IN THE SUPREME COURT OF FLORIDA

LARRY THOMAS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

_____/

CASE NO. 95,126

5TH DCA CASE NO. 97-1691

ON DISCRETIONARY REVIEW OF THE
DISTRICT COURT OF APPEAL,
FIFTH DISTRICT

PETITIONER'S BRIEF ON THE MERITS

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

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CERTIFICATE OF FONT

Petitioner certifies that this brief was typed on an electric, Brother EM-1000 typewriter using a legal prestige 10 point wheel.

This is the only type machine the Florida Department of Corrections has available.

Petitioner has compared this type with the samples contained in this Court's 1998 administrative order and believes this type face is appropriate.

PRELIMINARY STATEMENT

Petitioner was the Appellant, and Respondent was the Appellee in the Fifth District Court of Appeal. In the brief the Respondent will be referred to as "the State" and the Petitioner will be referred to as he appears before this Honorable Supreme Court of Florida. The court below, whose decision is being reviewed by this court, will be referred to as the "5th DCA" for covenience.

In the brief the following symbrols will be used:

"R" - Record on appeal below, Volumes I and II, including transcript of sentencing.

"T" - Transcript of trial proceedings, Volumes III through V of record on appeal.

There are four record excerpts attached to this brief as Tabs A., B., C., and D.

Tab A, consists of the transcript of the pretrial hearing on counsel's motion to withdraw.

Tab B, is the four (4) page motion to withdraw filed by counsel in open court.

Tab C, is a copy of the decision of the 5th DCA affirming the trial court's denial of the motion to withdraw.

Tab D, is a copy of the Notice of Hearing filed by Counsel Sweeting on May 12, 1997.

STATEMENT OF CASE AND FACTS

Petitioner was arrested subsequent to a vehicle stop due to an expired tag by the Orange County Sheriff's Office. (R 1, Vol.I). Petitioner was charged by an amended information filed in the Circuit Court of Seminole County, Florida. (R 11-14, Vol. I) On January 30, 1997, the public defender's office was appointed as counsel for petitioner. (R 21, Vol. I) On March 4, 1997, the public defender's office moved to withdraw as counsel for petitioner, motion was granted by the trial court. Trial court appointed James Sweeting, III, Esq. as special appointed public defender as counsel for petitioner. (R 32, Vol. I) On March 10, 1997, counsel Sweeting made his first discovery motions in this case. (R 33-35, 36-39, Vol. I) On March 28, 1997, counsel Sweeting filed his application for issuance of deposition subpoenas. (R 57-59, Vol. I) Counsel Sweeting made no application for issuance of deposition subpoenas for three (3) of the victims, Jodie Molnar, Donald Judd and Charlotte Gardner, and on the day of trial acknowledged that he still had not been able to deposition two of the victims. (See Transcript, Record Excerpt at Tab "A" attached hereto) On May 27, 1997 Counsel Sweeting filed in open court his formal motion to withdraw as counsel (R 112-115, Vol. I, Record Excerpt at Tab "B" attached hereto) Counsel Sweeting briefly, in general terms, discussed the basis of the motion to withdraw. (See Tab "A", Pg. 6) The trial court did not question counsel Sweeting further as to the specifics of why counsel believed his loyalty to petitioner Thomas was impaired

to such a degree counsel could not consider, recommend, or carry out an appropriate cause of action for petitioner because of counsel's responsibilities to and knowledge of the victim Jodie Molnar and her family. (R 113, Vol. I; Tab "B") The trial court did not inquire of petitioner Thomas whether or not he waived conflict-free counsel. The trial court denied counsel Sweeting's motion to withdraw because the court didn't think there was a conflict. (See Tab "A", Pg. 6)

On May 27, 1997, trial began. Testimony was taken that between 9:00 and 9:45 p.m. on the evening of July 8, 1996, a burglary occurred in a condominium in Casselberry, Florida. During the burglary an armed robbery was perpetrated against the persons of Donald Judd, Charlotte Garder, Ms. Gardner's daughter Cassandra, and her overnight guest Jodie Molnar. Mr. Judd was told to lie face down on the bed and not look at the masked robber. (T 197-199, vol. III; T 204-275, Vol. IV) Mr. Judd testified he saw a spandex black glove holding a gray short-barreled revolver and the man's "plaid type" shirt. (T 210, 227, 231, 234, Vol. IV) However, it should also be noted that during the initial questioning by police at the scene of the crime Mr. Judd, nor Ms. Gardner, said anything about one of the robbers wearing a "plaid type" shirt. (R 6, Vol. I; T 235-245, Vol. IV) A second man on Ms. Gardner's side of the bed held a flat silver gun in a gloved hand and wore a "surfer type" shirt and baggy jeans. (T 210, 213, 228, 234, 250, 251, 258-260, Vol. IV)

The two men rifled Mr. Judd's and Ms. Gardner's bedroom

and then, according to Cassandra Gardner's and Jodie Molnar's testimony, a black masked man carrying a small gun and wearing a tan polo style shirt with an off-white collar and loose denim shorts came into their room, telling them to get down and rummaged through the objects in that room. (T 212, 213, 251, 252, 261, 264-266, 269-271, 273, 276, 281, Vol. IV)

When summoned at 9:45 p.m. the Seminole County Sheriff's Office responded very quickly to the condominium, arriving at 9:50 p.m. ((R 5, Vol. I; T 224, 235, 253, 258, 305, Vol. IV)

AT 10:51 p.m., petitioner was stopped by the Orlando Police Department. (R 1, Vol. I) Petitioner submitted to a patdown and consented to a search. (T 282-286, 289, 294, Vol. IV) When the Orlando Police began to search the car, the passenger, Isaac Hill, began to run. (T 286-290, 294, 296, Vol. IV) Petitioner never ran, nor attempted to flee. (T 293-294)

A loaded .22-caliber automatic handgun was found under petitioner's car seat. Petitioner told Orlando Police he carried the handgun for protection. (T 290, 293) On the passenger, Isaac Hill's, side of the car the police found a .38-caliber revolver; a pair of kevlar gloves; a ski mask; Charlotte Gardner's purse and keys; and a blue pillow case in the glove compartment containing a jewelry box, jewelry, and coins. (T 131, 133-135, 145-147, 150, 155, 174, 180, Vol. III; T 254-257, 289, 295, 297, 298, Vol. IV) A sawed-off shotgun and a BB gun were found in the car's trunk, and receipts and other papers were found in the car. (T 131, 136, 147-152,

154, 164, 166, Vol. III; T 255-257, 290, 297, 298, Vol. IV) There was only one mask and only one pair of gloves found in the car. Both found under Isaac Hill's passenger seat in the car. (T 297, Vol. IV)

Petitioner was wearing a green plaid shirt, blue jean-shorts, and Nike shoes when he was arrested. (T 163, 164, 166, Vol. III; T 292, vol. IV)

Petitioner's wife, Leslie Thomas, testified that on the day and evening of July 8, 1996 (day of the crime) she was living with petitioner in the Cambron Square Apartment's in Orlando. She testified that petitioner had befriended Isaac Hill who had recently been released from prison. (T 335, 336, Vol. IV) Hill's calls and visits, she said, always provoked arguments between her and petitioner. (T 336, 358, Vol. IV) On the last day that petitioner was at home, she said, he had spent the day getting license plates for a car he had just purchased. (T 337, 338, 345, Vol. IV)

Between 9:30, 9:35, Isaac Hill telephoned to speak to petitioner. (T 338, Vol. IV) Petitioner's phone conversation with Isaac Hill took about five to six minutes, he conducted the conversation outside in front of petitioner's sister and a couple of people, then a few minutes later brought the cordless phone back inside got his keys and shoes and said I'll be back; I'm going to go pick "Ike" up. (T 339, Vol. IV) She said petitioner left the house about 9:45 p.m. (T 339, Vol. IV) Petitioner called about 40 minutes later, she said, and asked her if she wanted some jewelry. (T 340, Vol.

IV) She testified she had never seen petitioner with a ski mask or any gloves. (T 341, Vol. IV) She learned the next morning that petitioner had been arrested. (T 341, Vol. IV)

Petitoner appealed below after being convicted of numerous criminal charges by a jury. (R 281-286, Vol. II; T 440-442, Vol. V) Petitioner was sentenced as an habitual offender (R 331, 339, 376, 377, Vol. IV)

On December 18, 1998, the Fifth District Court of Appeal affirmed the trial court's acts in a split decision. (See Record Excerpt Tab "C" attached hereto)

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 11, 1999.

On Tuesday, June 8, 1999, this Honorable Supreme Court of Florida accepted jurisdiction and dispensed with oral argument.

This timely filed brief on the merits follows the court's June 8, 1999 order.

SUMMARY OF THE ARGUMENT

The trial court and the 5th DCA both erred in this case by failing to follow the fundamental doctrine of stare decisis.

The trial court erred by denying trial counsel's motion to withdraw as counsel where counsel had certified that a personal conflict of interest existed that had impaired his duty of loyalty to his client to such on extent counsel had not formulated a defense for his client. The trial court made only a cursory inquiry into the adequacy of the basis of the conflict before reaching the decision that no conflict existed. The inquiry conducted by the trial court was inadequate and not specific enough to support the decision reached.

The 5th DCA's opinion constitutes an ex post facto legal decision wherein the district court does not follow the doctrine of stare decisis nor is the opinion of the court supported by the record or Florida case law.

ARGUMENT

THE TRIAL COURT ERRED BY DENYING THE COURT-APPOINTED COUNSEL'S MOTION TO WITHDRAW AS COUNSEL, WHICH RULING RESULTED IN THE DENIAL OF APPELLANT'S RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

On review petitioner contends that the decision of the 5th DCA below, affirming the trial court's denial of court-appointed counsel's motion to withdraw, was made in error. Just as the trial court's decision to deny the motion to withdraw was made in error.

Both courts entered into error for the same reason. They failed to follow a fundamental principle of Florida law - Stare Decisis.

In Florida, on an issue decided by the Florida Supreme Court, the various DCA's are bound to adhere to the Supreme Court's ruling on the same issue. State v. Dwyer, 332 So.2d 333 (Fla. 1976); Hoffman v. Jones, 280 So.2d 431 (Fla. 1973).

This doctrine also extends to the trial courts who not only must adhere to the Supreme Court's rulings on a specific issue, State v. Lott, 286 So.2d 565 (Fla. 1973), but are also obligated to follow decisions of other District Courts of Appeal in the state in the absence of conflicting authority and where the appellate court in its own district has not decided the specific issue. State v. Hayes, 333 So.2d 51 (Fla. 4 DCA 1976); Chapman v. Pinellas County, 423 So.2d 578 (Fla. 2 DCA 1982); McGauley v. Goldstein, 653 So.2d 1108 (Fla. 4 DCA 1995).

The Florida state courts are also obligated to follow and adhere to the decisions of the United States Supreme Court.

Branch v. State, 212 So.2d 29 (Fla. 2 DCA 1968); Kidwell v. State, 696 So.2d 399 (Fla. 4 DCA 1997).

At the trial court level petitioner was initially represented by the Public Defender. (R 23, Vol. I) On March 4, 1997, private counsel was appointed as special assistant public defender to represent the petitioner herein. (R 32, 39, Vol. I).

In Florida a special assistant public defender has no independent status, and he derives his authority and status from and acts instead of and as agent of public defender, and his acts in defending an insolvent defendant are, in legal effect, acts of public defender. See Op. Atty. Gen., 065-15, February 17, 1965.

At least a day, if not more, prior to the day of trial special assistant public defender James Sweeting, III, had researched and prepared his motion to withdraw at Tab "B". The motion was formally filed in open court on the day of trial, although it would appear from the pre-trial hearing on the motion at Tab "A", that there had been some discussion of the motion, off the record, between counsel Sweeting and the trial court. A careful reading of counsel Sweeting's motion at Tab "B", clearly shows that the conflict had occurred in counsel Sweeting's own mind. The actual conflict of interests was between counsel Sweeting's own interests, his personal feelings of loyalty and responsibilities toward the victim Jodie Molnar and her family; and his professional duty of loyalty he owed to his present client Larry Thomas. Rules Regulating the

Florida Bar 4-1.7, 4-1.7(b), 4-1.7 comment. Counsel Sweeting certified in his motion to withdraw that he "believes that his loyalty to [Larry Thomas] is impaired as he cannot consider, recommend, or carry out an appropriate cause of action [defense] for the client because of the [undersigned's] responsibilities to and knowledge of the victim Jodie Molnar and her family." (R 113, Vol. I; Tab "B") The motion to withdraw was denied by the trial court. (R 117, Vol. I; Tab "A", Page 6).

In the memoradum of law in counsel Sweeting's motion to withdraw the wording in the opening paragraph is identical to the Fourth Districts ruling in Roberts v. State, 670 So.2d 1042 (Fla. 4 DCA 1996). See Roberts, 670 So.2d at 1043-1044. Counsel Sweeting, through his memorandum of law, directed the trial court's attention to this Honorable Court's decisions in Guzman v. State, 644 So.2d 996, 999 (Fla. 1994); Babb v. Edwards, 412 So.2d 859, 860 (Fla. 1982); Hope v. State, 654 So.2d 639, (Fla. 1995); and the Fourth District's decision in Williams v. State, 622 So.2d 490 (Fla. 4 DCA 1993).

The wording of Rule 4-1.7(b) of Rules Regulating the Florida Bar is clear. "A lawyer shall not represent a client if the lawyer's exercise of independent professional judgment in the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person or by the lawyer's own interest. Loyalty to a client is also impaired when a lawyer cannot consider, recommend, or carry out an appropriate cause of action for the client because of the lawyer's other responsibilities

or interest."

Counsel Sweeting's motion to withdraw stated categorically that he had experienced a conflict of interest so severe that his loyalty to petitioner Thomas was compromised. Petitioner contends that attorneys are officers of the court, and when they address the trial judge solemly upon a matter before the court, their declarations are virtually made under oath. Counsel Sweeting's motion was not made for dilatory purposes, and for the trial court to ignore the large body of case law that specifically stated that a trial court is not permitted to reweigh the facts considered by the public defender in determining that a conflict exists, Guzman, at 999, citing Nixon v. Segal, 626 So.2d 1024 (Fla. 3 DCA 1993), and that once the public defender determined that a conflict existed regarding petitioner Thomas, then the principles set forth in Guzman, supra, Babb, supra, and Nixon, supra, required the trial judge to grant the motion to withdraw. For the trial judge to deny the motion by simply saying he was going to deny the motion to withdraw because he didn't think there was a conflict is an abuse of discretion and grounds for reversal due to a departure from the essential requirements of the law.

Perhaps the trial court thought that pursuant to Holloway v. Arkansas, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978), he had a right to inquire and explore the adequacy of the basis of the conflict. As a matter of Federal Constitutional law he may have been right, howerver, that is not the law in Florida, nor was the inquiry the court conducted, Tab "A",

pretrial adequate or specific enough to reach a decision that no conflict existed.

The trial court erred in denying the motion to withdraw, and as will be argued below the 5th DCA also erred in affirming the trial court's conclusion.

In the 5th DCA's opinion, Tab "C", that is now under review, the district court erred by interpreting the situational facts in the present case as distinguishable from this court's decision in Guzman, supra, and completely ignored the Fourth District's decision in Williams, supra, as to a counsel's perceived conflict between his client's and his own interests. Thus the 5th DCA misapplied the law in Florida, ignored the doctrine of Stare Decisis, and in denying relief created a new prejudice standard of appellate review that was never before required and where such a standard of appellate review would necessitate an evidentiary hearing in this particular case in order for petitioner Thomas to establish prejudice. The 5th DCA based this new prejudice standard of appellate review on two out-of-state decisions, completely ignoring the fact that no court in Florida has ever required a showing of prejudice by the defendant in order to result in reversal of a conviction.

In fact in Babb v. Edwards, 412 So.2d 859, 860 (Fla. 1982) this court stated in F.N. 1 on page 860, that:

> "1. In this case we have not considered, nor have we decided, whether a trial court's refusal to grant a public defender's motion to withdraw based on conflict of interest will result in the reversal of a conviction

without a showing of prejudice by the defendant."

It would appear that the 5th DCA in this case has "considered" and "decided" that a showing of prejudice by the defendant is necessary for the reversal of the conviction where the trial court refused to grant a public defender's motion to withdraw based on conflict of interest. The 5th DCA completely overlooked the fact that in some cases, such as petitioner's where the evil occurred in what trial counsel found himself compelled to refrain from doing, not only at trial, but pretrial where the actual prejudice occurred, the district court would end up embroiled in post-conviction issues and evidentiary hearings in order to be able to evenly apply this new prejudice standard of appellate review.

Moreover, another panel of the 5th DCA has held that once a conflict in the representation of an indigent accused has been shown, i.e., determined by a Public Defender or one of his assistants, prejudice need not be demonstrated because Holloway v. Arkansas, supra, holds that prejudice is presumed where a conflict is shown. Volk v. State, 436 So.2d 1064 (Fla. 5 DCA 1983); Avera v. State, 436 So.2d 1115 (Fla. 5 DCA 1983). Volk and Avera held that forcing the Public Defender to represent a client despite the certification of conflict of interest in doing so requires the reversal of a conviction obtained under such circumstances whether prejudice is demonstrated or not. These principles apply as well in the case of private appointed counsel, who stands as a "successor"

to the Public Defender's Office's obligations to his indigent client.

The opinion issued by the 5th DCA at Tab "C" would almost seem to qualify as an ex post facto judicial decision. Appointed appellate counsel, who wrote the initial brief, was proceeding, and formulating arguments, under prior case law from the Florida Supreme Court and from the same and other District Courts of Appeal; when suddenly the 5th DCA pulled a Catch-22 ploy and changed the pleading standards to a new level where the defendant in the case "must demonstrate that he has been prejudiced in some way to establish reversible error." See Tab "C". page 4.

Had appellate counsel been aware of this new prejudice standard prior to writing the brief the new demonstration of prejudice standard would not have been hard to meet in this case. Especially given the circumstantial evidence case that the state presented. Briefly, one of the most prejudicial acts committed by counsel Sweeting was in scheduling a hearing on defendant's motion to supress; motion for bill of particulars; and re-hearing on motion to bill at an hourly rate, Tab "D", and then counsel Sweeting failed to appear at the scheduled hearing. In Florida failure to appear at a hearing could warrant a one year suspension in counsel's right to practice law. The Florida Bar v. Hofer, 412 So.2d 858 (Fla. 1982). Failure to file the motion to suppress and have a hearing on same, pre-trial, was a very serious deficiency, given the fact pattern of this case. There was no direct

evidence to connect petitioner himself to the scene of the crime as a perpetrator. Petitioner was convicted upon the tainted identification of a green-blue plaid type shirt he was wearing when he was arrested. Of course when the two victims identified the green-blue plaid type shirt at the police department and picked it out of the evidence line-up it was the only shirt on the table to be identified. (T 235, 236, Vol. IV) This tainted identification of petitioner's shirt would definitely have been a hot topic at any suppression hearing. Especially in light of the fact that the two victims who identified the green-blue plaid type shirt never said one word about it when describing the perpetrators in the police reports on the night of the crime.

Only a counsel whose loyalty to his client had been compromised would have advised his client not to testify in his own behalf and thereby give the jury his reasonable explanation for the presence of Isaac Hill and the stolen property being in his car on the night of the crime.

A reasonably effective, conflict-free counsel would have subpoenaed petitioner's sister, Brenda, and her three friends who were in the front yard listening to the new car's radio when petitioner took the 9:45 p.m. phone call from Isaac Hill on the night of the crime. These four witnesses' testimony would have confirmed petitioner's wife's testimony that petitioner was at home in Orlando, a thirty minute drive from Casselberry, at the time the crime was committed. (T 339, 344, Vol. IV)

With petitioner's reasonable explanation for Isaac Hll and the stolen property being in his car being placed in front of the jury and with four more witnesses confirming petitioner's whereabouts in Orlando at the time the crime was committed in Casselberry, counsel would then have requested the special jury instruction on circumstantial evidence be given. Even if petitioner had still been convicted after the circumstantial evidence jury instruction was given it would be very doubtful the conviction would have been upheld on appeal based upon the suspicious identification of a green-blue plaid type shirt where hundreds, if not literally thousands, of the very same shirts had been sold in the central Florida area. See Bunderick v. State, 528 So.2d 1247 (Fla. 1 DCA 1988).

Under the holdings of Guzman v. State, Babb v. Edwards, Williamms v. State, Holloway v. Arkansas, and Volk v. State, and Avera v. State, and under the facts of this case wherein a personal, third party conflict was certified to exist by appointed counsel, Petitioner Thomas has been denied his right to assistance of conflict-free counsel and effective assistance of counsel which should be unimpaired by the existence of conflicting interests being represented by a single attorney. Foster v. State, 387 So.2d 344 (Fla. 1980); Art. 1, s. 16 Fla. Const; Amends. VI and XIV, U.S. Const.

CONCLUSION

Because of the well reasoned arguments and case law cited in the brief, this Honorable Court should reverse, vacate the judgment and sentence in this case and remand the petitioner, Larry Thomas back to the trial court for a new trial where he will be represented by a conflict-free counsel.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing PETITIONER'S BRIEF ON THE MERITS has been furnished by U.S. MAIL to counsels for respondent, Belle B. Turner, and Ann M. Phillips at the Office of the Attorney General, 444 Seabreeze Boulevard, 5th Floor, Daytona Beach, Florida 32118 on this 28TH day of June, 1999.

Larry Thomas

LARRY THOMAS, DC#100471,MB#530
PETITIONER / PRO SE

Appendix A