IN THE SUPREME COURT OF FLORIDA

ANTHONY SHEPPARD,	
Petitioner,	
v.	Case No. SC08-1452
STATE OF FLORIDA,	2DCA NO.: 2D06-4557
Respondent.	

ON PETITION FOR REVIEW FROM

THE SECOND DISTRICT COURT OF APPEAL

STATE OF FLORIDA

JURISDICTIONAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE AND FACTS

On September 24, 2002, Petitioner Anthony Sheppard admitted violating previously imposed sex offender probation extended on a attempted sexual battery conviction imposed in case no. 00-8186. (Supp 1 R 149) Revoking his probation, the circuit court sentenced Sheppard to five years prison. Id. On the same date, Sheppard also entered guilty pleas to two counts of uttering a forged instrument as charged in case no. 02-8009. (R 1 12-13, 20-21) Pursuant to his plea terms (Supp 1 R 153), Sheppard was placed on sex offender probation for five years on count one of case no. 02-9009, followed by three years of sex offender probation on count two. These probationary terms ran consecutively to his prison sentence in case no. 00-8186. (V 1 R 20-21, 22-24, 25-29, 91-105)

Upon his release from prison, Sheppard was arrested for violating the terms of his supervision. (V 1 R 30-36) Revoking his probation, the circuit court placed Sheppard on two years community control followed by three years on sex offender probation on count one of case no. 02-8009. A consecutive term of three years sex offender probation was imposed on count two. (V 1 R 30-39, 40-41, 42-43, 44-48)

On August 9, 2005, Sheppard admitted he violated his community control imposed in case no. 02-8009, in particular, condition 9 (failure to report) and condition 12 (failure to remain in approved residence. During the plea colloquy, Sheppard confirmed he

understood he was pleading open with the advice of counsel, and no threats or promises had made to him to enter his plea. (V 1 R 148) He indicated he wanted to do straight time Revoking his community control, the circuit court imposed five-year prison terms on the two counts of uttering a forged instrument to run consecutively.

Sheppard filed a pro se motion to withdraw his admission to having violated his community control in which he claimed his counsel told him the state had made an offer of a prison term of a year and a day with four years probation. According to Sheppard, he informed his counsel he wanted to accept the offer; however, counsel purportedly refused to allow him to accept the deal, telling Sheppard counsel was sure he could get Sheppard two years probation if Sheppard would enter an open plea. (V 1 R 77) Sheppard alleged that had he known he would not be sentenced to two years probation, he would not have entered his admission. (V 1 R 78) By nonfinal order rendered February 1, 2006, the circuit court directed the state to respond to Sheppard's motion to withdraw his pleas. (V 1 R 5) The public defender's office was appointed to represent Sheppard. (V 1 R 6)

An evidentiary hearing was held May 9, 2006, on Sheppard's request to withdraw his admission. His trial counsel testified Sheppard did not want to accept the state's offer of one year in the county jail, followed by four years probation. Not desirous of a probationary term, Sheppard wanted to plead open and request the

circuit court to impose jail time. His trial counsel informed Sheppard he could be sentenced to the maximum prison term of five years to run consecutively on each count of uttering a forged instrument. (R 138-139) Stating it has reviewed the transcript of the violating hearing at which Sheppard had admitted violating his community control, the circuit court denied his motion to withdraw the admission. (R 125) A written order followed on September 13, 2006. (V 1 R 106-117) Sheppard appealed, and following briefing, the district court in a detailed revised opinion on rehearing reversed with directions to the circuit court to strike the pro se motion to withdraw, filed while Sheppard was represented by court-appointed counsel, as a nullity. Sheppard v. State, 33 Fla. L. Weekly D 1773 (Fla. 2d DCA July 16, 2008).

The district court then addressing Sheppard's argument the allegations in his pro se motion were sufficient to show that "an adversarial relationship" existed between him and his court-appointed counsel and such negated the prohibition against the filing of pro se pleadings by defendants with counsel, even though the motion did not contain an unequivocal request to discharge counsel. The district court certified its decision was in direct conflict with Peterson v. State, 881 So. 2d 1129 (Fla. 4th DCA 2004), and Bermudez v. State, 901 So. 2d 981 (Fla. 4th DCA 2005). As the court explained these two grounds prompted the court in Mourra v. State, 884 So. 2d 316 (Fla. 2d DCA 2004), to note its

disagreement with the holding in Peterson: (1) a recognition of the prohibition against hybrid representation in criminal cases except in circumstances where the pro se pleading is accompanied by an unequivocal request to discharge counsel and (2) concerns about the possible prejudice that the defendant might unwittingly sustain as a result of the pro se filing. The district court also declined to follow Bermudez in the Fourth District held a defendant's allegation he was promised by counsel he would get a shorter sentence if he pled guilty created "an adversarial relationship" between the defendant and his attorney that precluded striking the pro se motion as a nullity. In so declining, the district court noted the exceptions to the rule prohibiting hybrid representation that the Fourth District has adopted in Peterson and Bermudez may be at odds with the more limited view of the matter that this Court in Logan. Further, the position it took in Mourra is fully consistent with Logan. Moreover, the potential preclusive effect of the rule 3.170(l) motion argues against permitting all defendants with complaints about their counsel's advice or performance to pursue pro se motions under the rule. See Mourra, 884 So. 2d at 319-21. In addition, the district court observed the exceptions to the rule prohibiting hybrid representation that the Fourth District has recognized in Peterson and Bermudez are so broad that they threaten to swallow the rule. Accordingly, the district court concluded the exception to the rule prohibiting hybrid

representation for motions under rule 3.170(l) should be limited--as it held in Mourra--to cases where the defendant makes an unequivocal request to discharge counsel. Sheppard, supra.

Petitioner invokes the discretionary jurisdiction of this Court, asserting the decision of the Second District in the instant case expressly and directly conflicts with the Fourth District's decisions in Peterson and Bermudez.

SUMMARY OF THE ARGUMENT

Pursuant to Rule 9.030, Fla. R. App. P., Petitioner has not alleged sufficient grounds which warrant the discretionary jurisdiction of this Court. Although the Second District certified direct conflict with the Fourth District's decisions in Peterson and Bermudez, such decisions are factually distinguishable. Moreover, the exhaustive decision of the Second District comports with this Court's decisions in Logan v. State, 846 So. 2d 472 (Fla. 2003), and Johnson v. State, 974 So. 2d 363, 364-365 (Fla. 2008), which authorize dismissal of any pro se filing seeking affirmative relief in the context of any criminal proceeding where it is clear from the face of the petition the petitioner is represented by counsel in pending criminal proceedings and do not clearly indicate they are seeking to discharge counsel therein.

ARGUMENT

ISSUE

WHETHER THIS COURT SHOULD EXERCISE ITS DISCRETIONARY JURISDICTION TO REVIEW THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL IN SHEPPARD V. STATE, 33 Fla. L. Weekly D 1773 (FLA. 2d DCA July 16, 2008). (as restated by Respondent)

Petitioner seeks to invoke this Court's jurisdiction based on express and direct conflict. Pursuant to Fla. R. App. P. 9.030(2), the discretionary jurisdiction of the Florida Supreme Court may be sought to review decisions of district courts of appeal that: (ii) expressly construe a provision of the state or federal constitution; or (iv) expressly and directly conflict with a decision of another district court of appeal or of this Court on the same question of law; Fla. R. App. P. 9.030(2). See Art. V § 3(b), Fla. Const.

This Court has identified two basic forms of decisional conflict which properly justify the exercise of jurisdiction under section 3(b)(3) of the Florida Constitution. Either (1) where an announced rule of law conflicts with other appellate expressions of law, or (2) where a rule of law is applied to produce a different result in a case which involves "substantially the same controlling facts as a prior case. . . ." Nielsen v. City of Sarasota, 117 So. 2d 731, 734 (Fla. 1960).

Petitioner claims the Second District's decision in the instant case is in direct and express conflict with the Fourth District's opinion in Peterson v. State, 881 So. 2d 1129 (Fla. 4th

DCA 2004), in which the court, while recognizing a defendant is not constitutionally entitled to a hybrid form of presentation, held there was an exception where the defendant claims his counsel coerced him into entering a plea. There, the defendant in a pro se motion claimed he was coerced into pleading no contest; however, his argument on appeal was his attorney had misadvised him. Nevertheless, the Fourth District reversed and remanded, directing that if the record did not conclusively rebut his allegations, conflict-free counsel should be appointed with respect to his claim his plea was coerced.

In contrast, here, Petitioner did not specifically allege in his motion to withdraw his admission his violation attorney forced or coerced him to admit violating community control. Rather, the thrust of his claim was his counsel talked him out of accepting the state's plea offer by telling him counsel "was sure" he could get him two years prison if Petitioner entered an open admission to the violation. (V 1 R 77) The claim was, at its core, one of a wrong prediction as to the sentencing outcome and is factually distinguishable from a claim of coercion such as Peterson's motion claiming he was coerced to plead. Therefore, there is no express conflict with Peterson.

Petitioner also claims the Second District's decision in the instant case is in direct and express conflict with the Fourth District's opinion in Bermudez v. State, 901 So. 2d 981 (Fla. 4th

DCA 2005), in which the defendant alleged he was promised by his attorney he would get a shorter sentence if he entered a plea of guilty. The Fourth District considered the alleged promises asserted by Bermudez to create an adversarial relationship with his attorney and therefore concluded such precluded the striking of his pro se motion.

Bermudez is factually distinguishable from the instant case. Petitioner in his motion to withdraw his admission did not assert his counsel promised him a two-year sentence. Rather, he said his counsel said he was sure he could get Petitioner two years prison. So framed, Petitioner's claim was one assailing counsel's confidence in a prediction and not one of a guarantee on the part of counsel. Accordingly, notwithstanding the Second District's certification of direct conflict, Bermudez is distinguishable on the facts and thus not in express conflict with the Sheppard decision, as Petitioner did not allege his attorney promised him a two-year prison outcome.

Respondent recognizes the Second District's declination of an invitation to except a claim such as Sheppard's from the rule precluding hybrid representation has been viewed by the Second District as in direct conflict with Peterson and Bermudez. Even if this Court were so conclude, nonetheless, this Court should decline to exercise its discretionary jurisdiction because the instant decision comports with this Court's decision in Logan v. State, 846

So. 2d 472, 474-475 (Fla. 2003), in which this Court made clear it would not entertain pro se extraordinary writ petitions from criminal defendants seeking affirmative relief in the context of pending trial court criminal cases, where it is clear from the face of the petitions the petitioners are represented by counsel and do not clearly indicate they are seeking to discharge counsel in those proceedings. This rule was premised upon grounds that criminal defendants have no right under the Sixth Amendment or under the Florida Constitution to engage in hybrid representation. See Johnson v. State, 974 So. 2d 363, 364-365 (Fla. 2008) (clarifying "that the rule announced in Logan is not limited to cases where the defendant is represented by trial counsel. The rule applies to any pro se filings submitted by litigants seeking affirmative relief in the context of any criminal proceeding where a death sentence has not been imposed, whether direct or collateral, either in the trial court or a district court of appeal, and who are represented by counsel in those proceedings."). Logan did not carve out an exception for a coerced plea claim, nor lay aside the rule for any petitioner's claim that could be merely categorized as that of an adversarial relationship between the defendant and counsel. Given that Petitioner in his motion to withdraw his admission did not unequivocally request discharge of his counsel, the decision in his case is in accord with Logan and Johnson.

CONCLUSION

Respondent respectfully requests this Honorable Court decline to accept jurisdiction to review this case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Richard P. Albertine, Jr., Esquire, Public Defender's Office, Polk County Courthouse, P.O. Box 9000 –- Drawer PD, Bartow, FL 33831 this 26th day of August 2008.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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