ORIGINAL

IN THE SUPREME COURT OF FLORIDA

CASE NO. 93,252

LARRY WHITE,

Petitioner,

-vs-

HARRY K. SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

REPLY BRIEF OF PETITIONER

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INTRODUCTION

This brief is a reply to the respondent's ("state's") brief on the merits. Additional facts have been supplied to reply to the state's allegation that Mr. White never asked his attorney to appeal this case. As in the petitioner's initial brief, the symbol "R." will indicate the record on appeal.

ADDITIONAL STATEMENT OF FACTS

Larry White had one sentencing hearing for both cases, at the end of which the trial court told him about his right to "an appeal" (R. 66).

The text of Larry White's petition for belated appeal reads as follows:

> Mr. White was adjudicated guilty pursuant to a "trial by jury" before the Honorable Richard Fowler, Circuit Court Judge, In and For the Sixteenth Judicial Circuit Court (Monroe County, Florida) in case number 93-1103. Mr. White was also adjudicated pursuant to a plea in case number 93-79. These adjudications were entered on December 15, 1993.
>
> Mr. White was adjudicated and sentenced as follows:
>
> Case number 93-1103 -- Sale of Cocaine, and Possession of Cocaine. Ten (10) years Habitual Offender Status.
>
> Case number 93-79 -- Violation of Community Control. Five (5) years Habitual Offender Status.
>
> Mr. White's sentence was structured as follows: Ten (10) years Habitual Offender (#93-1103) was ran [sic] consecutive to five (5) year Habitual Offender (#93-79), totaling fifteen (15) years as a Habitual Offender.
>
> After being adjudicated guilty by "jury trial" in case number 93-1103, Mr. White informed his trial attorney (Mr. Michael Wheeler) that he wished to pursue a direct appeal.

(R. 2).

Mr. White also referred to and included in his petition for a belated appeal a letter to his trial attorney, which began:

Re: Direct Appeal -- White v. State.
Circuit Court Case No. (s): 93-1103-CF; 93-79-CF

Mr. Wheeler,

As you may recall you represented me upon the above-mentioned cases and causes before the Honorable Richard Fowler.

After my "jury trial," and subsequent sentencing, I requested you to file the necessary paperwork so that I could have my "direct appeal."

(R. 10).

ARGUMENT

THE THIRD DISTRICT COURT OF APPEAL'S PROCEDURE IMPERMISSIBLY DEPRIVES A DEFENDANT OF THE RIGHT TO THE ASSISTANCE OF COUNSEL IN THE APPELLATE PROCESS MERELY BECAUSE TRIAL COUNSEL FAILED TO FILE A NOTICE OF APPEAL.

The state's brief confuses the standards for granting a petition for belated appeal with the standards for dismissing an appeal as frivolous. The only practical result of granting a belated appeal is to restore a defendant's right to appellate counsel. The appellate court can always entertain a motion to dismiss after both parties are represented by counsel. The state does not dispute that if Larry White's trial attorney had filed a timely notice of appeal, Mr. White would have an appellate attorney to represent him before the appellate court. Granting a belated appeal would remedy that wrong.

The state's brief, however, barely mentions an indigent defendant's right to appellate counsel. Instead the state argues that there is no *federal* constitutional right to appeal (State's brief at 10), which is irrelevant given that the *state* constitution guarantees a right to appeal. *See* Art. V, §4(b), Fla. Const.; *Amendments to the Florida Rules of Appellate Procedure*, 685 So. 2d 773, 774 (Fla. 1996). The state also details the Criminal Appeals Reform Act, the recent amendments to the rules of

appellate procedure, and the limitations on the issues that can be raised in an appeal from a guilty plea (State's brief at 11-15). Discussing the substance of these limitations does not help resolve the procedural question of whether an indigent defendant has the right to the assistance of appellate counsel to argue these jurisdictional limitations.

The answer to that question is in the rules of procedure and case law. Florida Rule of Appellate Procedure 9.140(j)(2) does not require that a petition for belated appeal plead one of the grounds for appeal listed in *Robinson v. State*, 373 So. 2d 898 (Fla. 1979). An inquiry into the *Robinson* grounds for appeal is necessarily a preliminary inquiry into whether the appeal has merit. Courts make such inquiries only after the defendant is represented by appellate counsel, accomplished here by granting the petition for belated appeal. Requiring such a preliminary showing as a precondition for granting a belated appeal violates the principle that the right to appellate counsel cannot turn on an indigent appellant making a preliminary showing on the merits of the appeal. *See, e.g., Douglas v. California*, 372 U.S. 353 (1963). That same principle applies to belated appeals as well as timely appeals. *See Rodriquez v. U.S.*, 395 U.S. 327, 330 (1969); *Baggett v. Wainwright*, 229 So. 2d. 239, 243 (Fla. 1970). The determination that an appeal has no merit requires the double protections of review by both counsel and the court. *See Anders v. California*, 386

U.S. 738 (1967); *In re Anders Briefs*, 581 So. 2d 149, 151 (Fla. 1991); *In re Order of the First District Court of Appeal*, 556 So. 2d 1114, 1116 (Fla. 1990).

The state criticizes the opinion in *Trowell v. State*, 706 So. 2d 332 (Fla. 1st DCA 1998), *rev. granted* Case No. 92,393 (Fla. July 22, 1998), for relying on these decisions because factually the convictions in those cases arose from a trial instead of a guilty plea (State's brief at 19-20). The state's distinction of those cases begs the precise question at issue in this case. The state assumes that because a guilty plea severely limits the issues cognizable in the merits stage, it somehow limits the right to have appellate counsel appointed in a preliminary stage. The state then uses that assumption to distinguish *Douglas*, *Rodriquez, Baggett,* and *Anders* without any discussion of whether that assumption is valid.

The state's criticism also misses the point. *Trowell* cites these cases not for their facts but for the principles of law discussed above. The state does not dispute these basic principles of law. Nor does the state dispute their applicability to *timely* appeals from guilty pleas. The state implicitly concedes that in a timely notice of appeal from a guilty plea, the notice of appeal need not state a *Robinson* ground for appeal. Moreover, in a timely appeal from a guilty plea, Mr. White would have appellate counsel to raise any *Robinson* issues or to defend against a motion to dismiss. At the very least, Mr. White would have the protection of an *Anders* review.

The state has no argument why if these principles apply to timely appeals from guilty pleas, they should not also apply to belated appeals from guilty pleas. The only difference is the ineffective assistance of trial counsel. It almost goes without saying that indigent defendants cannot be punished for the ineffective assistance of their trial counsel.

Bridges v. Dugger, 518 So. 2d 298 (Fla. 2d DCA 1987), explicitly rejects the state's attempt to artificially contain these principles. In that case, where the conviction resulted from a guilty plea, the court wrote:

> We have not heretofore required that a petitioner seeking belated appellate review demonstrate any probability of success on appeal. Conceivably, such a requirement would run afoul of the principles set forth in *Anders v. California*. . . . If an attorney cannot unilaterally terminate the appeal process solely on the basis of his unsubstantiated conclusion that the appeal is frivolous, it is difficult to imagine that he could legitimately refuse even to file a notice of appeal in a case where he believed no reversible error had occurred. . . . We, therefore, are disinclined to impose further restrictions upon defendants seeking relief from their attorney's failure to appeal than the supreme court appears to have done in *Meyers* or *Baggett*.

518 So. 2d at 300. This first holding is exactly right. Belated appeals from guilty pleas are, at least initially, subject to the same requirements as other belated direct appeals, although they may later be subject to motions to dismiss.

The state's brief ignores this first holding and quotes from the second holding. The second holding was that there was no prejudice, and therefore no ineffective assistance of counsel claim, if the appeal could have been dismissed under *Robinson*. *See* 518 So. 2d at 300. This second holding is not good law after the decision in *Penson v. Ohio*, 488 U.S. 75 (1988). *Penson* held that if failing to file a notice of appeal deprives the defendant of appellate counsel, that deprivation alone is sufficient prejudice to satisfy an ineffective assistance of counsel claim. *See* 488 U.S. at 88.

The Second District Court of Appeal probably would have recognized the problem with the second holding in *Bridges* much earlier if Mr. Bridges or the other *pro se* litigants had been represented by counsel. The problem with indigent defendants representing themselves before appellate courts is well known and amply demonstrated by the record in this case. Mr. White failed to file the appropriate notices to bring his case before this Court even after the District Court of Appeal certified conflict. Moreover, the state for the first time alleges that Mr. White's *pro se* petition for belated appeal was inadequate (State's brief at 7). The state makes its allegation by isolating one sentence from the petition: "After being adjudicated guilty by 'jury trial' in case number 93-1103, Mr. White informed his trial attorney (Mr. Michael Wheeler) that he wished to pursue a direct appeal." (R. 2).

In the mind of a lawyer who knows that Mr. White had a right to appeal each of his convictions separately, that sentence is ambiguous: Did Mr. White also tell his attorney to appeal from this case, number 93-79? Read in the context of the entire petition, however, Mr. White clearly thought he had only one appeal from both cases. After all, the trial court referred to his right to "an appeal." (R. 66). Mr. White's petition always refers to "appeal" in the singular (R. 1-6). In his letter to his trial attorney, Mr. White refers to asking for a "direct appeal" after his sentencing (R. 10). His letter also clarifies that he asked for the appeal after the trial and sentencing, which was a sentencing on both cases (R. 10, 53).

The rule that courts construe pleadings favorably to the pleader is especially important if the pleader is a *pro se* litigant. *See, e.g., Martinez v. Fraxedas*, 678 So. 2d 489 (Fla. 3d DCA 1996); *Register v. State*, 619 So. 2d 498 (Fla. 2d DCA 1993). Read accordingly, Mr. White's petition for belated appeal sufficiently alleges that he asked his trial attorney to appeal the entire result. Mr. White's failure to understand that technically he had two appeals, not one, is immaterial. The District Court of Appeal could not properly dismiss Mr. White's petition for belated appeal on the ground the state suggests.

Nevertheless, the state's suggestion belies its later assertion that *pro se* litigants should have no trouble representing themselves on jurisdictional issues

before the appellate court (State's brief at 20). *Pro se* litigants such as Mr. White often have a difficult time expressing even simple factual statements, especially when opposed by lawyers trained to pick apart their every word. Pretending that the average *pro se* litigant could competently represent himself or herself on jurisdictional issues is pure sophistry.

The state's pretense that forcing litigants to proceed *pro se* increases judicial efficiency is even less credible (State's brief at 20). Even if a *pro se* litigant is literate and articulate (hardly a given), interpreting the factual and legal allegations in *pro se* pleadings is never easy and is often time-consuming. As one court observed of *pro se* appeals in unemployment cases: "Because of [*pro se* litigants] unfamiliarity with the law and appellate procedures, these cases frequently require the court to devote considerably more time to their disposition than should be necessary. As in this case, we are often required to resolve procedural or jurisdictional problems, not to mention the merits, with little or no guidance from the litigant." *Steele v. Florida Unemployment Appeals Comm'n*, 596 So. 2d 1190 (Fla. 1st DCA 1992).

Clear presentation of the issues and law by lawyers enhances, rather than reduces, judicial efficiency. Even more important, a truly adversarial process with lawyers on both sides helps guarantee that an indigent defendant is not wrongly incarcerated. Mr. White would have automatically had the right to appellate counsel

if his trial counsel had filed a timely notice of appeal. Trial counsel's ineffective assistance of counsel in failing to do so cannot deprive him of that right.

CONCLUSION

The state's sloganeering notwithstanding, Mr. White is not arguing for an "unfettered right to full appellate review of guilty pleas." (State's brief at 23). Instead he seeks a procedure that preserves the right to the assistance of appellate counsel. Granting a petition for belated appeal is the procedural mechanism that provides indigent defendants with appellate counsel. The court can still entertain a motion to dismiss with attorneys on both sides to facilitate its decision-making process. Due process requires this adversarial process before courts dismiss an appeal. The Third District Court of Appeal dismisses appeals without such a process and therefore *Gonzalez v. State*, 685 So. 2d 975 (Fla. 3d DCA 1997) and its progeny, including the court's decision in this case, must be quashed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing brief was delivered by mail to Douglas J. Glaid, Assistant Attorney General, Office of the Attorney General, 110 S.E. 6th Street, 10th Floor, Ft. Lauderdale, Florida 33301, this 13th day of October 1998.

CERTIFICATE OF TYPE SIZE

I hereby certify that this brief is printed in 14 point Times New Roman.

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