a.k.7 11-1-91

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. **CASE NO. 78,560**

BRUCE W. ROCK,

Respondent.

ON APPEAL FROM THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA
CERTIFIED QUESTION

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, the State of Florida, was the prosecuting authority in the trial court and the appellee in the First District Court of Appeal, and will be referred to as "petitioner" or "the state" in this brief. Respondent was the defendant in the trial court and the appellant in the First District Court of Appeal, and will be referred to as "respondent" in this brief. References to the record on appeal will be noted by the symbol "R"; references to the transcripts of the proceedings below will be by the use of the symbol "T". All references will be followed by the appropriate page number(s) in parenthesis.

STATEMENT OF THE CASE AND FACTS

On August 25, 1987, Petitioner, the State of Florida, filed an amended information charging respondent with leaving the scene of an automobile accident with injury and false reporting of an accident, in violation of Fla. Stat. §316.061 (1987) and Fla. Stat. 8316.027 (1987) (R 9). On October 30, 1987, respondent pled nolo contendere to the offense of leaving the scene of an accident with injury, in return for the State's decision to nolle prosse the false reporting of an accident charge (T 4-6). The trial court accepted respondent's plea and withheld adjudication of guilt, placing respondent in the community control program for a period of three years (R 13-13A; T 6-7). The trial court stated that respondent's community control was to be modified at the end of six months, at which time respondent was to be placed on probation for the balance of the three-year term (R 13; T 7). The trial court's order withholding adjudication of guilt and placing respondent in community control contained standard condition #5 of community control, which provides as follows: "You will live and remain at liberty without violating the law. A conviction in a court of law shall not be necessary in order for such a violation to constitute a violation of your community control" (R 13).

On April 19, 1990, Department of Corrections Officer Adrena V. Thomas filed an affidavit stating that respondent

had violated conditions #5 and #19 of his probation (R 17-18). In the affidavit, Ms. Thomas stated that respondent had been arrested for the offenses of trespassing, disorderly intoxication, and resisting arrest without violence on March 21, 1990, thereby violating probation condition #5 (R 17). On April 19, 1990, the trial court signed a warrant for respondent's arrest on the grounds that he violated the terms of his probation, and respondent was arrested pursuant to that warrant on May 5, 1990 (R 19; 20).

At respondent's violation of probation hearing held on July 6, 1990, Ms. Thomas took the stand and testified that she is respondent's probation officer (T 21). She further testified that respondent was arrested on March 21, 1990, for trespassing, disorderly intoxication, and resisting arrest without violence, in violation of probation condition #5 (T 26-27). Ms. Thomas stated that her knowledge of respondent's arrest was based upon an arrest and booking report (T 34). Ms. Thomas also stated that, based upon information contained in respondent's file at the clerk's office, she knew respondent received concurrent sentences of five days with one-day credit as to each of the three offenses (T 34). Defense counsel objected to the introduction of the prior convictions solely on the grounds

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'Respondent's violation of special condition #19, which required appellant to enroll in and successfully complete an alcohol treatment program as specified by his probation officer, is not a subject of this appeal.

of hearsay (T 26). The trial court overruled defense counsel's objection (T 26).

At the hearing, respondent took the stand in his own behalf (T 43). He testified that he appeared in court on the morning following his arrest (R 43). Respondent admitted that he pled guilty to the trespassing, disorderly intoxication, and resisting arrest charges, stating:

> The Judge asked me if -- let's see. The Judge asked me if I knew what I was charged with. I didn't know what I was charged with. And then he asked me what I was pleading. I told him guilty. Then he told me to go out the door and the bailiff would do -- whatever.

(T 44). Respondent further stated that he was asked to sign two papers, but that he did not know what was contained in the papers (T 44). When asked by defense counsel why he pled guilty to the charges, respondent stated: "Well, most of the -- I don't know. It was most of the people in the jail that admitted guilt on disorderly intoxication get time served, which is overnight, and then get released" (T 44). When defense counsel asked respondent whether he was represented by an attorney on these charges, respondent answered: "No, sir" (T 45). Respondent made no comment regarding whether he knowingly and voluntarily waived his right to counsel (T 43-47).

At the conclusion of the revocation hearing, the trial court made the following findings: (1) Respondent was

arrested on March 21, 1990, and charged with trespassing, disorderly intoxication, and resisting an officer; (2) respondent committed the three offenses; and, (3) respondent was convicted of the offenses and sentenced to five days in jail (T 51). Because these arrests and conditions constituted a violation of community control condition #5, the trial court revoked respondent's community control (T 53; R 34), adjudicated him guilty of leaving the scene of an accident (R 35), and sentenced him to 30 months' incarceration (T 53; R 37).

In its opinion, Rock v. State, 16 F.L.W. D2242 (Fla. 1st DCA Aug. 21, 1991), the First District Court of Appeals concluded that the trial court erred in finding a violation of probation based on uncounseled misdemeanor convictions. Thus, the court reversed the trial court's order revoking respondent's probation and remanded the matter for a new hearing to determine whether respondent was actually represented by counsel or knowingly and voluntarily waived counsel. The court concluded that the trial court erred in finding a violation of probation based on uncounseled misdemeanor convictions. The court stated that, once respondent produced evidence that he was unrepresented in connection with the prior convictions, it became the State's burden to show that respondent was in fact represented or that counsel was available but validly waived. The court, however, certified the following question as one of great public importance for purposes of review by this Court:

> **IS THE DEFENDANT'S STATEMENT UNDER OATH THAT HE WAS NEITHER PROVIDED NOR OFFERED COUNSEL AT THE PROCEEDINGS RESULTING IN PRIOR CONVICTIONS SUFFICIENT TO PUT THE STATE TO THE BURDEN OF PROVING THAT SUCH CONVICTIONS WERE IN FACT COUNSELED OR THAT COUNSEL WAS KNOWINGLY WAIVED.**

Rock, supra, at D2242. This certified question mirrors the certified question set out by the First District in Beach v. State, 564 So.2d 614 (Fla. 1st DCA 1990), petition for review filed, No. 76,576 (Fla. Aug. 31, 1990).

SUMMARY OF ARGUMENT

This Court should answer the certified question in the negative. A defendant who challenges the validity of prior misdemeanor convictions in a subsequent revocation of probation proceeding should bear the burden of establishing by a preponderance of evidence that he had a right to counsel in the prior proceedings, that he was not provided with counsel, and that he did not knowingly waive his right to counsel.

ARGUMENT

ISSUE

IS THE DEFENDANT'S STATEMENT UNDER OATH THAT HE WAS NEITHER PROVIDED NOR OFFERED COUNSEL AT THE PROCEEDINGS RESULTING IN PRIOR CONVICTIONS SUFFICIENT TO PUT THE STATE TO THE BURDEN OF PROVING THAT SUCH CONVICTIONS WERE IN FACT **COUNSELED** OR THAT COUNSEL WAS KNOWINGLY WAIVED.

On October 30, 1987, respondent pled nolo contendere to the offense of leaving the scene of an accident with injury (T 4-6). The trial court accepted respondent's plea and withheld adjudication of guilt, placing respondent in the community control program for a period of three years (R 13-13A; T 6-7). The trial court's order withholding adjudication of guilt and placing appellant into the community control program contained standard condition #5, which required respondent to live and remain at liberty without violating the law (R 13). On **April** 19, 1990, respondent's probation officer filed an affidavit stating that respondent had violated condition #5 of his probation, in that respondent had been arrested for the offenses of trespassing, disorderly intoxication, and resisting arrest without violence on March 21, 1990 (R 17-18).

At respondent's violation of probation hearing **held** on July 6, 1990, respondent's probation officer testified that respondent was arrested on the above-noted charges. She further stated that respondent received concurrent sentences of five days with one-day credit as to each of the three

offenses (T 34). Taking the stand in his own behalf, respondent admitted that he pled guilty to the three offenses (T 44). However, respondent challenged the validity of the misdemeanor convictions for the purposes of probation revocation, alleging that the convictions were uncounseled (T 43-47). Respondent made no comment as to whether he knowingly and voluntarily waived counsel (T 43-47). Respondent presented only his own testimony to show that the prior convictions were obtained without the benefit of counsel (T 43-47).

Recently, this Court adopted the bright line rule set out in Justice Blackmun's concurring opinion in Baldasar v. Illinois, 446 U.S. 222 (1980), that an indigent defendant in a state criminal case must be afforded appointed counsel whenever the defendant is prosecuted for an offense punishable by more than six months' imprisonment or whenever the defendant is convicted of an offense and is actually subjected to a term of imprisonment. Hlad v. State, 16 F.L.W. S586 (Fla. August 29, 1991); see also Black v. State, 5 F.L.W. Fed. C1066 (11th Cir. July 5, 1991). As respondent served five days in the Duval County Jail on the three offenses in question, respondent was entitled to counsel at the prior proceeding.[2] However, respondent's testimony at the probation revocation hearing that he was not represented

[2]The State also notes that the offenses of trespassing, under Fla. Stat. §810.08 (1990), and resisting an officer, under Fla. Stat. 5843.02 (1990), are punishable by more than six months' imprisonment. See Fla. Stat. 8775.082 (1990).

by counsel was insufficient to put the State to the burden of proving that respondent's convictions were in fact counseled or that counsel was knowingly waived. Thus, this Court should answer the certified question in the negative.

"The finality of a judgment is not to be lightly overturned, as a duly entered judgment of conviction and sentence is to be presumed valid." State v. Caudle, 504 So.2d 419, 421 (Fla. 5th DCA 1987), citing State v. Harris, 356 So.2d 315 (Fla. 1978). A defendant who attacks the validity of a prior conviction has the burden of proving the alleged grounds by a preponderance of evidence. Allen v. State, 463 So.2d 351, 364 (Fla. 1st DCA 1985). Courts have defined the preponderance of evidence standard as evidence which as a whole shows that the fact sought to be proved is more probable than not. State v. Morales, 460 So.2d 410, 415 (Fla. 2d DCA 1984); see also Black's Law Dictionary 1281 (5th Ed. 1979).

In Allen v. State, 463 So.2d 351, 355-56 (Fla. 1st DCA 1985), several defendants were prosecuted far felony petit theft under Fla. Stat. §812.014(2)(c) (1981), which provided for the reclassification of a misdemeanor petit theft to a felony petit theft when the accused has been convicted of petit theft on two or more prior occasions. The defendants filed a motion to dismiss the felony charges on the ground that their prior convictions were invalid and unreliable because they were based on guilty or nolo contendere pleas

obtained in violation of various constitutional rights, including the right to counsel. Id. at 356.

The First District Court of Appeal held that, when a defendant challenges prior convictions on grounds that the trial court failed to properly ascertain whether the defendant knowingly and voluntarily waived his constitutional rights, mere conclusory assertions are insufficient to meet the defendant's burden to show that the prior convictions are invalid. Id. at 364. The court stated as follows:

> When attacking the validity of prior convictions, the defendant has the burden of proving the alleged grounds by a preponderance of the evidence . . . The defendant's initial burden of proving denial of constitutional rights because the defendant was not made aware of those rights by the court is usually met by producing records of the prior proceedings. In addition, the defendant must prove by competent evidence that there was, in fact, no knowing and voluntary waiver of those rights on his part. It is not sufficient to simply make the bald assertion that a waiver was not a knowing and intelligent one; rather the defendant must prove specific facts showing in what respects the rights were not understood or not voluntarily waived. (Citations omitted).

Allen, supra, at 364. Similarly, in Price v. State, 519 So.2d 76, 78 (Fla. 2d DCA 1988), the court held that a defendant, to defeat the inclusion of points for prior convictions in a sentencing scoresheet, has the burden at the sentencing hearing to "make a prima facie showing that his prior convictions were uncounseled."

If the defendant shows that he had a right to counsel in the prior convictions, and alleges that counsel was not provided, he should be required to establish by a preponderance of evidence either that he was not made aware of or did not waive his right to counsel in the prior cases. See Hamm v. State, 521 So.2d 354 (Fla. 2d DCA 1988). The court in Harrell v. State, 469 So.2d 169 (Fla. 1st DCA), review denied, 479 So.2d 118 (Fla. 1985), held that when a defendant alleges that counsel was not provided and he did not waive his right to counsel, the state must show by a preponderance of evidence that the defendant was represented or waived representation. The court did not hold that the burden is on the state in the absence of such initial allegations by the defendant. In Allen, the court held that, when a defendant assails prior convictions as unconstitutional, "a conviction is rendered unreliable and void only if there is competent evidence to support a determination that the defendant in fact did not make a knowing and intelligent waiver." Id. at 362. The court in that case refused in one instance to set aside a felony conviction which was reclassified because of the prior uncounseled conviction because the defendant did not expressly allege that his waiver of counsel was not voluntary and intelligent.

The court in State v. Caudle, supra, relying upon Harrell and Allen, found that the defendant's allegations that he did not recall being advised of his constitutional

rights in two prior convictions were insufficient to place the burden on the state to establish that the prior convictions were reliable. The Court stated that "[a]lthough the rights provided by the constitution are a shield against violations of due process, surely a defendant must be required to claim that his armor was defective before forcing the state to surrender its sword." Id. at 423. The court also noted that, "[a]lthough uncounseled convictions are inherently suspicious, nonetheless as a starting point a defendant must first swear that he was not advised of his rights and did not waive counsel." Id. at 422.

In Croft v. State, 513 So.2d 759 (Fla. 2d DCA 1987), the court held that the defendant failed to make out a prima facie case sufficient to shift the burden to the State under the following circumstances:

> The appellant's testimony that to the best of his recollection he had never been offered an attorney, had never been represented by counsel, and had never waived his right to counsel was insufficient in this case to constitute a prima facie showing that any of the appellant's convictions had been obtained in violation of his constitutional right to counsel. His testimony does not begin to approach an affirmative allegation that he specifically remembered having been denied his right to counsel on one or more particular occasions or that he had made any unknowing or involuntary waivers of counsel .... Since the appellant did not meet his burden, the state was not required to go forward with contrary evidence to show either

> that the appellant was afforded all constitutional rights or that he had made valid waivers thereof.

Id. at 761.

In the present case, respondent admitted that he pled guilty to the offenses of trespassing, disorderly intoxication, and resisting arrest. In an attempt to discredit his guilty pleas, respondent merely testified that he was not represented by counsel in the prior proceedings. Respondent failed to allege that he never waived his right to counsel. As he did not present any records to support his allegations, respondent's testimony amounts to a mere "bald assertion." It is the complaining party's obligation to provide an appellate court with a record sufficient to demonstrate the errors complained of and failure to do so mandates affirmance of the trial court's order. See Demons v. State, 16 F.L.W. D945, D945 (Fla. 4th DCA April 10, 1991); Caddell v. Caddell, 574 So.2d 328, 329 (Fla. 5th DCA 1991); Applegate v. Barnett Bank of Tallahassee, 377 So.2d 1150, 1152 (Fla. 1979). Regardless, a conviction based upon a probationer's plea of nolo or guilty is a lawful basis for revocation of probation. Maselli v. State, 446 So.2d 1079, 1080-81 (Fla. 1984).

The testimony under oath in this case, alleging only that respondent was not represented by counsel in the prior proceeding, did not begin to approach an affirmative assertion that respondent's convictions were unreliable for

purposes of revoking respondent's probation. A defendant who challenges prior misdemeanor convictions as unreliable far probation revocation, should be required as a threshold matter to assert that he had the right to counsel in the prior proceedings. If the defendant can meet that threshold burden, he should be required to show by a preponderance of evidence that he was not provided counsel in the prior proceedings, and either was not advised of his right to counsel or did not knowingly waive that right. In the present case, respondent failed to meet his initial burden.

Florida has had a public defender system to provide counsel for indigents since the early 1960's. The two cases establishing the constitutional right and its parameters are themselves eighteen and twenty-seven years old respectively, Gideon v. Wainwright, 372 U.S. 9, 9 L.Ed.2d 799, 83 S.Ct. 792 (1963) and Argersinger v. Hamlin, 407 U.S. 25, 32 L.Ed.2d 530, 92 S.Ct. 2006 (1972). Both of these cases long precede the convictions at issue here. In view of the well-established right to counsel and the hundreds of millions of dollars which Florida has spent on its public defender system, it is absurd to permit a defendant to blithely assert, without any proof, that he was denied the right to counsel on previous convictions, and, on the basis of those unsupported assertions, shift the burden to the state to show that it is following long-established law. It cannot be rationally suggested that there should be a presumption that the state failed to provide counsel when the claimant

has not challenged those previous convictions in a collateral proceeding, on which he would unquestionably be entitled to reversal if, in fact, he was improperly denied counsel.

The certified question therefore should be answered in the negative.

CONCLUSION

Based on the foregoing legal authorities and arguments, Petitioner requests this Honorable Court to answer the certified question in the negative.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing petitioner's brief on the merits has been furnished by U.S. Mail to Clyde M. Collins, Esq., 920 Blackstone Building, 233 East Bay Street, Jacksonville, FL 32202, this ?*day of October, 1991.

Wendy S. Morris
Assistant Attorney General