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Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

TONY RAY PALEN,
Petitioner,

v.

CASE NO. 77,592

STATE OF FLORIDA,
Respondent.

_____ /

RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT OF CASE AND FACTS

The Public Defender representing petitioner, Tony Ray Palen, filed an initial brief and a motion to withdraw from further representation of Palen in purported compliance with the procedure provided in *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). The Fifth District Court of Appeal ("district court") denied the motion to withdraw based upon a finding that the Public Defender raised in the "Anders brief" a meritorious legal issue which was a claim that the trial court imposed costs on Palen without notice or a meaningful opportunity to object. *Palen v. State*, 574 So.2d 269 (Fla. 5th DCA 1991). The rationale of the district court in the instant case was as follows:

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 actions 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.

This Court has recently affirmed *Coupe* and disapproved the decision of the district court in the instant case in *In re: Appellate Court Response to Anders Briefs* ("In re: Anders Briefs"), 16 FLW 399 (Fla. May 30, 1991).

SUMMARY OF ARGUMENT

In the instant case, Palen is entitled to representation by appellate counsel acting as an advocate because the "*Anders* brief" raised a legal point arguable on its merits- a claim that the trial court imposed costs on Palen without notice or a meaningful opportunity to object. Since Palen must be provided counsel acting as an advocate, the district court correctly followed the *Anders* procedure by denying the public defender's motion to withdraw.

The state acknowledges that this Court's recent decision in *In re: Anders Briefs* disapproves the district court's decision in the instant case, but maintains that it was wrongly decided because this Court misconstrued the *Anders* procedure as a "right" when it is actually a "safeguard" for protecting the indigent appellant's right to counsel acting as an advocate. The decision defeats the principle of *Anders* because it deprives indigent appellants of their right to counsel acting as an advocate when their counsel identifies only minor sentencing issues on appeal.

The decision results in "the tail wagging the dog." The United States Supreme Court decisions clearly demonstrate that the purpose of the *Anders* procedure is to ensure that indigent appellants receive counsel acting as an advocate whenever their appeal presents an arguable issue. On the other hand, this Court's decision in *In re: Anders Briefs* deprived the indigent appellants of their right to appellate counsel acting as an advocate in order to provide them the *Anders* procedure. Thus, the United States Supreme Court devised a procedure to protect a

right and now the Florida Supreme court denies that right to protect the appellant's access to that procedure. This Court should re-examine the *In re: Anders Briefs* decision and affirm the district court's decision in the instant case.

ARGUMENT

THE DISTRICT COURT CORRECTLY DENIED
THE PUBLIC DEFENDER'S MOTION TO
WITHDRAW BECAUSE THE "ANDERS BRIEF"
RAISED A MERITORIOUS LEGAL ISSUE.

The issue presented to this Court is whether indigent criminal appellants lose their right to representation by counsel acting as an advocate on direct appeal when their counsel identifies only minor sentencing issues in an "Anders brief." In *Anders v. California*, 386 U.S. 738, 744, 87 S.Ct. 1396, 1400, 18 L.Ed.2d 493 (1967), the Court held that indigent appellants must be provided assistance of appellate counsel acting as an advocate if the court finds "any of the legal points arguable on their merits."

In the instant case, Palen is entitled to representation by appellate counsel acting as an advocate because the "Anders brief" raised a legal point arguable on its merits- a claim that the trial court imposed costs on Palen without notice or a meaningful opportunity to object. Since Palen must be provided counsel acting as an advocate, the district court correctly followed the *Anders* procedure by denying the public defender's motion to withdraw.

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principle of *Anders* because it deprives indigent appellants of their right to counsel acting as an advocate when their counsel identifies only minor sentencing issues on appeal.

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A. *Anders* procedure is a "safeguard" for protecting the indigent appellant's right to counsel acting as an advocate.

The United States Supreme Court has held that an indigent appellant has the same right to representation by counsel acting as an advocate as an appellant who can retain counsel of his or her choice. *McCoy v. Court of Appeals of Wisconsin*, 108 S.Ct. 1895,1900 (1988). A narrow exception to such right exists when the appeal is "wholly frivolous" because both appointed and retained counsel have an ethical obligation to refuse to prosecute a frivolous appeal. *Penson v. Ohio*, 109 S.Ct. 346,351 (1988). However, if the trial record supports arguable claims,

there is no basis for the exception and the appellant is entitled to representation. *Id.*

The purpose of the *Anders* procedure is to protect the indigent appellant's right to representation by counsel acting as an advocate when counsel believes the appeal is "wholly frivolous" and wishes to withdraw. In *Anders*, the indigent appellant's counsel concluded that there was no merit to the appeal and advised the court by letter. The appellant then filed his own pro se brief. The United States Supreme Court held that the appellant's appointed counsel did not represent the appellant with the level of advocacy that an appellant would have received from retained counsel. In order to insure that indigent appellants would receive the same level of advocacy from appointed counsel as appellants would receive from retained counsel, the Court adopted what is known as the *Anders* procedure which is as follows:

1. If counsel finds the appeal to be "wholly frivolous" after a "conscientious examination" of it, he should so advise the appellate court and request permission to withdraw.
2. The request to withdraw must be accompanied by a brief "referring to anything in the record that might arguably support the appeal."
3. A copy of counsel's brief must be furnished to the indigent appellant and time allowed for appellant to raise any points that he chooses.
4. The appellate court then makes a "full examination of all the proceedings to decide whether the appeal is wholly frivolous.

5. If the appellate court finds the appeal to be wholly frivolous, it may grant counsel's request to withdraw and dismiss the appeal.

6. If the appellate court finds "any of the legal points arguable on their merits" it must afford the indigent appellant the assistance of counsel prior to reaching a decision on the merits.

In *Penson, supra* at 349-350, the Court explained that the above *Anders* procedure provided "safeguards" for protecting the indigent appellant's right to representation of counsel.

B. *Anders* should not be construed as a right nor expanded to apply to minor sentencing issues.

There is absolutely no language in any United States Supreme Court decisions that describe the *Anders* procedure as a "right" nor is there any justification for expanding the procedure to apply when minor sentencing issues are present. A full reading of *Anders, McCoy* and *Penson* clearly demonstrates that the goal of the Court in applying the *Anders* procedure is to force counsel for the indigent appellant to perform with the same level of advocacy as retained appellate counsel.¹ If the appellants in *In re: Anders Briefs* and Palen in the instant case were represented by retained counsel, such counsel certainly would raise the minor sentencing errors in an advocate's brief. In light of the

¹ This point is demonstrated in the dissent by Chief Justice Rehnquist in *Penson, supra* at 355, where he states as follows: "Thus today's decision is added to the decision in *Anders* itself as a futile monument to the Court's effort to guarantee to the indigent appellant what no court can guarantee him: exactly the same sort of legal services that would be provided by suitably retained private counsel."

Court's goal in *Anders*, appointed counsel should be forced to raise the minor sentencing errors in an advocate's brief as well.

The Court has made it absolutely clear that appointed appellate counsel should not be allowed to withdraw if counsel raises any arguable issue. The Court held in *McCoy, supra* at 1902 as follows:

Only after such an evaluation has led counsel to the conclusion that the appeal is "wholly frivolous" [footnote 10] is counsel justified in making a motion to withdraw. This is the central teaching of *Anders*.

[footnote 10] The terms "wholly frivolous" and "without merit" are often used interchangeably in the *Anders* brief context. Whatever term is used to describe the conclusion an attorney must reach as to the appeal before requesting to withdraw and the court must reach before granting the request, what is required is a determination that the appeal lacks any basis in law or fact. (Emphasis added.)

Is this Court suggesting in *In re: Anders Briefs* that an appeal raising minor sentencing errors is wholly frivolous and without merit? Surely, even appeals raising minor errors cannot be said to lack any basis in law or fact.²

Furthermore, the situation for which *Anders* was intended to address only arises when there are no arguable issues on appeal. When retained counsel concludes that the appeal is frivolous, he or she may withdraw without leave of court. Appointed counsel, however, is presented with a dilemma because he or she must advise the court of counsel's opinion that the appeal is

² In *Mays v. State*, 519 So.2d 618 (Fla. 1988), this Court held that imposing costs without notice and an opportunity to be heard is a violation of due process. This type of error cannot be deemed frivolous.

frivolous and request leave of court to withdraw; this appears to conflict with counsel's duty to be an advocate for his or her client. *McCoy, supra* at 1901. The *Anders* procedure provides a means to resolve this dilemma. *Id.* The procedure is not necessary, however, when there is even a minor arguable issue on appeal because the appeal is not frivolous and counsel has no duty to withdraw.

C. *In re: Anders Briefs* deprives indigent appellants of their right to counsel acting as an advocate."

The *In re: Anders* decision defeats the principle of *Anders* because it deprives indigent appellants of their right to counsel acting as an advocate when their counsel identifies only minor sentencing issues on appeal. This Court held as follows:

Drawing such a distinction [between arguable issues that may be raised in *Anders* briefs and others that may not] does not defeat the principle of *Anders* because, even with this modification, the procedure continues to ensure that indigents have the right to meaningful appellate review with the assistance of counsel where the issues raised in "no merit" briefs are substantial.

* * *

There very well may be other sentencing errors substantive enough to warrant adversarial presentation to an appellate court with the assistance of counsel.

The above statement necessarily infers that indigent defendants do not have the right to adversarial representation by appellate counsel when there are issues raised on appeal, but the issues are deemed "insubstantial." This holding is completely contrary to the United States Supreme Court decisions previously discussed.

If appellate counsel is allowed to withdraw after raising a minor issue, the indigent appellant receives less effective counsel than an appellant who can afford to retain counsel of his or her choice. The public defender is not representing the indigent appellant as an advocate when he or she files an *Anders* brief which raises an arguable issue. In *McCoy, supra* at 1904-1905, the court held as follows:

The *Anders* brief is not a substitute for an advocate's brief on the merits. As explained above, it is a device for assuring that the constitutional rights of indigent defendants are scrupulously honored. . . Of course, if the court concludes that there are nonfrivolous issues to be raised, it must appoint counsel to pursue the appeal and direct that counsel prepare an advocate's brief before deciding the merits.

In *Penson*, the state appellate court allowed counsel for the indigent appellant to withdraw after counsel filed a "certificate" that the appeal was meritless. The state appellate court subsequently found reversible error and reversed one count of the conviction and sentence without reappointing appellate counsel. The Court held as follows:

It is apparent that the Ohio Court of Appeals did not follow the *Anders* procedures when it granted appellate counsel's motion to withdraw and that it committed an even more serious error when it failed to appoint new counsel after finding that the record supported several arguably meritorious grounds for reversal of petitioner's conviction and modification of his sentence. As a result, petitioner was left without constitutionally adequate representation on appeal. *Id.* at 350.

In the instant case, the public defender raised the issue of costs in a footnote in the statement of case and facts and cited

no cases in support of the issue. It would be ludicrous to suggest that retained counsel acting as an advocate would have filed such a brief.

D. Appellate court review of record not substitute for diligent and thorough evaluation of case by counsel.

Appellate counsel appointed to represent an indigent appellant is required to make the same diligent and thorough evaluation of the case as retained counsel before concluding that an appeal is frivolous. *McCoy, supra* at 1902. The Court also held as follows:

Every advocate has essentially the same professional responsibility whether he or she accepted a retainer from a paying client or an appointment from a court. The appellate lawyer must master the trial record, thoroughly research the law, and exercise judgment in identifying the arguments that may be advanced on appeal. In preparing and evaluating the case, and in advising the client as to the prospects for success, counsel must consistently serve the client's interest to the best of his or her ability.
Id.

After appellate counsel evaluates the case, concludes that the appeal is "wholly frivolous" and files an *Anders* brief, the appellate court reviews the trial record to determine whether appointed counsel has fully performed counsel's duty to search the case for arguable error and to support the client's appeal to the best of counsel's ability. *Penson, supra* at 351; *McCoy, supra* at 1902.

In the instant case, the public defender's main argument in the initial brief on the merits is as follows:

Petitioner contends that the holding of the Fifth District Court of Appeal is unfair in that it effectively denies Petitioner his right to a direct appeal by forcing appellate counsel to raise one minor and insignificant meritorious point, thus precluding review of other more substantive potential issues which Petitioner desires to be reviewed.

* * *

The question that this court must decide, is whether Petitioner can be denied his right to a full review of this primary issue simply because the record reveals a minor sentencing error. In every appeal, when a merit brief is filed, the appellate court may rely on defense counsel's assessment of which issues are meritorious and review only the issue or issues argued by defense counsel. On the other hand, when an Anders brief is filed, the appellate court is obligated to review the entire record for errors.

First, the public defender complains that he should not be forced to raise a "minor and insignificant meritorious point." This argument is contrary to the intended purpose of *Anders*, which is to force appellate counsel to raise any arguable issue. Second, the public defender argues that the review of more substantive potential issues have been precluded. Again, this argument is contrary to the *Anders* requirement that appellate counsel diligently evaluate the case and raise all substantive potential issues for review. Appellate counsel should not be permitted to transfer this responsibility of counsel to the appellate court. The last part of the public defender's argument also expresses a desire to substitute the appellate court's review for the diligent and thorough evaluation of counsel.

E. Summary.

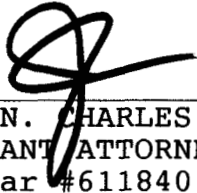
As explained above, the arguments made by the public defender should be rejected because they would result in denying Palen the same right of appellate counsel by an advocate that an appellant would receive from retained counsel. The public defender is attempting to transfer his responsibilities to the trial court, which he concedes in the initial brief on the merits is time consuming for the appellate court. These arguments would be rejected by the United States Supreme Court and should also be rejected by this Court.

CONCLUSION

Based on the arguments and authorities presented herein, respondent respectfully requests the court to affirm the district court decision in the above-captioned cause.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above brief on jurisdiction has been furnished by delivery to Michael S. Becker, assistant public defender, this 27th day of June, 1991.



James N. Charles
Assistant Attorney General