IN THE SUPREME COURT OF FLORIDA

CASE NO. 77,550

STATE OF FLORIDA,

Petitioner,

vs.

IN THE INTEREST OF J. H., a child,

Respondent.

****

ON PETITION FOR DISCRETIONARY REVIEW

****

AMENDED
PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, the State of Florida, was the Appellee before the District Court of Appeal, Fourth District, and was the prosecution in the trial court, Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. Respondent, J. H., a child, was the Appellant, and the defendant, respectively, in the courts below.

In this brief, the parties will be referred to as they appear before this Court, except that Petitioner may also be referred to as "the State."

References to the record on appeal will be made by the following symbols:

"R" = Record on Appeal

"SR" = Supplemental Record on Appeal

All emphasis has been added by Petitioner unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Respondent, J[redacted] H[redacted] a child, was charged with being a delinquent child in a petition that alleged that she possessed cocaine within 1,000 feet of a school (R. 57). The court appointed Assistant Public Defender, Gabriel Grasso, who prepared, signed and filed a motion to suppress on behalf of the child (R. 63-64).

At the beginning of the adjudicatory hearing, Mr. Levine, a certified legal intern, informed the court that the child was present, that he was ready, and that they were only waiting for the Assistant State Attorney to arrive (R. 4). There was an off-the-record pause, after which Assistant State Attorney Charles Kaplan came into the courtroom (R. 4). Mr. Kaplan commented for the benefit of the court that there was a motion to suppress which should be considered first. The prosecutor then handed Mr. Levine, **as Respondent's attorney**, "a copy of the police report" he had received the day before (R. 4). At that point in order to commence the hearing, the court announced for the record that "The child is present, with her lawyer." (R. 4). The "CONSENT TO APPEARANCE" form appears of record as entered in "Open Court" December 7, 1989, the day of the adjudicatory hearing. The Respondent did not object at the time to being represented by Mr. Levine. And the record does not show any further comments on the issue by the court, the Assistant State Attorney, or Mr. Levine, the certified legal intern. The record does not reveal whether Mr. Grasso was in the courtroom.

Prior to taking testimony from the witnesses, the court announced it would simultaneously consider the motion to suppress and the state's evidence in support of adjudication (R. 6-7).

In order to maintain its burden, the State called Detective Michael Menghi to the stand first. Detective Menghi's testimony revealed that two Broward County Sheriff's Officers, using binoculars, set up a surveillance in a predominately black neighborhood. They positioned themselves across the street from an apartment complex where there had been "a lot of drug activity" to see if they could observe any drug transactions (R. 8-9). During the fifteen minutes that they were there, the officers observed what they thought were two separate drug transactions. The first transaction involved an unidentified male and another person, and apparently Appellant had nothing to do with that incident (R. 9).

Five minutes later, the officers watched two white females drive up and park. Detective Menghi testified that he has known the Respondent for several years (R. 9).[1] Detective Menghi saw the Respondent, who had been across the street, walk over to the car and speak to the passenger (R. 9). Detective Menghi saw Respondent reach into her shorts and pull something out of the crotch area (R. 9). Respondent and the female passenger then walked between two apartment buildings (R. 9). Detective Menghi

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[1] The trial court took judicial notice of Respondent's prior record (R. 51, 60, 61) and noting the child on several prior occasions had been found to be delinquent as a result of various prior felony drug offenses, understood the officer's testimony to mean that the Officer knew Respondent had "been involved in this type of thing before." (R. 39, 43).

observed Respondent open her hand and observed some type of hand to hand exchange between the two women (R. 9), although he could not observe what exactly was exchanged (R. 14). The white female then left; Respondent reached back into the crotch area of her shorts and also left (R. 10).

Upon completion of the transaction, Detective Menghi radioed the description of the Respondent to a marked police unit for them to detain the Respondent (R. 10). However, Respondent walked away from the area before the uniformed police officer arrived, and at that point the officers lost sight of Respondent. The officers remained in the area looking for Respondent, until Detective Menghi spotted her 30 to 45 minutes later riding in a car with two other females (R. 10). Respondent was "ducking down" trying to hide from the police, but Detective Menghi could observe and identify Respondent's hat and clothing (R. 40). The officers followed the car until the car stopped at a convenience store approximately half-a-mile away (R. 10), where she was detained by Officer Philbrick (R. 11). Officer Philbrick brought Respondent outside, where Detective Menghi verified this was the same person he observed passing the contraband in the alley (R. 11).

Detective Menghi testified that when he confronted Respondent, he asked her "to take the cocaine out of her crotch." Appellant responded denying she was hiding anything. (R. 11) However, while standing there, Detective Menghi observed Respondent begin to move "something around with her thumb ... along her crotch area." (R. 11). At that point Detective Menghi

called a female police officer to conduct the search of Respondent (R. 11). The search revealed "a white, plastic baggie that contained 17 cocaine rocks." (R. 13)

After hearing the testimony of Detective Menghi, **one out of four** witnesses listed by the State, the court discussed the probable cause issue with counsel (R. 20-46), and after listening to both side's argument, denied the motion to suppress (R. 44). Respondent then changed her plea to nolo contendere "to the lesser included offense of possession of cocaine" reserving the right to appeal the denial of the motion to suppress (R. 45-46). The plea colloquy between the court and Respondent contains the following exchange:

> THE COURT: Do you have any problems understanding what I'm talking about?
>
> THE CHILD: No, sir.
>
> THE COURT: Do you have any problems understanding what you (sic) lawyer is talking about?
>
> THE CHILD: No, sir.
>
> THE COURT: **You and your lawyer have discussed this case, right?**
>
> THE CHILD: **Yes, sir.**
>
> THE COURT: He's told you the different things you can do, like going to court (sic), making the State prove it, filing defensive motions, doing a plea like you're doing today, stuff like that?
>
> THE CHILD: Yes, sir.
>
> THE COURT: Based on what you and he have talked about, is what you're doing by entering this plea the way that you want to handle this case?

THE CHILD: Yes, sir.

(R. 49). The court adjudicated Respondent delinquent, and sentenced her accordingly (R. 50-52).

Respondent filed its appeal with the District Court of Appeal, Fourth District, alleging the trial court erred in denying her motion to suppress, and for the first time, arguing she had not waived her right to "counsel".

In its opinion filed February 13, 1991, the majority of the three-judge panel found the waiver argument dispositive, and **without reaching the suppression issue**, "reverse and remanded with direction to the trial court to conduct a new adjudicatory hearing after appellant is given the opportunity to withdraw her plea." The reason for the reversal was that:

> The Broward County form does not state that appellant has a right to have a "supervising attorney personally present when required by the trial judge." Fla. Bar R. Governing the Law School Civil and Criminal Practice Program, Rule 11-1.2(a). Nor was appellant advised of that right at the time she entered her plea. **We hold that without such information appellant could not have intelligently waived her right to be represented by a lawyer.**

The Fourth District, however, also certified the following question as being one of great public importance:

> Does the consent form used in Broward County's courts constitute a waiver of the indigent's right to have an attorney present at a hearing on motion to suppress and adjudication?

In the Interest of J.H., ___ So.2d ___, 16 FLW D479 (Fla. 4th DCA February 13, 1991).

Judge Glickstein, while agreeing with the reversal and the certification, disagreed on the basis for the reversal, and on the waiver of counsel issue stated:

> The [appellate] assistant public defender, to her credit, vigorously and successfully argued to the satisfaction of the majority -- that waiver did not occur. I disagree with her position on that point.

Judge Glickstein would have reversed on the suppression issue. Id.

And Judge Garrett concurred that "appellant did not intelligently waive her right to an attorney," but found the State had establish probable cause to arrest Respondent, thus validating the search and the denial of the motion to suppress. Id., 16 FLW at D480 (Garrett, J., concurring specially.)

Notice to Invoke the Discretionary Jurisdiction of this Court pursuant to the certified question was timely filed February 26, 1991. This Court accepted jurisdiction and issued a briefing schedule March 11, 1991. This proceeding follows.

SUMMARY OF THE ARGUMENT

In this particular case, Respondent signed a consent of appearance which fully informed her that Alan Levine was a Certified Legal Intern working under the supervision of the assistant public defender. Rule 11-1.2(a) requires the personal presence of the supervising attorney **only when so required by the trial court.** It is therefore clear that the Rule was not violated in this case, and that Respondent was not denied her right to representation by counsel.

Therefore, the question certified by the District Court of Appeal should be answered in the affirmative; the opinion filed February 13, 1991, quashed; and the cause remanded to the District Court to enter its affirmance of the trial court's denial of the motion to suppress.

However, should this Court answer the certified question in the negative, the State maintains that since this is a clarification or an interpretation of the Rule by this Court, this Court's holding sub judice should be given prospective application only, and not apply to the instant case as no violation of the Rule was shown by Respondent to have occurred in this particular case.

ARGUMENT

RESPONDENT WAIVED HER RIGHT TO HAVE THE COURT APPOINTED ASSISTANT PUBLIC DEFENDER PRESENT IN COURT WHEN SHE AGREED, IN WRITING, TO BE REPRESENTED BY THE CERTIFIED LEGAL INTERN AND BY NOT OBJECTING TO SUCH REPRESENTATION BEFORE THE TRIAL COURT ON THE DATE OF THE ADJUDICATORY HEARING.

Finding that because the Broward County form does not state that Respondent has a right to have a "supervising attorney personally present when required by the trial judge." Fla. Bar. R. Governing the Law School Civil and Criminal Practice Program, Rule 11-1.2(a), the Fourth District held that without such information Respondent could not have intelligently waived her right to be represented by a lawyer. In the Interest of J.H., 16 FLW D479 (Fla. 4th DCA February 13, 1991). The Fourth District, nevertheless, certified the following question as being one of great public importance:

> Does the consent form used in Broward County's courts constitute a waiver of the indigent's right to have an attorney present at a hearing on motion to suppress and adjudication?

Without first seeking to vacate her plea as an uncounseled plea, Respondent argued, before the 4th DCA, that because Rule 11-1.2(a) was not complied with before she was represented by the certified legal intern, she was not represented by counsel, and therefore, her adjudication was improper as she was denied her constitutional right to legal representation. For

Respondent to suggest that such representation by a Certified Legal Intern, duly qualified under Rule 11-1.3, violates the right to counsel, is clearly without merit. See, Wilson v. Wainwright, 474 So.2d 1162 (Fla. 1985).

The Rules Regulating the Florida Bar, in Chapter 11 - Rules Governing the Law School Civil and Criminal Practice Program, provide in pertinent part as follows:

> **11-1.1. Purpose**
> The bench and the bar are primarily responsible for providing competent legal services for all persons, including those unable to pay for these services. As one means of providing assistance to lawyer who represent clients unable to pay for such services and to encourage law schools to provide clinical instruction in trial work of varying kinds, the following rules are adopted.
>
> **11-1.2. Activities**
> (a) An eligible law student may appear in any court or before any administrative tribunal in this state on behalf of any indigent person if the person on whose behalf he is appearing has indicated in writing his consent to that appearance and the supervising lawyer has also indicated in writing approval of that appearance. In such cases the supervising attorney shall be personally present WHEN REQUIRED BY THE TRIAL JUDGE who shall determine the extent of the eligible law student's participation in the proceeding.
>
> * * *
>
> (d) In each case the written consent and approval referred to above shall be filed in the record of the case and shall be brought to the attention of the judge of the court or the presiding officer of the administrative tribunal.
>
> * * *

In the case at bar, the record is clear that the spirit and letter of the Rule were complied with, and that Respondent, by signing the "Consent to Appearance" (SR), not only agreed to being represented by Mr. Levine, but waived any argument that she was unaware she was not being represented by an "attorney". The consent form executed by Respondent was as follows:

> TO THE CLERK OF THE CIRCUIT COURT
>
> This is to certify that I hereby consent to having ALAN LEVINE appointed by the Office of the Public Defender to act in my defense.
>
> I acknowledge that I have been advised and understand that ALAN LEVINE is a certified law student and has complied with Chapter 11 of the Rules of the Supreme Court Regulating the Florida Bar and is certified by the Supreme Court of the State of Florida and is supervised in this case by an attorney on the Staff of the Public Defender's Office.
>
> DATED this 7th day of December, 1989.
>
> (signed [redacted])
>
> APPROVAL OF APPEARANCE
>
> As Assistant Public Defender and as the supervising Attorney, I hereby give my approval of his/her appearance in the above cited matter.
>
> (initialed)
> Assistant Public Defender

(See SR). The copy of the consent form that appears in the record shows that the form was executed and filed in open court December 7, 1989, the day Respondent appeared before the court for the adjudicatory hearing as required by Rule 11-1.2(d).

Rule 11-1.2(a) also provides that the supervising attorney shall be personally present but only "**when required by the trial judge** who shall determine the extent of the eligible law student's participation in the proceeding." The record supports the inference, that since the consent form was filed in open court (SR), and in compliance with the requirements of Rule 11-1.2(a), the judge determined that the certified legal intern, Mr. Levine, was capable of participating in the adjudicatory hearing on behalf of Respondent, the judge allowed the hearing to proceed without the personal presence of Mr. Grosso (R. 4, 49).

The record also shows that the Motion to Suppress was signed and filed by the "Supervising Attorney" GABRIEL GRASSO, BAR NO. 793681, as Assistant Public Defender and Attorney for Appellant (R. 63-64). The record also shows that the Notice of Appeal was signed by Mr. Grasso, Assistant Public Defender, as Appellant's trial counsel (R. 68). The plea colloquy between the court and Respondent shows that Respondent conceded that Mr. Levine had discussed the case with her, and had apprised her of her options (R. 49). Thus Respondent entered a totally knowing and voluntary plea of nolo contendere without any coersion (R. 49-50). It is clear therefore that no violation of the Rule has been shown herein; that Respondent entered a voluntary plea, after waiving her right to be represented by a "licensed" attorney.

The State respectfully maintains that the record on appeal does not support the argument that Respondent was "denied the assistance of counsel at the preparation stage or at any other

stage of his trial." Aldridge v. State, 425 So.2d 1132, 1135 (Fla. 1983). Respondent claims that Rule 11-1.2(a) must be read to require the actual presence in court of the supervising counsel. The State submits that the Rule only requires the personal presence of the supervising attorney "when required by the trial judge." In the case at bar, the trial court determined the certified legal intern was eligible and qualified to participate in the defense of Respondent, and having the consent of Respondent (SR), did not require Mr. Grosso to be personally present at the adjudicatory and change of plea hearing (R. 4-52). The opinion of the 4th DCA should, therefore, be quashed as not supported by the record.

Unlike the defendants in In the Interest of L.S., 560 So.2d 425 (Fla. 4th DCA 1990); In the Interest of A.R., 554 So.2d 640 (Fla. 4th DCA 1989); In the Interest of C.B., 546 So.2d 447 (Fla. 4th DCA 1989); and Cheatham v. State, 364 So.2d 83 (Fla. 3d DCA 1978), the record herein refutes Respondent's allegations that she was "unknowingly represented by a person not a member of the Florida Bar." (SR). The State, thus, finds it unconscionable that the Broward Public Defender's Office are able to utilize certified legal interns to ease their case load burdens, leave the intern unsupervised, and then -- as in this case, as well as L.S., A.R., and C.B. -- attempt to take advantage of their own misconduct in following the mandates of Chapter 11 to obtain reversal of an otherwise valid and legal conviction.

The State maintains that the certified question must be answered in the **AFFIRMATIVE.** This is so because the Rule does not require the personal presence of the supervising attorney **until the trial court so requires it.** Further, the consent form does inform the defendant that Mr. Levine is a certified legal intern and has complied with Chapter 11 of the Rules of the Supreme Court Regulating the Florida Bar (SR). Thus, from this record it may be presumed that Mr. Grasso or Mr. Levine informed Respondent of his right to have Mr. Grasso present in the courtroom should she become dissatisfied with Mr. Levine's representation, or if Mr. Levine was doing anything contrary to her understandings or that did not meet with her approval.[2] In this case no complaints were ever made by Respondent regarding Mr. Levine's legal services to her, but rather, when questioned by the court, Respondent stated she was well satisfied with his services (R. 49). It is clear therefore that the opinion of the 4th DCA must be quashed, and the matter reversed to the District Court to enter its affirmance of the conviction.

Further, even should this Court agree with the District Court that the consent form does not fully inform the defendant of his rights to have the supervising attorney present at all times, and determines the answer to the certified question is in

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[2] Because the record does not show what the Public Defender's Office actually told Respondent, and based on the nature of the claim raised on appeal, the State submits that the proper method to decide this case should have been to affirm, without prejudice for Respondent to file a motion for post-conviction relief under Fla. R. Crim. P. 3.850, at which time an evidentiary hearing could be held to determine what Respondent was told regarding the Rule when she was given the "consent form" to sign.

the negative, the State respectfully submits this Court could enter its opinion modifying the consent form as deemed appropriate and necessary, but still **quash** the opinion of February 13, 1991, as not being supported by the facts and circumstances of this particular case. And in the interest of justice, the State urges this Court to put the Office of the Public Defender on notice that they must properly supervise their legal interns and follow the requirements of Chapter 11 or suffer the consequences of not being allowed to use this useful and necessary method of training future public defenders coming out of our law schools.

CONCLUSION

WHEREFORE, based on the above and foregoing arguments and authorities cited therein, the State of Florida respectfully requests this Honorable Court answer the certified question in the **AFFIRMATIVE**, **QUASH** the opinion of the District Court of Appeal, Fourth District, filed February 13, 1991, and **AFFIRM** the trial court's denial of Respondent's motion to suppress.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing "**Amended** Petitioner's Brief on the Merits" has been furnished by courier to: CHERRY GRANT, Assistant Public Defender, Counsel for Respondent, 9th Floor/Governmental Center, 301 N. Olive Avenue, West Palm Beach, FL 33401 this 12th day of April, 1991.

Of Counsel