ORIGINAL

IN THE SUPREME COURT OF FLORIDA

JAMES RUSSO,
Public Defender for the
Eighteenth Judicial Circuit,

Petitioner,

v.

WESLEY AKERS,

Respondent.
_____/

Case No. 91,943
DCA No. 97-2166

ON NOTICE TO INVOKE DISCRETIONARY REVIEW
OF A DECISION OF THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

After having been found guilty by a jury of two counts of aggravated assault, Wesley Akers was sentenced on June 8, 1995, as a habitual offender to serve ten years in the state penitentiary. Akers filed a motion for post-conviction relief pursuant to Fla. R. Crim. P. 3.850 alleging ineffective assistance of private counsel that had been retained. Eighteenth Judicial Circuit Judge Thomas Freeman entered an order granting an evidentiary hearing on February 24, 1997. Akers filed a motion for appointment of counsel to represent him at the evidentiary hearing.

Akers was brought before the court for the appointment of counsel. The assistant public defender at the hearing objected to the appointment of the public defender even though no conflict of interest existed. The court appointed private attorney Jeffrey Dowdy to represent Akers at the evidentiary hearing. Attorney Dowdy filed a motion to withdraw as counsel on the grounds that section 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 on April 22, 1997. On May 8, 1997, the court, *sua sponte*, withdrew the order relieving Dowdy as counsel. In the order, the court determined that Akers' motion met the criteria for appointment of counsel enunciated in Graham v. State, 372 So.2d 1363 (Fla. 1979).

Attorney Dowdy filed a second motion to withdraw as counsel citing a conflict of interest caused by Akers' alleged stated intention to file a bar grievance against Dowdy. This motion was granted and private attorney John Galluzzo was appointed to represent Akers.

Attorney Galluzzo filed a motion to withdraw as counsel on the grounds that Akers has no right to court appointed counsel under section 924.066(3) Fla. Stat. (Supp. 1996) and on the grounds that terms of Galluzzo's contract with Seminole County as a special assistant public defender does not include cases in which there is no conflict of interest that prevents the public defender from providing representation. The court withdrew Galluzzo as counsel and appointed the public defender to represent Akers.

The public defender filed his motion to withdraw as counsel on the grounds that Chapter 27 of the Florida Statutes and s. 924.066(3) Fla. Stat. (Supp. 1996) and s. 924.051(9) Fla. Stat. (Supp. 1996) do not allow the court to appoint the public defender to represent prisoners collaterally challenging their convictions via motion for post-conviction relief alleging ineffective assistance of counsel filed pursuant to Fla. R. Crim. P. 3.850.

On July 14, 1997, Senior Circuit Judge Uriel Blount, Jr. presided at the hearing held on the public defender's motion to withdraw as counsel. The public defender argued that Chapter 27 of the Florida Statutes did not authorize the court to appoint the public defender. The public defender also argued that under the 1996 legislation cited in the motion to withdraw, Akers did not have the right to court-appointed counsel paid by public funds. 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 legislation unconstitutional which would permit the court to disregard the legislation. Judge Blount 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 announed. Judge Blount rendered a written order denying the motion to withdraw as counsel.

The public defender filed a petition for common law writ of certiorari in the district court of appeal challenging the denial of the motion to withdraw as counsel. All of the motions and orders discussed above as well as a transcript of the July 14, 1997, hearing were included in the appendix to the petition. 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. The public defender took the same position on the issue as has the attorney general: "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." Op Att'y Gen. Fla. 64-77 (1964). The public defender argued that the attorney general's opinion was consistent with the decision of the Florida Supreme Court in State v. Weeks, 166 So.2d 892, 896 (Fla. 1964), where the Court concluded that, "The sum of 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."

The public defender argued that Florida Rule of Criminal Procedure 3.111(b)(2) does not confer authority upon the court to appoint the public defender to represent a prisoner in post-conviction collateral challenges to a conviction because only the legislature can specify the circumstances in which the court is authorized to appoint the public defender. The public defender emphasized that Fla. R. Crim. P. 3.111(b)(2) states that "counsel" - not the public defender - may be provided to indigent persons in post-conviction proceedings.

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).

The public defender argued that the trial courts are free to appoint private counsel to represent prisoners who file collateral challenges to their convictions under the authority of In the Interest of D.B., 385 So.2d 83, 92 (Fla. 1980), wherein the court held that when

appointment of counsel is required by the Constitution, counsel should be compensated in a fair, but reduced, manner.

The public defender suggested to the district court of appeal that the attorney general be afforded an opportunity to address the constitutionality of s. 924.066(3) and s. 924.051(9) and its applicability to the instant case. The district court of appeals did not seek the attorney general's position on the issue and did not order Akers to file a response to the petition for writ of certiorari.

The public defender timely filed his notice to invoke discretionary jurisdiction of the Supreme Court after the district court of appeal denied the petition for writ of certiorari. The public defender will file a motion for a stay of the trial court's order for an evidentiary hearing on the 3.850 motion pending the outcome of the Supreme Court's decision in the instant case. The public defender is sure that this order staying the proceedings will be granted and the public defender will advise this honorable court of the entry of the order.

SUMMARY OF ARGUMENT

The district court of appeal's decision expressly affects a class of constitutional officers - public defenders. In deciding a question of first impression in Florida, the district court of appeal's decision is binding on all trial judges under the doctrine of *stare decisis*. No other district court of appeal has held that Chapter 27 of the Florida Statutes is a legislative grant of authority to the judiciary that permits the public defender to be appointed to represent prisoners collaterally challenging their convictions. Thus, the district court of appeal's decision affects every public defender in the State of Florida.

ARGUMENT

THE DISTRICT COURT OF APPEAL'S DECISION EXPRESSLY AFFECTS A CLASS OF CONSTITUTIONAL OFFICERS - PUBLIC DEFENDERS

The issue that was before the district court of appeal in the instant case is one of first impression in Florida. No other district court of appeal has decided whether or not section 27.51 Fla. Stat. (1995) is a legislative grant of authority to the trial courts that allows the appointment of the public defender to represent prisoners in collateral proceedings filed pursuant to Fla. R. Crim. P. 3.850. Under the doctrine of *stare decisis*, the district court of appeal's decision in the instant case is binding on all trial courts in Florida. Dillon v. Chapman, 404 So.2d 354, 359 (Fla. 5th DCA 1981). Thus, the district court of appeal's decision expressly affects a class of constitutional officers - public defenders. In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender, 561 So.2d 1130 (Fla. 1990). In fact, the district court of appeal's decision case has already impacted public defender offices in Florida. Undersigned counsel was notified by an assistant public defender in Okeechobee that, after the decision in the instant case was published, the trial court for the first time ever appointed the public defender to represent a prisoner at an evidentiary hearing required by a prisoner's rule 3.850 motion alleging ineffective assistance of retained counsel. Prior to the district court of appeal's decision in the instant case the assistant public defender reported that the court had always appointed private counsel in rule 3.850 evidentiary hearing cases even when counsel who allegedly rendered ineffective counsel was a private attorney.

The Supreme Court should accept jurisdiction because the district court of appeal's opinion is devoid of any legal analysis, inquiry or reasoning. The opinion indicates that the court decided that the public defender must represent prisoners collaterally challenging their convictions because the public defender has been appointed in that capacity for years without any challenge to the appointments. The public defender submits that blind adherence to historical practice is no way to decide the law. Just because a matter has been addressed in a particular way in the past does not mean that this historical practice is correct.

The public defender only recently decided to challenge appointments to represent prisoners collaterally attacking their convictions because the number of such appointments in years past was not significant. However, as prisoners now serve eighty-five percent of their dramatically increased habitual offender sentences, the number of rule 3.850 motions alleging ineffective assistance of trial counsel has dramatically increased. It also seems that prisoners have become adept at including allegations in their motions that cannot be refuted by the record and therefore require an evidentiary hearing. These developments over the years have caused the public defender to scrutinize these type of appointments.

The legislature has not funded the office of the public defender to represent prisoners who collaterally challenge their convictions. "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)." The Florida Supreme Court has

interpreted Chapter 27 to permit public defender representation only when required by Gideon v. Wainwright, supra, and the Gideon progeny. In State v. Joranby, 498 So. 2d 948 (Fla. 1986), the court concluded that, "This statutory authority permits representation by a public defender only in circumstances entailing prosecution by the state threatening an indigent's liberty interest." When prisoners collaterally challenge their convictions, Chapter 27 does not permit public defender representation because the "threat" of incarceration that is incident to a prosecution by the state is no longer present because the prosecution has already been concluded. See, also, Behr v. Gardner, 442 So.2d 980, 982 (Fla. 1983) ("Chapter 27 does not impose upon the public defender a statutory duty to represent all insolvent defendants in all criminal proceedings").

It may seem logical to the court that the legislature should require the public defender to represent prisoners making collateral challenges to their convictions because of the financial savings to the counties. However, it is for the legislature - not the courts - to determine public policy. Holley v. Adams, 238 so.2d 401, 404 (Fla. 1970) ("In determining the validity of the statute certain basic principles of constitutional construction must be followed. First, it is the function of the Court to interpret the law, not to legislate. Second, courts are not concerned with the mere wisdom of the policy of the legislation, so long as such legislation squares with the Constitution."). The legislature is certainly free to amend s. 27.51 to authorize the appointment of the public defender in post-conviction relief proceedings after considering the entire subject and resulting effects involved in amending the statute. Florida Real Estate Comm. v. McGregor, 268 So.2d 529, 531 (Fla. 1972).

CONCLUSION

Based on the arguments and authorities presented herein, petitioner respectfully requests this honorable court to accept jurisdiction.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing petitioner's brief on jurisdiction was delivered by U.S. mail to respondent Wesley L. Akers, inmate #B-332492 C-2-220-U, New River Correctional Institute, P. O. Box 333, Raiford, FL 32083-0333, this 26th day of November, 1997.

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