1989 WL 142259
Only the Westlaw citation is currently available.
District Court of Appeal of Florida,
Second District.

ORDER ON PROSECUTION OF CRIMINAL APPEALS BY the TENTH JUDICIAL CIRCUIT PUBLIC DEFENDER.

May 12, 1989.

Not for Publication.

EN BANC.

***1** This court has previously entered a series of orders attempting to deal with the large backlog of appeals assigned to the Public Defender of the Tenth Judicial Circuit in which briefs are substantially overdue. *See, e.g., Haggins v. State,* 498 So.2d 953 (Fla. 2d DCA 1986); *En Banc* Order of March 31, 1987; Order of June 24, 1987.

Some of the previous orders gave liberal deadlines to the public defender to file briefs in the very oldest pending appeals, failing which the appeals would be dismissed. The public defender has filed briefs in most of those appeals. However, a few of the appeals were dismissed and this court denied motions to reinstate filed by the public defender. The effect of these orders was beneficial as to the prosecution of the oldest appeals, but the overall backlog of criminal appeals has not been alleviated and, indeed, has worsened.

In a letter to this court, dated March 24, 1989, the public defender has stated that the number of cases in which records are prepared and which are awaiting briefing by his office is 1,005. Additionally, an average of 150 new criminal appeals are filed in this court every month, many of which are ultimately assigned to the Public Defender of the Tenth Judicial Circuit. This court has the highest number of criminal appeals of any of Florida's courts of appeal. The public defender cannot process all of these new appeals and dispose of the existing backlog. Thus, the backlog continues to grow.

In previous orders, we were reluctant to discharge the Public Defender of the Tenth Judicial Circuit from his statutory appellate duties and transfer responsibility to other court-appointed counsel. We also were cognizant that "it is not within the province of this court to deal with funding for, or the allocation of resources within, the Office of the Tenth Circuit Public Defender." *See En Banc* Order of March 31, 1987, cited above. However, we had hoped that our continually calling attention to the problem would assist in a legislative solution.

A special committee, authorized by the Florida Judicial Council and chaired by the chief judge of this court, was appointed to consider the problem of public defender appellate backlog statewide. The report of the committee, submitted to and approved by the Judicial Council on March 30, 1989, concluded that the "inability of the appellate public defenders to presently cope with the massive number of appeals to which they are assigned results not from a lack of efficiency of the public defenders' offices, but a lack of funds appropriated to them in order that they can adequately staff their offices to handle the case load which they are constitutionally and statutorily required to handle." The recommendation of the committee is that the public defenders, as presently constituted, be adequately funded by the legislature. In view of the finding of the special committee, and the action we take today, we hereby reconsider previous orders denying reinstatement of certain dismissed appeals.

***2** In his communications with this court, the Tenth Judicial Circuit Public Defender has acknowledged that by his inability to timely process all appeals, he is being required to choose which of his appellants' appeals will be pursued according to the severity of their sentences. When an attorney representing indigent defendants is required to make choices between the rights of the various defendants, a conflict of interest is inevitably created.

The dissents discuss legitimate and serious concerns of which we all have been cognizant for some time and which have delayed our entry of this order before now in an effort to find or encourage another solution. The dissents do not recommend any alternative course except for the Tenth Judicial Circuit Public Defender to file additional motions to withdraw as counsel. That public defender has previously filed motions to withdraw in consideration of which all interested parties were given an opportunity to respond. Those responding parties objected to the discharge of the Tenth Judicial Circuit Public Defender. Nothing has changed except that more appellants in criminal appeals have had their appeals further delayed by the inability of the Tenth Judicial Circuit Public Defender to act expeditiously in processing

their appeals. While we acceded previously to the urging by the respondents in *Haggins* not to relieve the Tenth Judicial Circuit Public Defender, we conclude that we can no longer do so.

The rights of defendants in criminal proceedings brought by the state cannot be subjected to the fate of choice no matter how rational that choice may be because of the circumstances of the situation. We are required to exercise all of our powers, express or inherent, to protect the rights of the accused and we must do so after due consideration to the rights and limitations provided in both the Florida Constitution and the Constitution of the United States. We are not, as Judge Schoonover's dissent appears to suggest we are, interfering in legislative prerogatives, but are merely attempting to protect the rights of indigent defendants with the only means we, at this time, have at our disposal. Contrary to the implication of the dissents, we conclude that the legislature of Florida has provided for such circumstances in sections 27.53(2) and (3) and 925.036(2), Florida Statutes (1987). We need no further factual information or determination to conclude that we must act. In providing for compensation of appointed counsel by local government, the legislature has not limited payment to representation in capital cases. *See* § 925.036(2). However, even if the legislature had not enacted adequate provisions for the representation of indigent defendants, we believe that the inherent power of courts is sufficient to afford us the remedy necessary for the protection of rights of indigent defendants charged with crimes, whether those crimes be capital or otherwise. *See Board of County Commissioners of Hillsborough County v. Curry,* 545 So.2d 930 (Fla. 2d DCA 1989).

***3** As the court stated in *Rose v. Palm Beach County,* 361 So.2d 135, 137 (Fla.1978) (footnotes omitted):

[W]here the fundamental rights of individuals are concerned, the judiciary may not abdicate its responsibility and defer to legislative or administrative arrangements....

Every court has inherent power to do all things that are reasonably necessary for the administration of justice within the scope of its jurisdiction, subject to valid existing laws and constitutional provisions. The doctrine of inherent judicial power as it relates to the practice of compelling the expenditure of funds by the executive and legislative branches of government has developed as a way of responding to inaction or inadequate action that amounts to a threat to the courts' ability to make effective their jurisdiction. The doctrine exists because it is crucial to the survival of the judiciary as an independent, functioning and co-equal branch of government. The invocation of the doctrine is most compelling when the judicial function at issue is the safe-guarding of fundamental rights.

See also Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963).

Judge Schoonover's dissent quotes from *Petition of Florida Bar,* 61 So.2d 646 (Fla.1952), wherein the Florida Supreme Court rejected a request for it to exercise an enlarged concept of its inherent power so as to authorize the funding and appointment of an administrative officer for the then State Board of Law Examiners. The supreme court in that case did, however, outline the proper scope of its inherent power as follows:

> It is true that courts of general jurisdiction have certain inherent or implied powers that stem from the constitutional or statutory provisions creating the court and clothing it with jurisdiction. In other words, regularly constituted courts have power to do anything that is reasonably necessary to administer justice within the scope of its jurisdiction, but not otherwise. Inherent power has to do with the incidents of litigation, control of the court's process and procedure, control of the conduct of its officers and the preservation of order and decorum with reference to its proceedings. Such is the scope of inherent power, unless the authority creating the court clothes it with more.

61 So.2d at 647.

Because of the increasing number of delinquent appeals and the increasing average length of time taken to file briefs in these cases, we think the necessity for further action by this court to protect the rights of those appellants is apparent. In *Kiernan v. State,* 485 So.2d 460 (Fla. 1st DCA 1986), the first district, while indicating a reluctance to disturb the statutory scheme of state funding for indigent appellants through an appellate public defender's office handling all appeals within each district, stated, however, that "when that desire is weighed against the indigent defendant's constitutional right to effective assistance of appellate counsel, the constitutional right must prevail." *Kiernan,* 485 So.2d at 462. *See also White v. Board of County Commissioners of Pinellas County,*

537 So.2d 1376 (Fla.1989), where in holding that a rigid statutory maximum for attorney's fees for appointed counsel violated an indigent defendant's right to competent and effective representation, the supreme court referred to *Makemson v. Martin County,* 491 So.2d 1109 (Fla.1986), *cert. denied,* 479 U.S. 1043, 107 S.Ct. 908, 93 L.Ed.2d 857 (1987), to support the principle of the inherent power of the courts to ensure the adequate representation of the criminally accused. *Cf. Board of County Commissioners of Hillsborough County v. Charles H. Scruggs, III,* 545 So.2d 910 (Fla. 2d DCA 1989).

***4** Therefore, the Public Defender of the Tenth Judicial Circuit shall not be assigned to, and he shall not accept assignments in, any appeals except those from the Tenth Judicial Circuit in which the notice of appeal is filed in the trial court after May 22, 1989. If appointed by a circuit judge or designated by another public defender to handle any of these appeals, the Public Defender of the Tenth Judicial Circuit shall promptly move this court to withdraw. The circuit judges within each circuit shall appoint that circuit's public defender to handle such appeals. Where that public defender can demonstrate conflict or other grounds for his inability to handle any such appeals, he shall file a motion to withdraw in that case and the circuit judge shall appoint other counsel. Contrary to the concern expressed by the dissents, we do not by this procedure disregard the interests of the individual public defenders of each circuit or the fourteen counties within this district. We know from their previous responses in *Haggins* that they do not favor this procedure. However, the interests of the appellants whose rights may be prejudiced by further delays are paramount and must be protected. The interests of the local public defenders and the counties may, if necessary, be more fully explored as explained in *Haggins* upon any motions to withdraw which the local public defenders feel required to file with the trial courts as a result of this order.

In addition, the Public Defender of the Tenth Judicial Circuit therefore shall forthwith file motions for reinstatement in all those cases heretofore dismissed in which the appellants might suffer prejudice by a failure to reinstate. Upon filing the record and appellant's brief in each of those cases, each will be reinstated and the Public Defender of the Tenth Judicial Circuit shall promptly proceed to process these appeals.

This court shall continue to monitor the prosecution of these appeals and this order shall stand until further order of this court.

CAMPBELL, C.J., and SCHEB, RYDER, DANAHY, LEHAN, FRANK, HALL, THREADGILL, PATTERSON and ALTENBERND, JJ., concur.

SCHOONOVER, J., concurring in part; dissenting in part.

PARKER, J., specially concurring in part; dissenting in part.

SCHOONOVER, Judge, concurring in part; dissenting in part.

Although I agree with that portion of the foregoing order permitting the reinstatement of appeals which have been dismissed due to the Tenth Judicial Circuit Public Defender's failure to file timely briefs, I must respectfully dissent from the remaining portion of that order which attempts to solve the Tenth Judicial Circuit Public Defender's problem by relieving him of his statutory duties and leaving the other public defenders in this district to handle appeals for which they are neither equipped nor funded.

In order to explain my reasons for disagreement with the majority's order, a review of the history and background of the problem is helpful. In *Haggins v. State,* 498 So.2d 953 (Fla. 2d DCA 1986), this court considered motions to withdraw in 247 pending criminal appeals. The motions alleged that the Tenth Judicial Circuit Public Defender did not have sufficient funding to handle his case load and that his inability to expeditiously process all of the appeals might place him in the position of affording ineffective assistance of counsel to his clients. As a result of the motions, this court invited responses from the chairmen of the county commissions and the county attorneys of all counties within this district, the chief judges of all circuits within the district, all public defenders and state attorneys in the district, and the attorney general's office. The responses received by this court all opposed the motions to withdraw. Many of the respondents pointed to section 27.51(4), Florida Statutes (1985), which sets forth the Tenth Judicial Circuit Public Defender's responsibility to handle appeals for the other public defenders in this district with funds appropriated pursuant to section 27.51(6), Florida Statutes (1985). Additionally, Hillsborough and Charlotte Counties contended that neither statutory authority nor case law supports mandatory county funding of special assistant public defenders appointed pursuant to section 27.53(2), Florida Statutes (1985). Hillsborough County pointed out that the 1979 version of section 27.53(2), which was relied upon in *Escambia County v. Behr,* 384 So.2d 147, n. 1 (Fla.1980), was amended in 1981 and is no longer authority for requiring the county to pay the fees of

private counsel specifically appointed to represent indigents in noncapital cases. *See* Ch. 81-273, § 2, Laws of Fla.

***5** In *Haggins,* this court denied the motions to withdraw and held that any future attempts by the Tenth Judicial Circuit Public Defender to be relieved from other appeals should be accomplished by filing "appropriate motions to withdraw in the various circuit courts from which those appeals are taken." The rationale for mandating this procedure was persuasive:

> The circuit courts can better determine on a case-by-case basis the possible prejudice to the defendants resulting from any delays, and those courts have the facility to receive evidence concerning such matters as the ability of the public defender to handle his caseload and the means by which substitute counsel, if appointed, can be compensated.

Haggins at 954. In further support of this procedure, this court stated that the following quotation from Justice England's concurring opinion in *Behr* seemed equally applicable to both trial and appellate representation:

> The problem of excessive caseload in the public defender's office should be resolved at the outset of representation, rather than at some later point in a trial proceeding. Public defenders, at the time of their appointment to a new case, are in the best position to know whether existing caseloads render unlikely their ability to continue to conclusion a new representation. If that prospect exists, they should so advise the trial court before undertaking new commitments. Trial judges can then conduct a hearing, in which the county should be entitled to appear, to evaluate the caseload claim and to determine whether private counsel should be assigned to serve as a special assistant public defender.

Thus, in *Haggins,* this court established a precedent of giving all parties who might be affected by a motion of the Tenth Judicial Circuit Public Defender to withdraw as appellate counsel an opportunity to be heard at an evidentiary hearing.

After our decision in *Haggins,* the funding problem of the Tenth Judicial Circuit Public Defender apparently persisted, and he remained unable to handle his appellate case load with the funds provided by the legislature. On March 31, 1987, this court entered an order related to the problem. *See In re Order On Prosecution Of Criminal Appeals By The Tenth Circuit Public Defender And By Other Public Defenders,* 504 So.2d 1349 (Fla. 2d DCA 1987). In the order, this court noted the position of the Florida Judicial Council urging the legislature to address this ever growing problem. The order directed each local public defender within this district, and any other potentially affected parties, such as county attorneys, county commissions, chief circuit judges, state attorneys, and the attorney general, to show cause why the Tenth Judicial Circuit Public Defender should not be discharged as counsel in 150 cases and should not be required to submit the files in those appeals to the other public defenders in this district who, this court concluded, were co-counsel. The responses to the order unanimously opposed the transfer of delinquent criminal appeals to the other public defenders in this district. The respondents asserted that the other public defenders had neither the manpower nor funds necessary to handle appeals and that county budgets lacked funds to pay the private counsel which would necessarily have to be appointed to handle the appeals. Once again Hillsborough County, this time joined by Pinellas County, contended that no authority existed to require the various counties to pay for such appointed attorneys. On June 24, 1987, this court entered an order declining to transfer any of the Tenth Judicial Circuit Public Defender's delinquent appeals. *See In re Order On Prosecution of Criminal Appeals By The Tenth Circuit Public Defender And By Other Public Defenders,* 523 So.2d 1149 (Fla. 2d DCA 1987).

***6** Keeping in mind this history and this court's prior decisions regarding this problem, I now turn to the instant matter. On March 24, 1989, the Tenth Judicial Circuit Public Defender contacted this court by letter. The letter indicated that if no steps are taken by this session of the legislature, he will have to limit the number of cases he will brief. The letter concludes with:

> Any assistance you can lend us in urging the Legislature to act on this matter would be greatly appreciated. A reminder to the Legislature of the state's commitment to fully fund

> Article V costs would be extremely helpful at a time when indigent appellants are being denied meaningful access to the courts....

On the basis of this letter and another recommendation of the Florida Judicial Council that the appellate public defenders be adequately funded by the legislature, the majority has, without even a motion being filed, entered the order from which I partially dissent.

I have no reason to doubt the report of the special committee of the Florida Judicial Council which concluded that the appellate public defenders presently lack adequate funding to cope with the massive number of appeals which they are both constitutionally and statutorily required to handle. *See* Art. V, § 18, Fla. Const.; § 27.51(4), Fla.Stat. (1987). I also agree that this court has an obligation to protect a criminal defendant's constitutional right to effective assistance of appellate counsel and, when necessary to do so, has the inherent power to enter orders assuring that such assistance is provided. *Kiernan v. State,* 485 So.2d 460 (Fla. 1st DCA 1986). However, I believe that insufficient evidence has been presented that such a necessity presently exists. Even if sufficient evidence had been presented to this court, the procedure set forth in *Haggins* would still apply. Appellate courts are not permitted to act as a *nisi prius* tribunal in cases where factual determinations must be made in order to arrive at a decision. *Newberry v. State,* 296 So.2d 586 (Fla. 1st DCA 1974).

In addition to disregarding the procedure set forth in *Haggins,* the majority's *sua sponte* order ignores the fact that the other public defenders of this district are not funded or equipped to handle appeals. According to responses received to this court's previous decisions addressing the Tenth Judicial Circuit Public Defender's continuing plight, the majority's order will most likely result in motions to withdraw by the other public defenders of this district when the responsibility of appellate representation is passed along to them. *See also, Kiernan.* If such motions are granted, special assistant public defenders will have to be appointed pursuant to section 27.53(2), Florida Statutes (1987). The majority has failed to directly address the prior contentions of Hillsborough, Charlotte, and Pinellas Counties that the counties of this district have no obligation to pay any private attorneys that may be appointed to handle noncapital appeals pursuant to section 27.53(2). Instead, the majority cites *White v. Board of County Comm'rs of Pinellas County,* 537 So.2d 1376 (Fla.1989), and *Makemson v. Martin County,* 491 So.2d 1109 (Fla.1986), *cert. denied,* 479 U.S. 1043, 107 S.Ct. 908, 93 L.Ed.2d 857 (1987). Both of these cases, however, deal only with capital cases where the legislature has specifically placed the burden of paying all compensation and costs upon local government. *See* § 925.035, Fla.Stat. (1987). The majority's order affects only noncapital cases.

***7** Justice Terrell in a discussion of the separation of powers doctrine stated, "Creating officers or positions and allocating public funds to support them, are clearly legislative prerogatives that the judiciary has no right to interfere with, absent specific authority from the legislature." *Petition of Florida Bar,* 61 So.2d 646 (Fla.1952). Since the majority's order may result in the reallocation of funds to support the state's appellate public defender system, and for the other reasons discussed herein, I must respectfully dissent. If the Tenth Judicial Circuit Public Defender is unable to perform his statutory duties with the funds at his disposal, he should follow the appropriate procedure for withdrawing as counsel. This procedure would allow all interested parties an opportunity to be heard.

PARKER, Judge, Specially concurring in part; dissenting in part.

I concur with the majority that the case of *White v. Board of County Commissioners of Pinellas County,* 537 So.2d 1376 (Fla.1989) permits this court, through its inherent judicial power, to provide for adequate representation of indigent criminal defendants. This power, in my opinion, allows this court to direct the Public Defender of the Tenth Judicial Circuit to accept no additional appellate cases from other circuits until his case load is manageable. Further, I agree that section 27.51, Florida Statutes (1987) can be read broadly enough to require the public defender who was the trial attorney to handle the appeal.

However, I share Judge Schoonover's concern, as expressed in his dissent, that the majority's order disregards the procedures established in *Haggins v. State,* 498 So.2d 953 (Fla. 2d DCA 1986), which require the public defender to file a motion and anticipate a hearing on the matter. In my opinion, the entry today of an order of this magnitude in this manner violates due process. There has been no motion directed to this issue pending in the trial court or in this court, and no responses have been ordered from affected parties.

The majority's order would require the counties to provide the compensation for appointed counsel. It is unlikely that the legislature, in enacting sections 27.53(2), 27.53(3), and 925.036, Florida Statutes (1987), which

provide private counsel for indigent criminal defendants in special circumstances, envisioned the eleven counties[1] of this district paying attorneys' fees of appointed counsel in a substantial number of cases each month until such time as the appellate public defender brings current his case load, which would be the effect of this order if the trial judge permits the local public defender to withdraw. I believe the legislature never considered the situation now engendered by the majority where private counsel, funded by a county, will handle the appellate public defender's substantial incoming case load for an extended period of time. The financial impact which the majority's order will have upon the counties will be considerable, and the counties, at the very least, deserve an opportunity to be heard before such a mandate is issued.

***8** As Justice Overton pointed out in his concurring opinion in *White,* while the courts of this state may exercise their inherent authority to require the state to ensure that indigents are provided competent, effective counsel who are to be paid reasonable compensation, the state's inadequate funding of the various public defenders results in placing the financial burden squarely upon the pocketbooks of the counties. Without a full hearing in which the impacted counties are permitted to present their views, I question this court's authority to order a county to appropriate funds to pay for private counsel to replace the public defender in these appeals if the Florida Statutes do not specifically so provide. There is an argument to be made that the amendment to section 27.53(2)[2] renders inapplicable the footnote in *Escambia County v. Behr,* 384 So.2d 147, 148 n. 1 (Fla.1980), which relied upon the 1977 version of section 27.53(2) in holding that the counties were required to pay the fees and expenses of appointed private counsel.

Finally, I note that section 27.53(2) requires that an attorney must register on a list before he or she is considered for service as a special assistant public defender. My experience as a trial judge indicates to me that if there is no funding to compensate these attorneys for their services, the number of attorneys disposed to serve will be insufficient to meet the need.

While I agree with the majority that this problem of failing to provide adequate representation to indigent criminal defendants is of the utmost importance to these defendants and to the court, I take issue with the method the majority uses to achieve a solution. Because I cannot agree that this court can direct the counties to appropriate these funds without a motion and full hearing, I refrain from joining in the majority opinion in that respect.

All Citations

Not Reported in So.2d, 1989 WL 142259

Footnotes

1 The three counties of the Tenth Judicial Circuit are not affected by this order.

2 That statute previously read as follows:
(2) In addition, any member of the bar in good standing may be appointed by the court to, or may register his or her availability to the public defender of each judicial circuit for acceptance of, special assignments without salary to represent insolvent defendants. Such persons shall be listed and referred to as special assistant public defenders and be paid a fee and costs and expenses. *Such fee and costs and expenses shall be fixed by the trial judge and shall be paid in the same manner as counsel fees are paid in capital cases or as otherwise provided by law.* In addition, defense counsel may be assigned and paid pursuant to any existing or future local act or general act of local application.
§ 27.53(2), Fla.Stat. (1977) (emphasis supplied). As amended, the statute now provides:
(2) Any member of The Florida Bar, in good standing, may register his availability to the public defender of any judicial circuit for acceptance of special assignments without salary to represent indigent defendants. Such persons shall be listed and referred to as special assistant public defenders and be paid a fee and costs and expenses as provided in s. 925.036.
§ 27.53(2), Fla.Stat. (1987).

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