictions as unreliable for guidelines scoring, should be required as a threshold matter to assert that he had the right to counsel in the prior proceedings. If the defendant can meet that threshold burden, he should be required to show by a preponderance of evidence that he was not provided counsel in the prior

proceedings, and either was not advised of his right to counsel or did not knowingly waive that right.

Florida has had a public defender system to provide counsel for indigents since the early 1960's. The two cases establishing the constitutional right and its parameters are themselves eighteen and twenty-seven years old, Gideon v. Wainwright,, 372 U.S. 9, 9 L.Ed. 2d 799, 83 S.Ct. 792 (1963) and Argersinger v. Hamlin, 407 U.S. 25, 32 L.Ed. 2d 530, 92 S.Ct. 2006 (1972). Both of these cases long precede the convictions at issue here. In view of the well-established right to counsel and the hundreds of millions of dollars which Florida has spent on its public defender system, it is absurd to permit a defendant to blithely assert, without any proof, that he was denied the right to counsel on previous convictions, and, on the basis of those unsupported assertions, shift the burden to the state to show that it is following long-established law. The rationale of Troehler, relying as it does on a 1967 decision, Burgett, which issued some twenty-three years ago, only four years after Gideon, and five years prior to Argersinger, would hardly seem appropriate for the 1990's. It cannot be rationally suggested that there should be a presumption that the state failed to provide counsel when the claimant has not challenged those previous convictions, on which he would unquestionably be entitled to reversal if, in fact, he was improperly denied counsel.

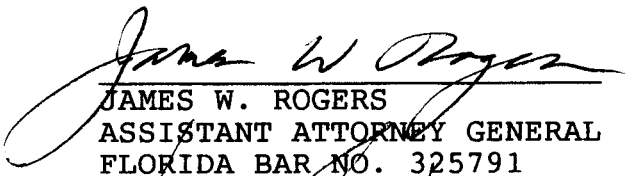
The certified question therefore should be answered in the negative.

Conclusion

Based on the foregoing argument and citations of authority, Petitioner requests this court to answer the certified question in the negative.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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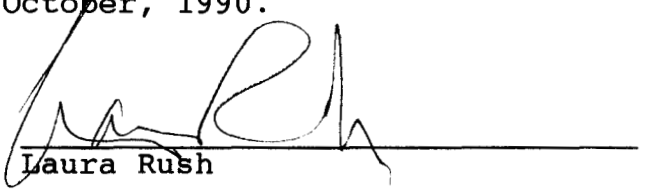
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief has been forwarded by United States mail to Mr. Williams H. Webster, P.A., Post Office Box 478, Crawfordville, Florida 32327, this 2nd day of October, 1990.



Laura Rush

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs. Case No. 76576

JOSEPH BEACH,

Respondent.
_____/

APPENDIX TO JURISDICTIONAL BRIEF

Appendix	Title of Document
A	Decision of the First District Court of Appeal
B	Motion to Correct Guidelines Scoresheet
C	Portion of Presentence Investigation Report
D	Affidavit
E	Portion of Transcript From Hearing on Motion
F	Guidelines Scoresheet