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FILED
SID J. WHITE
SEP 4 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

RESPONSE TO ORDER TO SHOW CAUSE ON PETITION FOR WRIT OF MANDAMUS OR AN ORIGINAL WRIT, OR FOR A WRIT OF HABEAS CORPUS

Pursuant to this court's Order to Show Cause, dated August 21, 1991, Respondents, by and through undersigned counsel, respond to the Petition for Writ of Mandamus or an Original Writ, or for a Writ of Habeas Corpus as follows:

1. Because the trial court did not enter the Order Appointing Public Defender (Appendix A) and Designation of Public Defender (Appendix B) until after the Fourth District Court of Appeal filed its opinion in this case (Appendix C), it did not have jurisdiction to enter them. Rule 9.600(a), Florida Rules of Appellate Procedure, provides in part, "before the record is transmitted, the lower tribunal shall have concurrent jurisdiction with the court to render orders on any other procedural matter relating to the cause, subject to the control of the court." (emphasis supplied). Hence, the trial court lacked jurisdiction to adjudge Petitioner indigent, and appoint the public defender, for purposes of appeal, and to

allow counsel of record to withdraw after entry of appeal. Smith v. State, 208 So.2d 462 (Fla. 1st DCA 1968). In State ex rel. Davis v. City of Clearwater, 108 Fla. 635, 146 So. 836, 836 (Fla. 1933), this court stated:

> . . . I have concluded that until the mandate is transmitted, even though it may be delayed, the lower court is without jurisdiction of the cause and can in no wise act therein, and that under such circumstances the cause remains within the jurisdiction of the appellate court. There can be no twilight zone in jurisdiction nor vacuum in its application. It is either effective full force or not at all. . . .

2. Petitioner asserts that he was denied his right to counsel on appeal. However, Petitioner had counsel on appeal. His counsel of record was Andrew Washer, a private attorney who represented Petitioner in the trial court. Mr. Washer did not withdraw as counsel prior to the Fourth District entering its opinion in this case. Therefore, the State sent Mr. Washer a copy of the Notice of Appeal (Appendix D) and a copy of the Initial Brief (Appendix E). Mr. Washer could have filed the Motion to Declare Defendant Indigent for Purposes of Appeal (Appendix F) and Motion to Withdraw (Appendix G) upon receipt of those items, instead of like he did, after the Fourth District filed its opinion. Thus, Petitioner's claim is really not that he was denied his right to counsel, but that his counsel was ineffective. As the Fourth District pointed out in its Order on Petitioner's Motion to Vacate Decision and Appoint Counsel for Appellee (Appendix H), Petitioner is free to

raise such a claim in a postconviction relief proceeding.

3. This court in Jenkins v. Lyles, 223 So.2d 740, 742 (Fla. 1976) held that the State's failure to serve a copy of the notice of appeal on the defendant did not require dismissal of appeal, in the absence of a showing of substantial prejudice to the moving party. Petitioner was not substantially prejudiced in this case.

4. First, the State objected to the imposition of Petitioner's sentence based on the fact that it was below the recommended guidelines sentence and the statutory mandatory minimum at the sentencing hearing (Appendix I, p.1). At the close of the hearing, the trial court noted, "This is over the objections of the State." (Appendix I, p.2). Petitioner, therefore, was aware that the State would most likely appeal from the sentence pursuant to Rule 9.140(c)(1)(I), Florida Rules of Appellate Procedure.

5. Second, Mr. Washer, as counsel of record, was specifically placed on notice of the State's appeal and the points raised therein. This court has stated that when a defendant retains private counsel at his original trial, the State may presume that the privately chosen counsel will act in the defendant's best interests in regard to appeal. McDaniel v. State, 219 So.2d 421 (Fla. 1969); Schaeffer v. Waignwright, 218 So.2d 442 (Fla. 1969).

6. Third, the State as appellant in this case was alleging that it was the aggrieved party. So, this was not an instance where Petitioner was deprived of an opportunity to assert

injustice. To the contrary, the trial court advised Petitioner that it would appoint a public defender to help in appeal if he could not afford an attorney, but Petitioner explicitly waived his right to appeal (Appendix I, p.2). Not surprisingly, Petitioner has failed to cite a case on a defendant's right to appellate counsel in which the defendant is the appellee.

7. Fourth, along the same lines, Petitioner's sentence was presumed valid on appeal. State v. Caudle, 504 So.2d 419 (Fla. 5th DCA 1987); Allen v. State, 463 So.2d 351 (Fla. 1st DCA 1985).

8. Fifth, and finally, even with representation by the public defender, the Fourth District's conclusion in the instant case would not have been different. In State v. Vola, Case No. 91-0273 (Fla. 4th DCA August 28, 1991)(Appendix J), the State appealed from a sentence on a conviction pursuant to section 893.13(1)(e)(1), Florida Statutes, in which the trial court downwardly departed based on section 397.12, Florida Statutes. The Fourth District per curiam reversed the sentence and refused to certify the question of whether section 893.13(1)(e)1 takes precedence over section 397.12. It determined that the question should not be certified due to its reasoning in State v. Ross, 447 So.2d 1380 (Fla. 4th DCA 1989), rev. denied, 456 So.2d 1184 (Fla. 1984) as to why section 893.13(1)(e)1 does take precedence. It noted its opinion in this case, and stated that it based that opinion on Edwards v. State, 456 So.2d 575 (Fla. 2d DCA 1984), in which the special concurrence also concluded that section 893.13(1)(e)1 takes precedence over section 397.12. Notably, both Ross and Edwards, on which the

Fourth District relied in Vola, were decided prior to the instant case, so that the appellate court's opinion herein was by no means a fluke. WHEREFORE, the Respondents request that the Petition for Writ of Mandamus, or an Original Writ, or for a Writ of Habeas Corpus be DENIED.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that a true copy of the foregoing has been forwarded by courier to Margaret Good, Assistant Public Defender, 301 North Olive Avenue, Ninth Floor, West Palm Beach, Florida 33401, and by U.S. mail to Andrew Washer, Esquire, 7 Southeast 13th Street, Fort Lauderdale, Florida 33316, this 3 day of September, 1991.

Of Counsel