OA 10-6-98

IN THE SUPREME COURT OF THE STATE OF FLORIDA

JAMES RUSSO,
Public Defender for the
Eighteenth Judicial Circuit,

Petitioner,

vs.

WESLEY AKERS,

Respondent.
_____/

Case No. 91,943

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

The Supreme Court has accepted jurisdiction to review a decision of the Fifth District Court of Appeal that affects a class of constitutional officers - public defenders. In Russo v. Akers, 701 So.2d 366 (Fla. 5th DCA 1997), the court held that the representation of indigent prisoners who seek to vacate a felony conviction pursuant to Fla. R. Crim. P. 3.850 falls within the duties of the public defender listed in Chapter 27 of the Florida Statutes. In so holding, the district court of appeal denied the public defender's petition for common law writ of certiorari that sought to quash the trial court's order requiring the public defender to represent an indigent prisoner at a rule 3.850 evidentiary hearing. Set forth below is the statement of the facts.

After having been found guilty by a jury of two counts of assault, Wesley Akers was sentenced as a habitual offender to serve ten years in the state penitentiary. (Pet. appendice 1). Akers filed a motion for postconviction relief pursuant to Fla. R. Crim. P. 3.850 alleging ineffective assistance of private counsel who had been retained. (Pet. appendice 2). The circuit court entered an order granting an evidentiary hearing. (Pet. appendice 3). Akers filed a motion for appointment of counsel to represent him at the evidentiary hearing. (Pet. appendice 4). The

public defender objected to the appointment of the public defender although no conflict of interest existed. The court appointed private attorney Jeffrey Dowdy to represent Akers at the evidentiary hearing. (Pet. appendice 5). Attorney Dowdy filed a motion to withdraw as counsel on the grounds that s. 924.066(3) Fla. Stat. (Supp. 1996) provides that a person seeking collateral review in a non-capital case has no right to a court-appointed lawyer. The court granted attorney Dowdy's motion to withdraw as counsel. (Pet. appendice 7). The court later, *sua sponte,* withdrew the order withdrawing Dowdy as counsel. In the order, the court determined that Akers' case met the criteria for appointment of counsel enunciated in Graham v. State, 372 So.2d 1363 (Fla. 1979). (Pet. appendice 8).

Attorney Dowdy filed a second motion to withdraw as counsel citing a conflict of interest caused by Akers' alleged intention to file a bar grievance against Dowdy. (Pet. appendice 9). This motion was granted and the court then appointed private attorney John Galluzzo to represent Akers. (Pet. appendice 10).

Attorney Galluzzo filed a motion to withdraw as counsel on the grounds that Akers has no right to court-appointed counsel under s. 924.066(3) Fla. Stat. (Supp. 1996) and on the grounds that the terms of Galluzzo's contract with Seminole County as a special assistant public defender

("conflict attorney") does not include cases in which there is no conflict of interest that prevents the public defender from providing representation. (Pet. appendice 11). The court withdrew Galluzzo as counsel and appointed the public defender to represent Akers. (Pet. appendice 12).

The public defender filed his motion to withdraw as counsel on the grounds that s. 924.066 (3) Fla. Stat. (Supp. 1996) and s. 924.051 (9) Fla. Stat. (Supp. 1996) prohibit the appointment of publicly-paid counsel in rule 3.850 collateral challenges to convictions. (Pet. appendice 13). Akers filed a motion to strike the public defender's motion to withdraw. (Pet. appendice 14).

Senior Circuit Judge Uriel Blount, Jr., presided at the hearing held on the public defender's motion to withdraw as counsel. (Pet. appendice 15). The public defender argued that Chapter 27 Florida Statutes does not authorize the public defender to represent a prisoner making a collateral challenge to a conviction. The public defender also argued that, under the 1996 legislation cited in the motion to withdraw, court-appointed counsel paid by public funds did not have to be provided to Akers. The public defender took the position that the court would have to either follow the law and withdraw the public defender as Akers' counsel or would have to declare the 1996 legislation unconstitutional which would permit the court to disregard the legislation.

Judge Bloun'c then ruled: "So be it. It's unconstitutional." This declaration of unconstitutionality was not reduced to a written order and no reasons for the court's ruling were given. Judge Blount rendered an order denying the public defender's motion to withdraw as counsel. (Pet. appendice 16).

The public defender filed in the Fifth District Court of Appeal a petition for common law writ of certiorari seeking to quash the trial court's order denying the motion to withdraw. The public defender, in his petition for common law writ of certiorari, did not argue that s. 924.066(3) Fla. Stat. (Supp. 1996) and s. 924.051(9) Fla. Stat. (Supp. 1996) prevent the court from appointing counsel to represent an indigent prisoner in collateral challenges to their convictions. After thoroughly researching the law the public defender abandoned the argument made to the trial court. In the petition, the public defender took the position that s. 924.066(3) and s. 924.051(9) are not applicable to the instant case because the Florida Supreme Court has determined that indigent prisoners collaterally challenging their convictions must be appointed counsel under Fifth Amendment due process considerations if the post-conviction motion presents apparently substantial meritorious claims for relief and if the allowed hearing is potentially so complex as to suggest the need. State v.

Weeks, 166 So.2d 892,896 (Fla. 1964); Graham v. State, 372 So.2d 1363,1366 (Fla. 1979). In the petition, the public defender argued that s. 27.51 Fla. Stat. (1995) does not allow the court to appoint the public defender because a prisoner making a collateral challenge to a conviction is no longer "charged with" a felony because the prisoner has already been convicted and sentenced. Despite abandoning the argument made in the trial court that s. 924.066(3) and s. 924.051(9) prohibit the appointment of counsel in post conviction challenges in non-capital cases, the Fifth District Court of Appeal addressed this issue in their decision. The district court of appeal concluded that these statutes do not prohibit the appointment of counsel because the trial court made a finding that the hearing on the motion was potentially so complex that counsel is constitutionally mandated under Graham, *supra*, and Weeks, *supra.* In denying the public defender's petition, the district court of appeal also concluded that the representation of indigent defendants who seek to vacate a felony conviction falls within the duties of the public defender listed in Chapter 27.

The Fifth District Court of Appeal subsequently rendered an order staying the Russo v. Akers decision until the Supreme Court decided the issue. The proceedings in the

trial court have been suspended as well pending a decision by the Supreme Court.

SUMMARY OF ARGUMENT

Section 27.51 Florida Statutes (1997) authorizes the public defender to represent an indigent defendant who is under arrest for or charged with a felony or misdemeanor crime. The public defender has no duty to represent a state prisoner making a postconviction challenge to a conviction because a state prisoner is no longer under arrest or charged with a felony crime. The state prisoner is well beyond that stage; having already been found guilty, convicted, and sentenced.

ARGUMENT

THE LEGISLATURE, IN ENACTING SECTION 27.51 FLORIDA STATUTES, DID NOT CONFER AUTHORITY UPON THE PUBLIC DEFENDER TO REPRESENT STATE PRISONERS IN POST CONVICTION COLLATERAL CHALLENGES TO THEIR CONVICTIONS.

Article V, section 18, of the Florida Constitution established the public defender as a constitutional officer and states: "He shall perform duties prescribed by general law." Section 27.51 Fla. Stat. (1997) sets forth the circumstances under which the legislature has authorized judges to appoint the public defender to represent indigent defendants. The statute authorizes appointment when a defendant faces loss of liberty because they are: (1) under arrest for or are charged with the commission of a felony crime; (2) under arrest for or are charged with the commission of a misdemeanor crime; (3) juveniles alleged to be a delinquent; (4) facing the prospect of involuntary hospitalization as a mentally ill or mentally retarded person. Each circumstance is directed toward an event that could result in incarceration. In enacting s. 27.51 (4) and (5) Fla. Stat. (1995), the legislature also created a grant of authority for judges to appoint the public defender to represent indigent defendants in the direct appeal of their convictions and sentences to the five district courts of appeal in Florida. Thus, the "Office of Public Defender is a creature of the state constitution and of statute, not of

the common law." State ex rel. Smith v. Brummer, 443 So.2d 957, 959 (Fla. 1984).

Petitioner submits that the trial court exceeded the authority granted by s. 27.51 when the court appointed the public defender to represent respondent Akers. Respondent Akers has already been tried, convicted, and sentenced. Akers is no longer "charged with" a felony within the meaning of s. 27.51 (1) (a)-(b). It is readily apparent that s. 27.51 allows a trial judge to only appoint the public defender after arrest but prior to trial and then renew an appointment or make an original appointment for a direct appeal of a conviction and sentence to the appellate court. In State ex rel. Smith v. Joranby, 498 So.2d 948 (Fla. 1986), the court stated, "This statutory authority permits representation by a public defender only in circumstances entailing prosecution by the state threatening an indigent's liberty interest." In the instant case, the "threat" of incarceration that is incident to a prosecution by the state is no longer present because the prosecution has already been concluded. A defendant is only "charged with" a crime before conviction. After a finding of guilt by judge or jury and the imposition of a prison sentence, the defendant is no longer "charged with" a crime but is instead convicted of a crime.

The Court's conclusion in Joranby, *supra*, that the public defender's statutory authority to represent indigents applies only in circumstances entailing prosecution by the state threatening an indigent's liberty interest is consistent with the court's explanation in Behr v. Gardner, 442 So.2d 980, 981 (Fla. 1st DCA 1983), that "The purpose of Chapter 27, Part II, Florida Statutes (concerning public defenders), is to ensure that indigent defendants are afforded the opportunity for representation by counsel as commanded by Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963)." Indeed, s. 27.51 Fla. Stat. (1997) authorizes public defender representation only in those circumstances where the appointment of counsel is constitutionally required under the Gideon decision and the Gideon progeny. In Gideon, the United States Supreme Court held that the Sixth Amendment right to counsel in felony cases applies to the states through the Fourteenth Amendment. In Argersinger v. Hamlin, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972), the Court extended this principle to misdemeanor cases. In In re Gault, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967), the Court held court-appointed counsel must be provided to an indigent juvenile in juvenile delinquency cases. In Douglas v. California, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed. 2d 811 (1963), the Court held court-appointed counsel must be provided, as a matter

of right, to a defendant directly appealing a conviction in the appellate court. Although the United States Supreme Court has never dealt squarely with the issue of the constitutional right of an indigent person facing civil commitment to appointed counsel, virtually every federal appeals court and high state court that has dealt with the question has found such a constitutional right. See, e.g., Heryford v. Parker, 396 F.2d 393 (10th Cir. 1968); Lessard v. Schmidt, 413 F. Supp. 1318 (E.D. Wis. 1976); Sarzen v. Gaughan, 489 F.2d 1076, 1085 (1st Cir. 1973); Dorsey v. Solomon, 435 F. Supp. 725, 733 (D. Md. 1977); State ex rel. Hawks v. Lazaro, 202 S.E.2d 109, 124 (W. Va. 1974).

The Florida Attorney General has concluded that a public defender has no duty to represent a state prisoner who has filed a motion for postconviction relief. Op. Att'y. Gen. Fla. 64-77 (1964) ("It is my opinion that a prisoner who files a motion to vacate under criminal procedure rule no. 1 is no longer charged with a crime within the contemplation of the public defender law; he is past that stage; his motion to vacate is not a part of the criminal proceedings; it is an independent, collateral civil proceeding. Therefore, the public defender has no duty to represent a movant under criminal procedure rule no. 1 in either the trial court or on appeal from an order denying his motion to vacate."). Florida Rule of Criminal Procedure

1 was the predecessor to current Florida Rules of Criminal Procedure 3.850 and 3.851. The opinion of the attorney general is as persuasive today as it was when it was issued in 1964 because the pertinent language in part II of Chapter 27 Florida statutes (i.e. "under arrest for, or is charged with") has not been changed in any way.

The Florida Supreme Court has determined that postconviction relief motions are civil in nature. State v. Weeks, 166 So.2d 892, 896 (Fla. 1964) ("The sum of the authorities is that post-conviction remedies of the type under consideration are civil in nature and do not constitute steps in a criminal prosecution within the contemplation of the Sixth Amendment, supra."). It is axiomatic that the courts do not have the authority to appoint the public defender to represent litigants engaged in civil litigation. In State ex rel. Butterworth v. Kenny, 23 Fla. L. Weekly S229 (Fla. April 23, 1998), the Court noted that postconviction proceedings, while technically classified as civil actions, are actually quasi-criminal because they are heard and disposed of by courts with criminal jurisdiction. The fact that postconviction proceedings can be termed quasi-criminal in nature does not mean that public defender representation is permissible because in Behr v. Gardner, 442 So.2d 980, 982 (Fla. 1st DCA 1983), the court concluded that, "Chapter 27 does not impose

upon the public defender a statutory duty to represent all insolvent defendants in all criminal proceedings.".

Florida Rule of Criminal Procedure 3.111(b)(2) does not confer authority upon a trial judge to appoint the public defender to represent a defendant in postconviction proceedings. Only the legislature can specify the circumstances in which the court is authorized to appoint the public defender. Significantly, Fla. R. Crim. P. 3.111(b)(2) states that "counsel" may be provided to indigent persons in postconviction proceedings, among other delineated types of proceedings. The rule does not state that the public defender may be provided to an indigent person in a postconviction proceeding.

The Florida Supreme Court has consistently held that the scope of the public defender's representation is strictly within the confines the legislature delineated in section 27.51 Florida Statutes. For example, in State ex rel. Smith v. Joranby, 498 So.2d 948 (Fla. 1986), the Court held that the public defender has no authority to litigate a federal civil rights action that seeks monetary damages. In State ex rel. Smith v. Brummer, 426 So.2d 532 (Fla. 1982) (Brummer I), cert. denied, 464 U.S. 823, 104 S.Ct. 90, 78 L.Ed. 2d 97 (1983), the Court held that the public defender has no authority to bring a class action suit in federal court . In State ex rel. Smith v. Brummer, 443 So.2d 957

(Fla. 1984) (Brummer II), the Court held that the public defender has no authority to represent defendants in a federal habeas corpus proceeding.

In a recent decision with issues that parallel those presented in the instant case, the Court held that the Office of the Capital Collateral Regional Counsel (CCRC) is not statutorily authorized to initiate federal civil rights actions seeking declaratory and injunctive relief regarding whether the functioning of Florida's electric chair rendered it an unconstitutional method of execution. State ex rel. Butterworth v. Kenny, 23 Fla. L. Weekly S229 (Fla. April 23, 1998). In reaching this decision, the Court strictly interpreted the statutes that created CCRC and defined the parameters of CCRC's representation. The Court made the following comparison to the scope of the public defender's representation:

. . . .

> ...We find CCRC's equal protection argument to be equally untenable; the fact that a capital defendant with private counsel could pursue actions without limitation is no different from the fact that non-capital defendants who are afforded no statutory right to post-conviction counsel could likewise hire private counsel to pursue such claims. See § 27.51, Fla. Stat. (1997) (providing no authority for public defenders to represent noncapital defendants with postconviction representation). We have previously upheld similar restrictions on the representation of indigents by public defenders. See, e.g., *State ex rel. Smith v. Brummer*, *443* So.2d 957 (Fla. 1984) (public defender is not authorized

by statute or rule to accept appointment by federal judge to represent indigent defendants in federal habeas corpus proceedings).

. .

From the sum of authorities discussed above, it is clearly established that section 27.51 Fla. Stat. (1997) does not confer authority upon the public defender to represent state prisoners who make postconviction challenges to their convictions and sentences.

Finally, the public defender notes that the district court of appeal's decision discussed sections 924.051(9) and 924.066(3) Fla. Stat. (Supp. 1996). Citing Graham v. State, 372 So.2d 1363 (Fla. 1979) and States v. Weeks, 166 So.2d 892 (Fla. 1964), the court concluded that these statutes do not prohibit the appointment of counsel in postconviction proceedings provided the postconviction motion presents a meritorious claim and hearing on the motion is potentially so complex that counsel is necessary. The public defender respectfully submits that the instant case should not be seen in any way as an opportunity to recede from the decisions in Graham, *supra*, and Weeks, *supra*. Receding from either of these decisions would have enormous implications in the trial courts affecting trial judges, state attorneys, and county jails. This case is not in a posture for the Court to consider any departure from stare decisis

principles because neither party in this case is advancing such a position. The public defender respectfully submits that the only issue before the Court is whether or not s. 27.51 authorizes the public defender to represent state prisoners in postconviction challenges to their convictions at evidentiary hearings in the trial court. Any further action by the Court, the public defender submits, would be contrary to the maxim of judicial review enunciated by Justice Terre11 in State v. Du Bose, 99 Fla. 812, 128 So. 4,6 (Fla. 1930), that courts "consistently decline to settle questions beyond the necessities of the immediate case. This court is committed to the 'method of a gradual approach to the general, by a systematically guarded application and extension of constitutional principles to particular cases as they arise, rather than by out of hand attempts to establish general rules to which future cases must be fitted.' "

As was the case in State ex rel. Smith v. Brummer, (Brummer I), supra, State ex rel. Smith v. Brummer. (Brummer II), supra, and State ex rel. Butterworth v. Kenny, *supra,* the attorney general is certainly free to make a challenge to the appointment of counsel in a non-capital postconviction proceeding should the attorney general believe such a challenge is warranted.

CONCLUSION

Based on the arguments and authorities presented above, the petitioner respectfully requests that the Florida Supreme Court reverse the decision of the Fifth District Court of Appeal.

CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing petitioner's brief on the merits has been furnished by U.S. mail delivery to Stephen F. Hanlon, counsel for Wesley Akers, P.O. Drawer 810, Tallahassee, FL 32302-0810, this 14th day of May, 1998.

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