

**FILED**

SID J. WHITE

JUL 24 1991

CLERK, SUPREME COURT

By \_\_\_\_\_  
Chief Deputy Clerk

**IN THE SUPREME COURT OF FLORIDA**

JOSEPH BAXTER,  
Petitioner,

vs.

GAVIN K. LETTS, and  
BOBBY GUNTHER, and  
EUGENE S. GARRETT, Judges  
of the District Court of  
Appeal, Fourth District of  
Florida,

Respondents.

Case No. 78,294

**PETITION FOR A WRIT OF MANDAMUS OR AN  
ORIGINAL WRIT, OR FOR A WRIT OF HABEAS CORPUS**

Pursuant to Fla.R.App.P. 9.100, Joseph Baxter, respectfully petitions this Court for a writ of mandamus, or in the alternative an original writ or a writ of habeas corpus compelling Judges Letts, Gunther and Garrett, of the District Court of Appeal, Fourth District, to vacate the decision where petitioner was not represented and appoint appellate counsel for petitioner, an indigent, in District Court case number 90-0317 and to grant him his right of notice of the state's appeal and to be heard before final decision.

**BASIS FOR INVOKING JURISDICTION**

This Court has original jurisdiction to hear and decide original writs, writs of mandamus and writs of habeas corpus pursuant to Article V, Sections 3(b)(7), (8), and (9), Florida Constitution, and Florida Rules of Appellate Procedure 9.030(a)(3).

The decision sought to be reviewed is the district court's decision on the merits of the state's appeal of petitioner's sentence of probation, resulting in an increase to 3 years in prison, while petitioner was indigent, incarcerated, WITHOUT COUNSEL and without actual notice of the state's appeal. Baxter v. State, 16 F.L.W. D1561 (Fla. 4th DCA June 12, 199) (Appendix 1-2). Appointment of counsel is a ministerial duty in a criminal proceeding on the defendant's sentence where there is no issue as to the defendant's economic eligibility for appointed counsel, but these judges on the district court neglected their duty to appoint counsel.

**FACTS UPON WHICH PETITIONER RELIES**

On November 7, 1990, petitioner, Joseph Baxter, pled guilty to purchase of cocaine within 1000 feet of a school and possession of cocaine before Judge Tyson in Broward County and was placed on probation for 2 and ½ years with a special condition of 8 months in the Broward County Jail in the drug treatment cell (Appendix 3-4).

Petitioner began serving that time in November, 1990 and on November 16, 1990, the state filed a notice of appeal of petitioner's sentence (Appendix 5). The notice was served on petitioner's trial counsel, Andrew Washor, but not on petitioner (Appendix 5, 14). Petitioner remained in the Broward County Jail in the cell for drug treatment and therapy until he was released.

Petitioner did not know about this state appeal, was not represented by counsel during this state appeal and did not waive his right to counsel (Appendix 1, 14). On June 12, Judges Letts, Gunther and Garrett issued a decision stating "No appearance for

appellee," which vacated petitioner's probation and remanded for imposition of a sentence of 3 years in prison (Appendix 1-2).

After months of incarceration, on June 20, trial counsel Washor requested the circuit court to declare petitioner indigent for purposes of appeal because petitioner was incarcerated due to the special condition of probation, wanted counsel on the appeal but was unable to afford an attorney (Appendix 6-7). Judge Tyson made an indigency inquiry, adjudged Mr. Baxter indigent, and appointed the Public Defender of the Seventeenth Judicial Circuit for purposes of appeal (Appendix 8, 14). The Public Defender of the Fifteenth Judicial Circuit was then designated as appellate counsel (Appendix 9).

On June 21, petitioner, through his recently appointed counsel, filed with the district court a Motion to Vacate Decision, and Appoint Counsel for Appellee, An Indigent, which pointed out that petitioner had a right to due process and counsel on this state's appeal and the decision of June 12 had been issued without affording petitioner those fundamental rights (Appendix 10-12). On July 16, 1991, the court denied petitioner's motion to vacate "without prejudice to appellee to seek post conviction relief in the trial court." (Appendix 13).

The district court's decision is not yet final because the mandate of the district court has not yet issued. A motion to stay mandate is being filed in the district court simultaneously with the service of this petition.

ARGUMENT IN SUPPORT OF THE PETITION

Petitioner, an indigent criminal defendant, has a clear right to appointed counsel during state initiated proceedings to an appellate court attempting to increase petitioner's sentence from probation to 3 years imprisonment. Petitioner had no counsel because he could not afford to retain counsel, had no actual notice of the state's appeal, and was incarcerated (Appendix 1-7, 14). The state appeal of petitioner's sentence is a critical stage of the criminal proceedings against Mr. Baxter at which he is entitled to counsel under the state and federal constitutions. Coleman v. Alabama, 399 U.S. 1, 90 S.Ct. 1999, 26 L.Ed.2d 387 (1970). Petitioner has a right to counsel at sentencing, Mempa v. Rhay, 389 U.S. 128, 88 S.Ct. 254, 19 L.Ed.2d 336 (1967), State v. Scott, 439 So.2d 219 (Fla. 1983), and on appeal. Douglas v. California, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963).

The district court has a duty under the state and federal constitutions to make a determination of counsel for the petitioner/appellee on a state appeal. Waiver of counsel on appeal may not be presumed from a silent record. Swenson v. Bosler, 386 U.S. 258, 87 S.Ct. 996, 18 L.Ed.2d 33 (1967). Fla.R.Crim.P. provides: "Counsel shall be provided to indigent persons in all prosecutions for offenses punishable by imprisonment...including appeals from the conviction thereof." "An appeal is a continuation of the original proceedings." Aranda v. State, 205 So.2d 667, 670 (Fla. 4th DCA 1968). Petitioner's proper sentence is not determined until the state's appeal is final. This state appeal is but a continuation of the prosecution of petitioner by the state

for the specific reason of having the district court rule that a sentence of incarceration should be imposed upon appellee.

Yet, respondents, state officials, judges on the district court, decided this appeal while petitioner was without counsel and indigent and have refused to vacate their decision and appoint counsel for petitioner (Appendix 13). Mandamus is the appropriate remedy to enforce a clear legal right against a state officer who refuses to perform a clear legal duty. Orange City Water Co. v. Mason, 166 So.2d 449 (Fla. 1964). Heath v. Beckett, 327 So.2d 3 (Fla. 1976). Mandamus enforces an established legal right by compelling a person in an official capacity to perform an indisputable legal duty. Puckett v. Gentry, 577 So.2d 965 (Fla. 5th DCA 1991).

The Fourth District itself has recognized that the remedy to force a proper consideration of an indigent's right to appointed counsel on appeal is a writ of mandamus. Graham v. Adams, 493 So.2d 103 (Fla. 4th DCA 1986). Where there is no issue as to the defendant's economic eligibility for appointed counsel, mandamus is available to review an appellate court's refusal to allow appointed counsel on appeal for an indigent. Taylor v. Carlisle, 566 So.2d 576 (Fla. 4th DCA 1990). This is so because there is a clear constitutional right to counsel on appeal from a criminal conviction. Douglas v. California, supra. Abraham v. Wainwright, 407 F.2d 826, 826-827 (5th Cir. 1969) ("An indigent defendant has the constitutional right to counsel on direct appeal"); Hooks v. State, 253 So.2d 424, 425 (Fla. 1971) ("Petitioner had a constitutional right to the assistance of counsel on his appeal to

the District Court of Appeal from his judgment of conviction."); McDaniel v. State, 219 So.2d 421, 423 (Fla. 1969) ("It is now clear that an indigent has a right guaranteed under both the equal protection clause and the due process clause, to appellate counsel.").

Lawyers in criminal cases are "necessities, not luxuries." Gideon v. Wainwright, 372 U.S. 335, 344, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). This is no less so on appeal. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). In Taylor v. Carlisle, the Fourth District observed: "Denial of appellate counsel would certainly result in irreparable harm to petitioner throughout the proceedings below." 566 So.2d at 576-577.

State criminal appeals simply cannot be prosecuted against an indigent defendant without affording him his right to appointed counsel because, as the United States Supreme Court observed, an appeal without an attorney is a "meaningless ritual," Douglas v. California, supra, 372 U.S. at 358, 83 S.Ct. at 814. Previously, the Fourth District observed in Aranda, supra, and in Lee v. State, 204 So.2d 245 (Fla. 4th DCA 1967) that "an appellate court needs the assistance of informed counsel as well as does the defendant." Aranda, 205 So.2d at 670. An appellate court's judicially neutral review of the record is "no substitute for the careful partisan scrutiny of a zealous advocate." Wilson v. Wainwright, 474 So.2d 1162, 1165 (Fla. 1985).

The Fourth District is well aware of these established principles of law, as citations to cases from that court attest. Aranda v. State, supra. Taylor v. Carlisle, supra, and Hamilton

v. State, 573 So.2d 109 (Fla. 4th DCA 1991) (explaining a criminal defendant's right to be heard and to have appointed counsel file a brief before an appellate court determines the issues are frivolous). Yet, once counsel was appointed for petitioner by the circuit court, after the district court's decision, the district court still denied petitioner's Motion to Vacate Decision, which requested appointment of counsel and an opportunity to be heard before the court reached a final decision (Appendix 10-13).

That motion was denied "without prejudice to appellee to seek post conviction relief in the trial court." (Appendix 13). Obviously, the circuit court in post-conviction proceedings cannot remedy the denial of petitioner's right to counsel and to be heard on appeal. Although this Court now requires a defendant to seek post-conviction relief by Fla.R.Crim.P. 3.850 for denial of his right to a direct appeal due to a lawyer's failure to file a notice of appeal, State v. District Court of Appeal, First District, 569 So.2d 439 (Fla. 1990), that procedure for ineffective assistance of trial counsel can only result in granting the defendant a "belated appeal." But, this appeal in the Fourth District is not the petitioner's appeal. Since the claim of no counsel stems from acts and omissions before the judges of the district court, that court, not the circuit court, had jurisdiction to determine petitioner's Motion to Vacate. Knight v. State, 394 So.2d 997, 998 (Fla. 1981). State v. District Court of Appeal, First District, makes it clear that, in spite of the new procedure to raise the claim of denial of the right to appeal, claims of ineffective assistance of appellate counsel shall continue to be raised in the

appellate court. 569 So.2d at 442, footnote 1.

The district court has decided the state appeal in cavalier, if not total, disregard of petitioner's right to be heard and to be represented by counsel. Just as a conviction with no counsel is presumptively void, Burkett v. Texas, 389 U.S. 109, 88 S.Ct. 258, 19 L.Ed.2d 319 (1967), so too the decision the respondent judges made when petitioner was denied his fundamental rights to counsel and to notice is also void and should be vacated by this Court. This Court should grant the writ of mandamus or other alternative writ, order the district court to withdraw its decision and to cease all criminal proceedings and appellate determinations against petitioner until he is represented by appointed counsel and given his due process right to be heard.

WHEREFORE, a decision, increasing petitioner's sentence by 3 years, having been entered by the district court without affording petitioner his right to counsel and to be heard on the state's appeal, the decision is unconstitutional and void and petitioner requests this Court to issue a writ of mandamus or other appropriate writ vacating the decision and requiring the respondent judges of the district court to allow petitioner to be represented and heard through appointed counsel on the state's appeal of petitioner's sentence.



Respectfully Submitted,

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*Margaret Good*

MARGARET GOOD  
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to Sylvia H. Alonso, Assistant Attorney General, Elisha Newton Dimick Building, 111 Georgia Avenue, West Palm Beach, Florida 33401 and by hand delivery to Honorable Gavin K. Letts, Fourth District Court of Appeal, 1525 Palm Beach Lakes Boulevard, P. O. Box A, West Palm Beach, Florida 33402, Honorable Bobby Gunther, Fourth District Court of Appeal, 1525 Palm Beach Lakes Boulevard, P. O. Box A, West Palm Beach, Florida 33402 and to Honorable Eugene S. Garrett, Fourth District Court of Appeal, 1525 Palm Beach Lakes Boulevard, P. O. Box A, West Palm Beach, Florida 33402 this 23<sup>rd</sup> day of July, 1991.

*Margaret Good*

Counsel for Petitioner