IN THE SUPREME COURT OF FLORIDA

BEHR, JACK

Petitioner,

vs.

CASE NO. 85,024
1st DCA CASE NO. 94-3327

BELL, FRANK L.
AS CIRCUIT JUDGE OF THE
FIRST JUDICIAL CIRCUIT

Respondent.
_____/

RESPONDENT'S BRIEF ON JURISDICTION

ROBERT A. BUTTERWORTH
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COUNSEL FOR RESPONDENT

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PRELIMINARY STATEMENT

This is a petition for discretionary review pursuant to article V, section 3(b)(3), Florida Constitution, based on a claim that the decision below expressly and directly conflicts with a decision of another district court or, alternatively, that the decision below expressly affects a class of constitutional officers.

The conflict between decisions "must appear within the four corners of the majority decision," and "[n]either a dissenting opinion nor the record itself can be used to establish jurisdiction." Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986). Further, it is the "conflict of decisions, not conflict of opinions or reasons that supplies jurisdiction for review." Jenkins v. State, 385 So. 2d 1356, 1359 (Fla. 1980).

To establish discretionary jurisdiction under the class of constitutional officers provision of the constitution, petitioners must show that the decision expressly affects a class of constitutional officers and "does more than simply modify or construe or add to the case law which comprises much of the substantive and procedural law of this state." Spradley v. State, 293 So. 2d 697, 701 (Fla. 1974).

STATEMENT OF THE CASE AND FACTS

Respondent agrees with petitioner's statement of the case and facts for the purpose of determining whether grounds for discretionary review exist and supplements with the following.

The petition in the district court seeking writs of prohibition or, alternatively, certiorari was not served on either respondent Judge Bell or the State of Florida, Office of the Attorney General, pursuant to Florida Rule of Appellate Procedure 9.140(b)(2). The district court directed petitioner to properly serve the petition, which was done, but did not issue an order to show cause, apparently concluding that the law was so well-settled as to require no response from either the state or Judge Bell. After tersely denying the petition on 24 October 1994, the expanded order of 15 December 1994 concluded that (1) trial court jurisdiction was certain and, thus, prohibition was inappropriate, and (2) there was no showing of a departure from the essential requirements of law and certiorari would not lie.

Petitioner then sought discretionary review here by notice filed on or about 9 January 1995, properly served on both respondent Judge Bell and the State of Florida, Office of the Attorney General. Thereafter, petitioner apparently filed his brief on discretionary jurisdiction with this Court on or about 26 January 1995 but erroneously served it on the "Respondent, First District Court of Appeal" and the State's Attorney, 1st Judicial Circuit, neither of whom is a party to, or has any interest in, the petition for discretionary review in this Court. This office subsequently obtained a copy of the brief and attached material from the Clerk of this Court on or about 16 March 1995. This brief is prepared on behalf of the State of Florida, the proper party in a petition for writ of certiorari. Because the petitioner does not challenge the denial of the

petition for writ of prohibition, former respondent Judge Bell has agreed that this office should respond on behalf of the real and actual party in interest, the State of Florida.

SUMMARY OF ARGUMENT

The state agrees that the decision below expressly affects a class of constitutional officers but suggests that it merely construes existing case law authorizing trial courts to appoint amicus counsel to assist the court in some aspect of the trial.

Petitioner argues that the appointment of standby counsel contradicts the express language of section 27.51, Florida Statutes. The state does not necessarily agree but, regardless, construction of a statute, erroneous or not, does not furnish a jurisdictional basis for this Court to exercise discretionary review.

Petitioner also argues that there is direct and express conflict with Hammond v. State, 264 So. 2d 463 (Fla. 4th DCA 1972). Not so. Hammond stands for the well-settled proposition that a defendant who elects self-representation is not entitled to the assistance of an appointed counsel and cannot base a claim for ineffective assistance of counsel on the ineffectiveness of his own representation. The decision below holds that trial courts may appoint standby counsel for their own purposes, it does not hold that self-represented defendant are entitled to such appointments. Thus, Hammond and the decision below do not conflict and both are consistent with Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975).

ARGUMENT

ISSUE I

DOES THE DECISION BELOW EXPRESSLY AFFECT A CLASS OF CONSTITUTIONAL OFFICERS IN A MANNER WHICH ESTABLISHES JURISDICTION FOR DISCRETIONARY REVIEW PURSUANT TO ARTICLE V, SECTION 3(b)(3) OF THE FLORIDA CONSTITUTION?

The state agrees that the decision below expressly affects a class of constitutional officers, the public defenders of the state. Art. V, §18, Fla. Const. However, the decision is a general statement of law which affects all who may be involved in criminal trials. Thus, the decision is similar to Spradley v. State, 293 So. 2d 697 (Fla. 1974) where this Court rejected discretionary review because the decision under review did nothing more than "construe or add to the case law which comprises much of the substantive and procedural law of the state" and simply bound the class of constitutional officers just as it did any other citizen of the state.

Respondent acknowledges, however, that the question of when and under what conditions standby counsel should be appointed is of great importance to the public defenders of the state, and, for that matter, to all constitutional officers involved in the conduct of criminal trials and appeals therefrom. Further, the decision is also of considerable importance to the real and actual party in interest, the State of Florida because it has "a great effect on the proper administration of justice throughout the state." Art. V, §3(b)(5), Fla. Const. This point will be developed below in the examination of issue III.

ISSUE II

DOES THE DECISION BELOW CONSTRUING SECTION 27.51, FLORIDA STATUTES ESTABLISH JURISDICTION FOR DISCRETIONARY REVIEW PURSUANT TO ARTICLE V, SECTION 3(b) OF THE FLORIDA CONSTITUTION?

There is no question that the district court below construed section 27.51 in rendering its decision. There is also no question that article V, section (3)(b), does not authorize jurisdiction in this Court to review decisions of district courts which construe state statutes and do not by their terms declare the statutes valid or invalid.

ISSUE III

DOES THE DECISION BELOW DIRECTLY AND EXPRESSLY CONFLICT WITH THE DECISION IN HAMMOND V. STATE, 264 SO. 2D 463 (FLA. 4TH DCA 1972)?

The trial court order appointing the public defender to act as standby counsel for defendant Hill stated in relevant part:

> 2. The Public Defender's Office for the First Judicial Circuit of Florida is appointed "standby counsel" to aid the Defendant if and when the Defendant requests help, and to be available to represent the Defendant in the event that termination of the Defendant's self-representation is necessary. As "standby counsel," the Public Defender's Office should continue to be involved in the trial process to the extent that a delay or continuance will not be required in the event that termination of the Defendant's self-representation is necessary.

In rejecting petitioner's claim that the appointment of standby counsel was a departure from the essential requirements of law, the district court below reasoned that Faretta recognized that trial courts might appoint standby counsel even though the

defendant had asserted and been permitted self-representation. The district court then examined section 27.51 and determined that the statutory authority to "represent" indigent defendants could be read broadly to encompass the appointment of standby counsel. Thus, the trial court order did not depart from law on either the constitutional or statutory level and certiorari would not lie. The district court also commented in dicta that Hammond was decided three years prior to Faretta and appears to be a "general condemnation of the concept of 'standby counsel'." The district court questioned the continued vitality of Hammond in view of Faretta and concluded that Faretta did not support petitioner's proposition that it was impermissible to appoint standby counsel.

There is no direct and express conflict with the decision in Hammond. There, the issue was entirely different: Was Hammond entitled to the appointment of standby counsel to assist him even though he had asserted and been granted the right to self-representation? The answer of no is entirely valid today and nothing in Faretta changed that legal proposition. Faretta simply recognizes that it may be prudent for a trial court to appoint standby counsel in order to: (1) provide counsel should a self-represented defendant subsequently request the assistance of counsel at the next critical stage of the trial when the trial court is required to renew the offer of counsel, or (2) provide representation should the self-represented defendant abuse the dignity of the courtroom or demonstrate an inability, or refusal, to follow the relevant rules of substantive and procedural law,

thereby frustrating the orderly conduct of the trial itself. This Court has itself melded the essential aspects of both Hammond and Faretta. See, Jones v. State, 449 So. 2d 253 (Fla. 1984), where this Court held:

> 1. Appointment of standby counsel over the objection of the self-represented defendant was not a denial of the defendant's right to self-representation.
> 2. Appointment of standby counsel was constitutionally permissible, not constitutionally mandated. (This is the same issue and the same holding as in Hammond. Jones issued nine years after Faretta and is a controlling decision from this Court. Thus, the district court's comment below that Hammond was no longer viable is simply incorrect.)
> 3. The refusal of the self-represented Jones to consult with his standby counsel and the subsequent refusal of the standby counsel to furnish legal advice did not constitute a denial of Jones' right to counsel because a standby counsel "whose only knowledge of the case is based on sitting in the courtroom observing the trial cannot realistically be expected to offer sound legal advice to a defendant." Jones, 449 So. 2d at 258. (In other words, a self-represented defendant who belatedly seeks legal assistance after a period of self-representation may be held responsible for the inability of a subsequently accepted counsel to furnish effective assistance of counsel. In this connection, see Faretta, 422 U.S. 834, fn46, which states in part that "whatever else may or may not be open to him on appeal, a defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of 'effective assistance of counsel.'"
> 4. Even though the offer of appointed counsel should be renewed at the beginning of each critical stage of the trial, appellate courts should not uphold form over substance and defendants should be forewarned that the right to appointed counsel like the Faretta right to self-representation "is not a license to abuse the dignity of the court or to frustrate orderly proceedings, and a defendant may not manipulate the proceedings

by willy-nilly leaping back and forth between the choices." Jones, 449 So. 2d at 259.

To summarize the state's position, there is no direct and express conflict of decisions on which to base jurisdiction. Moreover, although the decision does expressly and significantly affect a class of constitutional officers, the decision to appoint standby counsel as a friend of the court is consistent with the settled law of both Faretta and Jones.

The state recognizes that the standby counsel appointment procedure is of considerable importance to the orderly administration of justice and may contribute to unnecessary retrials if trial courts overlook, or do not understand, that standby counsel are not appointed to assist self-represented defendant but to assist the court should it become necessary to terminate the self-representation at some subsequent point in the trial. It must be made clear to self-represented defendants that they are completely responsible for their own defense without any assistance from the court or "standby counsel." Appointment of standby counsel does not obviate the necessity to make the defendant fully aware of the disadvantages to self-representation. See, for example, a series of recent reversals by the district court below where the trial court granted self-representation: Dortch v. State, 20 Fla. L. Weekly D440 (Fla. 1st DCA February 16, 1995); Payne v. State, 642 So. 2d 111 (Fla. 1st DCA 1994); Moore v. State, 614 So. 2d 874 (Fla. 1st DCA 1993); Taylor v. State, 610 So. 2d 576 (Fla. 1st DCA 1992); Kearse v. State, 605 So. 2d 534 (Fla. 1st DCA 1992). Compare with Crystal v. State, 616 So. 2d 150 (Fla. 1st DCA 1993) where

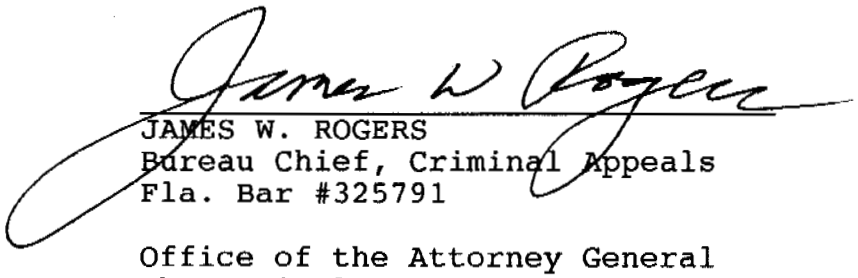
the trial court denied self-representation and was reversed. See, particularly, Judge Kahn's concurring opinion in Payne and Judge Barfield' dissent in Dortch which set out the fallacy of reversing convictions because a trial court has not mechanically recited a litany for the benefit of a defendant who insists on self-representation and then obtains a retrial as a reward for having obtained what he insisted on, self-representation.

CONCLUSION

This Court should decline review on the grounds argued by petitioner but may find it useful and desirable to exercise discretionary jurisdiction grounded on the importance of the question to the orderly administration of justice.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Earl D. Loveless, Assistant Public Defender, 190 Governmental Center, Pensacola, Florida 32501, this 27th day of March, 1995.

James W. Rogers

JAMES W. ROGERS

Appendix

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

JACK BEHR, PUBLIC DEFENDER,
FIRST JUDICIAL CIRCUIT

Petitioner,

v.

FRANK L. BELL, as Circuit Judge of the First Judicial Circuit,

Respondent.

_____/

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND DISPOSITION THEREOF IF FILED

CASE NO. 94-3327

Opinion filed December 15, 1994.

Petition for Writ of Prohibition or Certiorari - Original Jurisdiction.

Jack Behr, Public Defender, First Judicial Circuit, for petitioner.

No appearance for respondent.

PER CURIAM.

Paul Jennings Hill was charged with two counts of first degree murder and one count of attempted first degree murder in the First Judicial Circuit. Hill was determined to be indigent and the public defender for that circuit, Jack Behr, was appointed to represent him in the prosecution. Hill filed a motion for leave to represent himself at trial. The trial court, Honorable Frank L. Bell presiding, held a hearing and determined that Hill's motion for self-representation should be granted. Over the objection of

an assistant public defender, the public defender was appointed to serve as "standby counsel." In his written order Judge Bell found that Hill was competent and had knowingly and intelligently waived his right to counsel for trial. The public defender was appointed as

> "standby counsel" to aid the Defendant if and when the Defendant requests help, and to be available to represent the Defendant in the event that termination of the Defendant's self-representation is necessary. As "standby counsel," the Public Defender's Office should continue to be involved in the trial process to the extent that a delay or continuance will not be required in the event that termination of the Defendant's self-representation is necessary.

The public defender timely petitioned this court for a writ of prohibition or certiorari for review of this order. He acknowledged that the concept of "standby counsel" has been approved in Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). The public defender argued that, as a creature of statute, he is limited by law in the representation he can provide. See, e.g., Behr v. Gardner, 442 So. 2d 980 (Fla. 1st DCA 1983)(public defender cannot be appointed to serve as co-counsel to privately retained counsel who has been hired by third parties to represent an indigent defendant). According to petitioner, the only case on point disapproved the appointment of the public defender as "standby counsel." Hammond v. State, 264 So. 2d 463 (Fla. 4th DCA 1972). This court denied the petition by unpublished order with a commitment therein to issue an opinion setting forth our rationale.

As a preliminary matter, petitioner did not allege that the trial court acted without jurisdiction and therefore he made no colorable claim for issuance of the writ of prohibition. See English v. McCrary, 348 So. 2d 293 (Fla. 1977). The petitioner's proper remedy, if any, is a writ of certiorari. However, the order of the trial court was not a departure from the essential requirements of law.

After Faretta, it is clear that the trial court may appoint "standby counsel" for a defendant who successfully asserts his right to represent himself at trial. Thus, the only question presented here is whether Florida law permits the public defender to be appointed to this particular role where the self-representing party is financially unable to afford his own counsel. Section 27.51(1), Florida Statutes, provides that the public defender shall represent indigent defendants charged with a felony. We find that the term "represent" can be read broadly enough to include the role of "standby counsel" in circumstances such as these. Petitioner's reliance on Hammond is misplaced. That case was decided three years prior to Faretta and it appears to be a general condemnation of the concept of "standby counsel." Its continued vitality is doubtful after Faretta. We do not find that Hammond supports the petitioner's proposition that the appointment of the public defender to serve as "standby counsel" is impermissible once the court determines "standby counsel" should be appointed.

After the issuance of this court's unpublished order, petitioner brought to this court's attention the decision of

Littlefield v. Superior Court, 22 Cal. Rptr. 2d 659 (Cal. Ct. App. 1993). This is apparently the only reported decision which has squarely addressed the question presented here and, in a two-to-one decision, the court found that the appointment of the public defender to serve as "standby counsel" was not authorized by state law. The majority noted that the controlling California statute authorizes the public defender to "defend" persons charged with crimes and concluded that "[s]tanding by is not defending." Id. at 661. We choose not to follow Littlefield, finding that the majority's reliance on earlier California precedent in construing the term "defend" militates against adopting the reasoning of the majority in construing section 27.51(1), Florida Statutes, which by contrast provides that the public defender shall "represent" indigent defendants. Moreover, the public defender in the instant case was given responsibilities as "standby counsel" for defendant Hill which went beyond those assigned to the public defender by the trial court in Littlefield.

The appointment of the public defender to serve as "standby counsel" is authorized by section 27.51(1), Florida Statutes, and therefore the petition for writ of prohibition or certiorari was and is DENIED.

ERVIN, JOANOS and BARFIELD, J.J., CONCUR.