

IN THE SUPREME COURT OF FLORIDA

015
FILED
MAR 31 1999

CLERK, SUPREME COURT
By _____
Deputy Clerk

LARRY THOMAS,
Petitioner,

vs.

CASE NO.: 95,126
(DCA No. 97-1691)

STATE OF FLORIDA,
Respondent.

_____ /

PETITIONER'S JURISDICTIONAL BRIEF

On Review from the District Court
of Appeal, Fifth District
State of Florida

LARRY THOMAS, DC#100471
AVON PARK CORRECTIONAL INST.
P.O. BOX 1100 / MB#530
AVON PARK, FL 33826-1100

STATEMENT OF THE CASE AND FACTS

The State of Florida was the plaintiff in a criminal action wherein the petitioner here was charged by an amended information with possession of a firearm by a violent career criminal; armed burglary of a dwelling; two counts of robbery with a firearm; and attempted robbery with a firearm. Following a jury trial petitioner was found guilty as charged. Petitioner was sentenced as an habitual offender to concurrent terms totalling 50 years in prison, including a 15-year mandatory minimum term for possession of a firearm by a violent career criminal and a three-year mandatory minimum terms on the remaining counts for having possessed a firearm.

On the day of trial petitioner's special appointed public defender filed a written motion to withdraw as counsel based upon third party conflict so extensive counsel believed that his loyalty to the petitioner was impaired to such an extent counsel could not consider, recommend, or carry out an appropriate cause of action for petitioner. The trial court inquired into, and reweighed, the facts considered by petitioner's counsel in his determination that a conflict existed and denied the certified motion to withdraw.

An appeal was filed to the Fifth District Court of Appeal to review the trial court's reweighing of the facts considered by petitioner's trial counsel in his determination that a conflict existed plus two other grounds not the subject of this petition, and on December 18, 1998, the district court affirmed the trial court's acts in a split decision. The

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district court held that the trial court's denial of the motion to withdraw was not reversible error because there was no showing of prejudice to petitioner appearing in the record, basing that decision on two out-of-state cases and distinguishing petitioner's case from Florida case law construing Florida Statutes and Florida Rules Regulating the Florida Bar.

Rehearing was denied on February 22, 1999, and the petitioner's notice to invoke the discretionary jurisdiction of this Court was timely filed on March //, 1999.

SUMMARY OF THE ARGUMENT

In this case, the district court of appeal, using out-of-state case law as a basis, held that there had to be a showing of prejudice, appearing in the record, in order to reverse and remand for a new trial where the trial court had reweighed the facts considered by the public defender in his determination that a conflict of interest existed and then denied a public defender's certified motion to withdraw from the case based upon third party conflict. The decision of the district court cannot be reconciled with the previous decision of this Court in Guzman v. State, 644 So.2d 996 (Fla. 1994) wherein this Court held that the trial court was not permitted to reweigh the facts considered by the public defender in determining that a conflict exists. Nor can the district court's decision be reconciled with the previous decision of the Fourth District in Williams v. State, 622 So.2d 490 (Fla. 4 DCA 1993) wherein that court held that third party conflict was sufficient not to need a showing of prejudice in order to reverse and remand for a new trial.

This Court should accept discretionary review and quash the contrary decision of the district court below.

JURISDICTIONAL STATEMENT

The Florida Supreme Court has discretionary jurisdiction to review a decision of a district court of appeal that expressly and directly conflicts with a decision of the Supreme Court or another district court of appeal on the same point of law. Art. V. § 3(b)(3) Fla. Const. (1980); Fla.R.App.P. 9.030(a)(2)(A)(iv).

ARGUMENT

THE DECISION OF THE DISTRICT COURT OF APPEAL IN THIS CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THIS COURT IN GUZMAN V. STATE, 644 SO.2D 996 (FLA. 1994) AND WITH THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL IN WILLIAMS V. STATE, 622 SO.2D 490 (FLA. 4 DCA 1993).

The district court of appeal distinguished this case from Guzman v. State, 644 So.2d 996 (Fla. 1994) and interpreted the facts of this case in a manner inconsistent with Florida case law. The district court of appeal based this decision on out-of-state case law. As explained below, the decision of the district court conflicts with a decision of this Court holding that a trial court is not permitted to reweigh the facts considered by the public defender in determining that a conflict exists. The petitioner respectfully submits that this Court should grant discretionary review and resolve the conflict by quashing the decision of the district court.

In the decision of the district court reported as Avera v. State, 436 So.2d 1115 (Fla. 5 DCA 1983), the initial decision of the trial judge was reversed. The district court remanded the case for a new trial based on the trial court's erroneous decision to deny the public defenders motion to withdraw certifying a conflict of interest. In so doing the district court rejected the very same showing of prejudice argument it has used in affirming this case. See Avera, at 1116. Thus, the Fifth District has expressly held that where an attorney certifies conflict and a trial judge reweighs the facts

considered by the public defender no showing of prejudice is necessary to reverse and remand for a new trial.

Yet in the instant decision of the district court reported as Thomas v. State, ____ So.22d ____ (Fla. 5 DCA 1998), 24 Fla. L. Weekly D66 (Fla. 5 DCA 1998) the initial decision of the trial judge was affirmed based upon out-of-state case law. There is no Florida case law that is directly on point given the facts of this case. The district court affirmed in Thomas holding that the conflict certified by petitioner's counsel consisted solely of Counsel's employment relationship (2½ years) with the victim's mother, at a time prior to the commission of the crime and trial and his firms representation of the victims family, as defendants, in a completed civil case. The district court "expressly" held that the conflict in this case was "sufficiently attenuated as to make this case distinguishable from Guzman v. State, 644 So.2d 966 (Fla. 1994)..."

The district court approved the very, "reweighing of facts considered by the public defender in determining that a conflict exists," that this Court in Guzman, at 999, held to be reversible error by the trial court. Thus, the district court's decision is in direct conflict with the decision of this Court in Guzman, supra, on the same point of law.

While this Court's Guzman, supra, decision concerned conflict between two clients, and Banks v. State, 661 So.2d 419 (Fla. 4 DCA 1995); Hope v. State, 654 So.2d 639 (Fla. 4 DCA 1995), concerned conflict between a client and a previously

represented alleged victim, the facts of this case establish that petitioner's counsel certified conflict based upon third party, plus his own personal interests. In the decision of the Fourth District reported as Williams v. State, 622 So.2d 490 (Fla. 4 DCA 1993) a similiar factual situation is discussed where the public defender certified conflict based upon third party conflict, and personal interests, and the district court reversed and remanded for a new trial based upon this Court's decision in Babb v. Edwards, 412 So.2d 859 (Fla. 1982).

The district court's Thomas, supra, decision is in direct conflict with the decision of the Fourth District in Williams v. State, 622 So.2d 490 (Fla. 4 DCA 1993), wherein the Fourth District expressly stated that a public defender should be permitted to withdraw where the public defender determined that he could not adequately represent his client due to his loyalty to his investigator, a third party. In this instant case petitioner's counsel certified in a written motion to the trial court;

"That as a result of the undersigned attorney's multiple contacts and relationship with the family of Jodi Molnar, one of the victims in this case and her family, counsel believes that his loyalty to the defendant is impaired as he cannot consider, recommend, or carry out an appropriate cause of action for the client because of the undersigned responsibilities to and knowledge of the victim Jodi Molnar and her family."

Id. Motion to Withdraw, Page 2.

This certified statement by petitioner's trial counsel

is substantially the same as that made by counsel in Williams, supra, and should have been sufficient to put the trial court on notice that petitioner's trial counsel had come up against such a conflict between the interests of his client.

If counsel's certified statement was not enough to put the trial court on notice that a serious conflict existed, then counsel's, unexplained, failure to appear at a hearing to suppress in petitioner's case, two weeks prior to trial, should have elicited some serious concern. Especially since failure to appear at a hearing could warrant a one year suspension in counsel's right to practice law in Florida. The Florida Bar v. Hoffer, 412 So.2d 858 (Fla. 1982).

In petitioner's view the question this case presents to this Honorable Court is whether or not it's decision in Guzman, supra, not permitting the reweighing of the facts considered by a public defender in determining that a conflict exists extends, or covers, where a public defender certifies conflict based upon third party, plus his own personal interests is used as a basis for making his motion to withdraw as counsel.

The decision of the district court in this case is in conflict with the decision of this Court in Guzman, supra, to the extent it allowed a reweighing of the facts considered by a public defender in determining that a conflict exists, and utilized a prejudice standard of review not authorized or approved of by any Florida case law, where an appellant would necessarily have to show outside the appellate record issues to establish prejudice in order to prevail in a claim

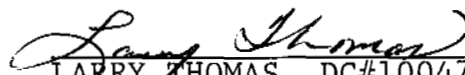
that he was denied conflict free counsel. As of a necessity, when a public defender files his motion to withdraw on the day of trial, the prejudice would have occurred pre-trial in the preparation stage and would not appear in the record. This Court correctly interpreted the law in Florida in Guzman, supra, and the court should now reaffirm that interpretation by accepting discretionary review and quashing the contrary decision of the district court below.

CONCLUSION

This Court has discretionary jurisdiction to review the decision below, and the Court should exercise that jurisdiction to consider the merits of the petitioner's argument.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing JURISDICTIONAL BRIEF has been furnished to the Office of the Attorney General at 444 Seabreeze Blvd., Ste. 500, Daytona Beach, Florida 32118 VIA U.S. MAIL on this 28 day of March, 1999.



LARRY THOMAS, DC#100471
PETITIONER / PRO SE