IN THE SUPREME COURT OF FLORIDA

TONY RAY PALEN,
Petitioner,
vs.
STATE OF FLORIDA,
Respondent.

CASE NO.: 77,592

PETITIONER'S BRIEF ON JURISDICTION

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

MICHAEL S. BECKER
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ATTORNEY FOR PETITIONER

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STATEMENT OF THE CASE AND FACTS

Petitioner entered into a negotiated plea whereby he pled nolo contendere to various criminal charges. Thereafter, and prior to sentencing, Petitioner sought to withdraw his plea. (R 31-32, 49-50, 52-57) This was denied and Petitioner was sentenced. Petitioner filed a timely notice of appeal and the office of the Public Defender was appointed to represent him on appeal. (R 168-169, 174)

On appeal, appointed counsel filed a motion to withdraw and submitted a brief in compliance with the dictates of Anders v. California, 386 U.S 738, 87 S.Ct. 1296, 18 L.Ed.2d 493 (1967) asserting that there was no meritorious issue which could be presented on behalf of the Petitioner. In the brief which was submitted, appointed counsel noted by way of a footnote that it appeared that the Petitioner did not receive notice or an opportunity to object to the imposition of court costs in the amount of $225.00. On February 7, 1991 the Fifth District Court of Appeal issued its opinion on the motion to withdraw denying the motion on the grounds that appointed counsel by inclusion of the

footnote regarding the unlawful imposition of costs, has admitted that there is a meritorious issue which can be raised. In so ruling, the Fifth District Court of Appeal disagreed with the position of the First District Court of Appeal in Coupe v. State, 564 So.2d 1199 (Fla. 1st DCA 1990) which held that the raising of minor issues such as costs by way of a footnote in an Anders brief was appropriate. Petitioner timely filed its notice to invoke discretionary jurisdiction on March 8, 1991.

SUMMARY OF ARGUMENT

The decision of the Fifth District Court of Appeal in the case sub judice is in direct conflict with a decision of the First District Court of Appeal in Coupe v. State, 564 So.2d 1199 (Fla. 1st DCA 1990) on the identical issue. Thus, this court has discretionary jurisdiction to accept the instant case to resolve the conflict. Further, Petitioner notes that the decision of the First District Court of Appeal in Coupe is currently pending review by this court sub nom In Re: Appellate Court Response To Anders Brief, Case No. 76,483. Therefore, this court additionally has jurisdiction to review the instant case where the issue is currently pending before this court.

ARGUMENT

THIS COURT HAS JURISDICTION TO REVIEW THE INSTANT DECISION OF THE FIFTH DISTRICT COURT OF APPEAL WHERE SUCH DECISION IS IN DIRECT CONFLICT WITH A DECISION FROM THE FIRST DISTRICT COURT OF APPEAL ON THE SAME ISSUE AND WHICH DECISION IS CURRENTLY PENDING BEFORE THIS COURT.

This Court has discretionary jurisdiction to review a case which is in direct conflict with the decision of another district court of appeal on the same rule of law. See, Rule 9.030(a)(2)(A)(iv), Florida Rules of Appellate Procedure. On the face of the decision in the instant case, the Fifth District Court of Appeal specifically disagreed with the decision of the First District Court of Appeal in Coupe v. State, 564 So.2d 1199 (Fla. 1st DCA 1990). In Coupe, the court approved a procedure whereby appointed counsel could file a brief in compliance with the dictates of Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967) and by way of a footnote draw the court's attention to the fact that certain minor errors have been committed. In the instant case, appointed counsel filed a brief and a motion to withdraw pursuant to Anders in which one issue was discussed, the denial of Petitioner's motion to withdraw his plea. However, by way of a footnote, appointed counsel noted that the trial court imposed court costs in the amount of $225.00 without notice and an opportunity to object. The Fifth District Court of Appeal denied Petitioner's motion to withdraw on the grounds that this footnote raised a meritorious issue and thus the Anders brief was improper. In so ruling, the court

specifically disagreed with the First District Court of Appeal's opinion in Coupe. Clear conflict exists.

Petitioner also draws this Court's attention to the fact that the First District Court of Appeal's opinion in Coupe, is currently pending review before this Court sub nom In Re: Appellate Court Response to Anders Brief, Case No. 76,483. To ensure uniformity of decisions, this Court can accept the instant case for review pursuant to the dictates of Jollie v. State, 405 So.2d 418 (Fla. 1981).

CONCLUSION

Based on the foregoing reasons and authorities, Petitioner respectfully requests this Honorable Court exercise its discretionary jurisdiction and accept the instant case for review on the basis of express conflict between the decision of the Fifth District Court of Appeal sub judice and the decision of the First District Court of Appeal in Coupe v. State.

Respectfully submitted,

JAMES B. GIBSON
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SEVENTH JUDICIAL CIRCUIT

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 210 N. Palmetto Ave, Suite 447, Daytona Beach, FL 32114 in his basket at the Fifth District Court of Appeal and mailed to: Tony R. Palen, P.O. Box 028538, Miami, FL 33102, this 18th day of March, 1991.

Michael S. Becker

MICHAEL S. BECKER
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

TONY RAY PALEN, Petitioner, vs. STATE OF FLORIDA, Respondent.	)	CASE NO.: 77,592

A P P E N D I X

Palen v. State, DCA Case No. 90-1269 (5th DCA February 7, 1991)

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JANUARY TERM 1991

INTERIM NON-DISPOSITIVE OPINION. NO MANDATE WILL BE ISSUED AT THIS TIME.

TONY RAY PALEN,

Appellant,

v.

CASE NO. 90-1269

STATE OF FLORIDA,

Appellee.

Opinion filed February 7, 1991

Appeal from the Circuit Court
for Brevard County,
Vernon C. Mize, Jr., Judge.

James B. Gibson, Public Defender,
and Barbara L. Condon,
Assistant Public Defender,
Daytona Beach, for Appellant.

Robert A. Butterworth,
Attorney General, Tallahassee,
and James N. Charles,
Assistant Attorney General,
Daytona Beach, for Appellee.

ON MOTION TO WITHDRAW

SHARP, W., J.

In this case, the Public Defender filed a brief in purported compliance with *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), and also filed a motion to withdraw from further representation of the appellant. However, the Public Defender raised in the *Anders* brief a meritorious legal issue -- a claim that the trial court imposed costs on the appellant without notice or a meaningful opportunity to object. The appeal

therefore is not wholly frivolous and is not properly presented as an *Anders* appeal.

Anders held that where court-appointed appellate counsel finds an appeal in a criminal case to be wholly frivolous he should so advise the appellate court and request permission to withdraw. Only if the appellate court, after a full examination of all the proceedings, finds any legal points arguable on their merits (and therefore not frivolous), must it afford the indigent appellant the assistance of counsel to argue the appeal. It is inappropriate for counsel to argue that an appeal is completely without merit and at the same time to submit that the trial court committed an error which requires corrective action by this Court.

We disagree with the position of the First District in *Coupe v. State*, 564 So.2d 1199 (Fla. 1st DCA 1990), that an appellant has a "right" to the *Anders* procedure in cases where the appeal is not wholly frivolous. Therefore, we deny the Public Defender's motion to withdraw, and we direct the appellee to file a supplemental answer brief within fourteen days after issuance of this opinion, addressing the issue of costs.

IT IS SO ORDERED.

GOSHORN and DIAMANTIS, JJ., concur.