097

FILED
THOMAS D. HALL
MAY 15 2000
CLERK, SUPREME COURT
BY

IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO THE FLORIDA RULES OF CRIMINAL PROCEDURE

Case No.: Sc00-562

/

COMMENTS ON RULE 3.111(b)(1) AND PROPOSED RULE 3.994

The Office of the Public Defender for the Eleventh Judicial Circuit offers the following comments on Florida Rule of Criminal Procedure 3.111(b)(1) and the standard "Order of No Imprisonment" proposed as Florida Rule of Criminal Procedure 3.994. The office of the public defender is concerned that the current wording of the proposed form and the underlying rule may result in continuing violations of the right to counsel in Miami-Dade County.

A number of county judges in this county have been using orders of no imprisonment to frustrate the constitutional right to counsel. The typical scenario is as follows. Indigent defendants appear at a combination first appearance hearing and arraignment where the court makes indigency determinations and appoints the public defender. At a subsequent hearing, the assistant state attorney will announce in some of these cases that the state is not seeking jail. Sometimes the state makes this announcement because the defendant has no (or minimal) priors. Sometimes the state makes this announcement because it cannot prove its case at trial, for

instance where the defendant's breath-alcohol reading was below the legal limit. Whatever the reason, the county court will almost invariably issue an order of no imprisonment. Faced with the prospect of going to trial without an attorney, the indigent defendant will usually plead guilty or nolo contendre and receive a probation sentence.

Statistically, about half the probationers violate the conditions of their probation. In some of these cases, the state seeks a jail sentence for the probation violation. The county court then reappoints the public defender for the probation violation hearing.[1] If found to have violated probation, the county court will often

---

[1]Counsel could move to withdraw the plea for lack of voluntariness. *See* Fla. R. Crim. P. 3.850(a). Such a motion is often difficult to win, however. Many of the orders of no imprisonment say that they will be withdrawn if the defendant is alleged to have violated the conditions of probation. Moreover, as part of the sentencing colloquy the county court judges often inform defendants that they could be sentenced to jail for six months or a year, sometimes within minutes of issuing an order of no imprisonment. *See* Fla. R. Crim. P. 3.172(c)(1). In Miami-Dade County, these procedures are often used to defeat a claim of lack of voluntariness.

A motion to withdraw the plea because of the unconstitutionality of the denial of counsel would be heard by the same county court judge who issued the order of no imprisonment. Needless to say, those judges do not admit the unconstitutionality of this practice.

Thus, defense counsel is often in the frustrating position of not being able to reopen the underlying case where there may have been a meritorious defense, but having to represent a client at a probation violation hearing where there is often no defense.

sentence the defendant to jail.

A jail sentence in such circumstances is unconstitutional. The right to counsel requires that before the court can sentence a person to jail, the court must have provided for the assistance of counsel at all critical stages in the proceeding. *See Scott v. Illinois*, 440 U.S. 367, 373-74 (1979); *Argersinger v. Hamlin*, 407 U.S. 25, 37-40 (1972); *Traylor v. State*, 596 So. 2d 957, 966-70 (Fla. 1992). Obviously, a *pro se* trial or guilty plea is a critical stage in that it "may significantly affect the outcome of the proceedings." *See Traylor*, 596 So. 2d at 968.

"By denying the defendant counsel, the court effectively waives its right to sentence him to prison." *United States v. Reilley*, 948 F.2d 648, 654 (10th Cir. 1991). This principle applies even if the court suspends or does not otherwise immediately impose the incarcerative sentence. *See Reilley*, 948 F.2d at 654, *United States v. Sultani*, 704 F.2d 132 (4th Cir. 1983); *United States v. White*, 529 F.2d 1390, 1394 (8th Cir. 1976). "If we allow a court to incarcerate a defendant on the basis of an underlying, uncounseled conviction by revoking probation, then we allow it to achieve the forbidden end result of incarcerating uncounseled defendants." *State of Vermont v. DeRosa*, 633 A.2d 277 (Vt. 1993).

In Florida, sentencing after a probation revocation is merely "a deferred

sentencing proceeding." *See, e.g., Green v. State*, 463 So. 2d 1139, 1140 (Fla. 1985). "Since imprisonment could not have been imposed on [the defendant] at the conclusion of his trial, *see Argersinger*, 407 U.S. at 37, 92 S. Ct. at 2012, imprisonment could not be imposed on [the defendant] following revocation of his probation." *United States v. Foster*, 904 F.2d 20, 21 (9th Cir. 1990); *see also Sultani*, 704 F.2d at 133-34; *DeRosa*, 633 A.2d at 279. The county court judges' manipulation of the orders of no imprisonment result in just such an unconstitutional denial of counsel and an unconstitutional deprivation of liberty.

Unfortunately, Florida Rule of Criminal Procedure 3.111(b)(1) is not sufficiently clear to halt this unconstitutional practice. The rule only speaks of no imprisonment after "conviction," but does not specifically address probation violations. Proposed Florida Rule of Criminal Procedure 3.994 may exacerbate this problem. The most objectionable language is the phrase "on the substantive charge(s)" in the first paragraph of the proposed standard order. The complete first paragraph reads:

> 1. The court hereby certifies that it will not sentence the defendant to imprisonment if there is a finding of guilt or a plea of guilty or nolo contendre *on the substantive charge(s)* in this case.

Assuming this phrase is not superfluous, "substantive charge(s)" could be read to

exclude probation violation charges. The proposed form fails to mention probation violations in the litany of situations in which the court agrees not to impose a jail sentence. This failure would promote the county court judges' unconstitutional reading. Finally, the only prerequisite to withdraw this order is "notice to the defendant." The failure to condition withdrawal on the nonoccurrence of any prejudicial events, such as a finding of guilt or a plea of guilty or nolo contendre, also supports this unconstitutional reading.

This Court should amend the proposed form to clearly state that in no circumstances will the defendant be incarcerated. Paragraphs "1" and "3" should be amended as follows:

> 1. The court hereby certifies that it will not sentence the defendant to imprisonment if there is a finding of guilt, a finding of probation violation, or a plea of guilty or nolo contendre in this case.
>
> 3. After notice to the defendant, ~~T~~this certification of no imprisonment may be withdrawn by the court provided the court has not made a finding of guilt or the defendant has not pled guilty or nolo contendre at the time the order is withdrawn. ~~after notice to the defendant.~~

Additionally, this Court should clarify the underlying rule. The second sentence of Florida Rule of Criminal Procedure 3.111(b)(1) should be amended to

read:

> Counsel does not have to be provided to an indigent person in a prosecution for a misdemeanor or violation of a municipal ordinance if the judge, ~~prior to~~before trial or a plea of guilty or nolo contendre, files in the cause a statement in writing that the defendant will not be imprisoned if convicted or subsequently found to have violated probation.

The office of the public defender has been unable to effectively address this unconstitutional incarceration of indigent defendants through the usual means of appeals and writs of habeas corpus. Often the county court, aware of the significant constitutional issues, offers short jail sentences to these defendants. Rather than risk an extensive incarceration, these defendants often accept these offers and thereby waive their right to an appeal. Moreover, the issue would normally be moot by the time defense counsel secured the necessary transcripts, filed the writ, had the circuit court issue a rule to show cause, gave the state time to respond, and had the circuit court issue its writ. The few writs the office of the public defender has taken (and won) have not significantly altered the practices of the county court judges. *See Bouza v. Felton*, No. 94-30913 (Fla. 11th Cir. Ct. Oct. 19, 1994) (reversing a 180-day sentence). Accordingly, the best solution is a change in the Florida Rules of Criminal Procedure to more clearly protect the right to counsel.

CONCLUSION

The office of the public defender respectfully requests that this Court amend both the form in proposed Florida Rule of Criminal Procedure 3.994 and the second sentence of Florida Rule of Criminal Procedure 3.111(b)(1) to unambiguously protect the constitutional right to counsel.

Respectfully submitted,

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit of Florida
1320 N.W. 14th Street
Miami, Florida 33125
(305) 545-1958

BY: _____
JOHN E. MORRISON
Assistant Public Defender
Florida Bar No. 072222

CERTIFICATE OF FONT SIZE

I hereby certify that this comment is printed in 14 point Garamond, a font similar to Times Roman.

_____
JOHN E. MORRISON
Assistant Public Defender