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FILED
SID J. WHITE
MAY 6 1991
CLERK, SUPREME COURT
By ________
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

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

Respondent.

Case No. 77,550

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent was the Appellant before the District Court of Appeal, Fourth District, and the defendant in the trial court, Circuit Court of the Seventeenth Judicial Circuit, In and For Broward County, Florida. Petitioner was the Appellee and the prosecution, respectively, in the courts below.

In the brief, the parties will be referred to as they appear before this Honorable Court.

The following symbol will be used:

R = Record on Appeal

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's statement of the case and facts except as specified below.

Respondent rejects Petitioner's statement that "The court appointed Assistant Public Defender, Gabriel Grasso, who prepared, signed and filed a motion to suppress on behalf of the child." Petitioner's brief at 2. Respondent states that the court appointed the Public Defender's Office for the Seventeenth Judicial Circuit to represent Respondent. A motion to suppress signed by Mr. Grasso appears in the record at 63-64.

The "Consent to Appearance" form bears a stamp "filed in open court" but no mention of that form otherwise appears in the record. The form does not have a signature indicating "approval of appearance" by an assistant public defender, but bears the initials F.D. (SR).

Respondent disputes Petitioner's claim that "The record does not reveal whether Mr. Grasso was in the courtroom." Petitioner's brief at 2. The first page of the record reflects "Appearances: Alan H. Schreiber, Public Defender, by Alan Levine, Certified Legal Intern, appearing on behalf of the child" (R 1). The second page of the record reflects "Also present: J[redacted] H[redacted] a child and J[redacted] W[redacted], mother of child" (R 2).

As an alternative claim in the district court, Respondent challenged the denial of the motion to suppress on the ground that there was no probable cause for Respondent's arrest and search.

The district court did not resolve the claim[1] because it found that Respondent had been improperly denied counsel at the motion to suppress hearing. Respondent therefore neither agrees nor disagrees with Petitioner's factual recitation concerning the officers' observations, etc.

[1] In the event this Court were to reverse the district court's opinion, the case would need to be remanded to that court for resolution of the issue.

SUMMARY OF ARGUMENT

Respondent was represented at her motion to suppress and adjudicatory hearing by a certified legal intern with no supervising attorney present. Unless the supervising attorney is present, representation by a certified legal intern alone is a violation of the constitutional right to counsel and requires a knowing and voluntary waiver of that right. No such waiver was shown in the case at bench. Respondent is therefore entitled to have her adjudication and sentence vacated and have the case remanded for a new motion to suppress/adjudicatory hearing conducted with counsel.

ARGUMENT

RESPONDENT DID NOT KNOWINGLY AND VOLUNTARILY WAIVE HER RIGHT TO COUNSEL GUARANTEED BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The United States Supreme Court in In Re Gault, 387 U.S. 81, 87 S.Ct. 1428, 19 L.Ed.2d 336 (1967), held that juveniles are entitled to court-appointed counsel in delinquency proceedings unless that right it knowingly waived. At issue in the instant case is a combined motion to suppress and adjudicatory hearing, a proceeding at which the right to counsel applies. The question then is did Respondent have counsel, and if not, did she waive that right.

At her hearing, Respondent was represented by a certified legal intern not an attorney. No written waiver of counsel was ever filed in the instant case and the trial court at no time made any inquiry in that regard. Accordingly, the Fourth District Court reversed Respondent's adjudication of delinquency and remanded for further proceedings. In The Interest of J.H., 16 F.L.W. D479 (Fla. 4th DCA Feb. 13, 1991). The District Court's decision was correct and should be affirmed. The certified question should be answered in the negative.

Petitioner claims that representation by an intern does not violate the right to counsel and that any claim otherwise is "clearly without merit," while simultaneously claiming that the permission form used in the case constitutes a waiver of counsel. Petitioner is wrong on both claims.

The right of indigent defendants to have assistance of counsel has been strictly guarded by the courts. Gideon v. Wainwright, 372

U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) (felony charges); Powell v. Alabama, 278 U.S. 45, 53 S.Ct. 55, 77 L.Ed.2d 158 (1932) (capital cases); Argersinger v. Hamlin, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972) (misdemeanors involving deprivation of liberty); In Re Gault, supra (juvenile proceedings). The right to court-appointed counsel presupposes appointment of counsel fully accredited by competence and moral standards to practice law. Huckelbury v. State, 337 So.2d 400 (Fla. 2d DCA 1976). Counsel, as employed in the constitutional provisions, means a duly licensed and qualified lawyer. People v. Cox, 146 N.E.2d 19 (Ill.App. 1957); People v. Washington, 348 N.Y.S.2d 691 (1976); Baker v. State, 130 P. 820 (Okl. 1912).

Respondent was not represented by a lawyer but by an intern. The state argues that Chapter 11 of The Rules Regulating the Florida Bar have somehow done away with Respondent's constitutional right to counsel. Obviously neither this Court nor the Florida Bar, by rule or otherwise, can abrogate constitutional requirements of counsel. NAACP v. Button, 371 U.S. 415, 83 S.Ct. 328 (1963) (statute prohibiting NAACP from advising and referring potential litigants to particular attorneys or groups of attorneys under guise of regulating the legal profession violated First and Fourteenth Amendments); Johnson v. Avery, 393 U.S. 483, 89 S.Ct. 747 (1969) (prison regulation which prohibited inmates from assisting others in filing writs under guise of controlling practice of law violated federal right to court access); Sperry v. Florida ex rel. Florida Bar, 373 U.S. 379, 83 S.Ct. 1322 (1963) (Florida could not enjoin person registered to practice before U.S. Patent Office from performing functions necessary to that practice

even though it constituted practice of law and person not licensed by Florida Bar). Certainly this Court in adopting The Rules Regulating the Florida Bar never envisioned creating a group of nonlawyers authorized to practice law, but only to represent poor people.

Chapter 11 of the rules does nothing more than it purports to do: It allows law students, who like all other lay persons are not otherwise allowed to practice law, to appear and practice under certain limited conditions. For instance, Rule 11-1.2 requires, as a condition of representation, that the indigent person indicate in writing his consent to the appearance and that the supervising lawyer also indicate in writing approval of that appearance. The rule further requires that the trial judge determine the extent of the eligible student's participation in the proceeding, and that the written consent and approval be filed in the court of the case and be brought to the attention of the judge. Rule 11-1.3 requires that an attorney introduce the law student to the court. Rule 11-1.8 authorizes the representation of an indigent by a recent law school graduate provided that the supervising attorney certify that he or she will assume the duties and responsibilities of the supervising attorney as provided in other provisions (Rules 11-1.2 and 11-1.13) of Chapter 11.

But merely complying with these conditions does not necessarily fulfill the constitutional right to counsel; those requirements are different. "Distinctions are made between criminal cases where constitutional standards require representation by counsel, and civil and other criminal cases. In the former, the student must be accompanied in court by a member

of the bar who bears ultimate and immediate responsibility for the case and the student's work. In the latter, the student may or may not have to be accompanied by counsel." Bar Admission Rules and Student Practice Rules at 916 (Klein Edit. 1978). While there is no constitutional impediment to an intern working with or under the direction of an attorney, "only a member of the bar is competent to undertake to represent a defendant without supervision." People v. Perez, 155 Cal.Rptr. 176, 182 (Cal. 1979).

Direct and in-court supervision of interns is constitutionally required if the person being represented has a constitutional right to counsel, whether or not a particular bar rule requires it. Recognition of that fact seems implicit in Cheatham v. State, 346 So.2d 83 (Fla. 3d DCA 1978), cert. denied 372 So.2d 471 (1979). That case appears to stand for the proposition that the actual in-court presence of the supervising attorney is required, notwithstanding the qualified language of Rule 11-1.12. Indeed other courts around the country have recognized such a constitutional requirement when dealing with student interns.

In People v. Perez, supra, a defendant was represented at a felony trial, in part, by a student intern (who was awaiting bar examination results) certified by the California Bar. The defendant consented in writing to representation by the intern under the supervision of a named deputy public defender. The trial was conducted by the intern assisted by the public defender who interposed objections to evidence, approved jury instructions and verdict forms, participated in conferences with the court and prosecution counsel, and in other ways actively participated in the defense. 155 Cal. Rptr. at 178. The California Supreme Court

found that the intern's participation in the case did not deprive the defendant os his right to assistance of counsel and California's student practice rule was not violative of the Sixth Amendment because:

> The defendant, in other words, is not merely represented by a student who has not been admitted to the bar; he is represented by an experienced member of the bar who serves as counsel of record, undertakes personal and immediate supervision of the student's performance, and assumes responsibility for the conduct of the defense.
>
> By so limiting the program to approved and qualified students, and by requiring the personal and immediate supervision of experienced counsel, the Rules provide reasonable assurance that the defendant will receive competent representation.

Id. at 179. Similar results have been reached by the courts in Louisiana, State v. Daniels, 346 So.2d 672 (La. 1977), and Michigan, People v. Masonis, 58 Mich. App. 615, 228 N.W.2d 489 (1975), where the bar rule in effect required the in-court supervision of interns and the rule was complied with. (Copies of the rules of Louisiana, Michigan, and California at the time of the decisions attached as appendix.)

Unlike the cases cited above, Respondent did not have the benefit of having an attorney present and participating in her adjudicatory and suppression hearing. The record reflects that while an attorney signed the original motion to suppress and someone initialed the consent form, the intern alone appeared, independently conducted the hearing and counseled Respondent

exercising his own independent judgment.[2] In other words, Respondent was without constitutionally required counsel. Unless Respondent waived that right, she is entitled to a new hearing both on her motion to suppress and at her adjudicatory hearing.

Florida Rule of Juvenile Procedure 8.290 implements the requirement of providing counsel in juvenile proceedings. The rule requires that any waiver of counsel be made in writing, and further provides the child:

> ...shall not be deemed to have waived the assistance of counsel until the entire process of offering counsel has been completed and a thorough inquiry into the child's comprehension of that offer and his capacity to make the choice intelligently and understandingly has been made.

8.290(b)(2), Fla.R.Juv.P.; see also Fla.R.Crim.P. 3.111(d); Mansfield v. State, 430 So.2d 586 (Fla. 4th DCA 1983).

No written waiver of counsel was ever filed in the instant case and the trial court at no time made any inquiry in that regard. Petitioner argues that the form titled "Consent to Appearance" filed December 7, 1989, the date of Respondent's motion to suppress/adjudicatory hearing constitutes a waiver of counsel. But the form filed in this case is not a waiver of counsel. It is not a waiver if for no other reason that it simply does not contain an express waiver of an attorney; the form, standing alone, does not meet the constitutional requirements necessary to show a waiver of counsel. VonMoltke v. Gillies, 332 U.S. 708, 68 S.Ct. 316 (1948); Boyd v. Dutton, 405 U.S. 1, 92 S.Ct. 759 (1972) and cases

[2] Appearing in court, preparing legal pleadings, giving legal advice, etc. all constitute the practice of law. State ex rel. Florida Bar v. Sperry, 190 So.2d 587, 591 (Fla. 1962).

cited therein. Further, no inquiry concerning counsel appears in the instant record. See Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525 (1975).

Petitioner would like to draw numerous inferences in this case to supports its position that a waiver has occurred. The first inference is that because the consent form was filed on the same day as the hearing, the trial judge must necessarily have been aware of it and must necessarily have determined that the intern was eligible, qualified, and capable of conducting Respondent's defense without his supervisor being present. Petitioner's brief at 12-13. No such inference can be drawn. The record does not disclose that Mr. Levine's status as an intern was ever brought to the court's attention as required by Rule 11-1.2(a) and (d). Further, the trial judge throughout these proceedings referred to Mr. Levine as Respondent's "lawyer." (R 4, 49). These are hardly facts consistent with Petitioner's claim that Respondent knowingly waived her right to a full fledged lawyer. Rather, like the defendant in People v. Miller, 152 Cal.Rptr. 707 (Cal. App. 1979), the record fails to disclose that Respondent was ever informed that she had a right to have a licensed attorney from the Public Defender's Office conduct her defense or to insist on a lawyer's active participation in it. These deficiencies and the potential for confusion are further compounded by the fact noted previously that the trial judge continually referred to the intern as an attorney. See In Re Moore, 380 N.E.2d 917 (1978).

What Petitioner asks this Court to do is infer a waiver of a basic constitutional right from an essentially silent record. A voluntary waiver of counsel cannot be presumed from the record in

this case because it is silent in that regard. Drago v. State, 413 So.2d 874, 876 (Fla. 2d DCA 1982); see Boykin v. Alabama, 395 U.S. 238 (1969). Without such a waiver, and not having had counsel, Respondent is entitled to a new motion to suppress and adjudicatory hearing. C.B. v. State, 546 So.2d 447 (Fla. 4th DCA 1989); L.S. v. State, 560 So.2d 425 (Fla. 4th DCA 1990); A.R. v. State, 554 So.2d 640 (Fla. 4th DCA 1989).

Finally, Petitioner intimates that a ruling in Respondent's favor will somehow be the death knell for the student practice program and use of interns by the Public Defender offices. That is simply not so, as demonstrated by the cases of Masonis, Daniels, and Perez, which involved active and immediate supervision of students by attorneys. Though it may be cheaper to let unsupervised students represent poor people that hardly justifies the action, even if it were constitutionally permissible. See The Florida Bar. In Re Advisory Opinion HRS Nonlawyer Counsel, 547 So.2d 909 (Fla. 1989). The goal of any student practice program should be to educate the student so that he or she may be a better lawyer once admitted to the bar. That education is accomplished by having an experienced attorney present and supervising a student, ready to intercede if necessary and to provide advice along the way. When dealing with cases involving the right to counsel, that requirement is a constitutional requirement.

CONCLUSION

Based on the foregoing arguments and the authorities cited therein, Respondent respectfully requests this Court affirm the decision of the Fourth District Court of Appeal and answer the certified question in the negative..

Respectfully Submitted,

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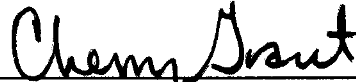

CHERRY GRANT
Assistant Public Defender
Florida Bar No. 260509

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to Georgina Jimenez-Orosa, Assistant Attorney General, Elisha Newton Dimick Building, Room 240, 111 Georgia Avenue, West Palm Beach, Florida 33401 this 3 day of May, 1991.

Counsel for Respondent