

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-1828

THOMAS ANTHONY WYATT,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

**ON APPEAL FROM THE CIRCUIT COURT
OF THE NINETEENTH JUDICIAL CIRCUIT,
IN AND FOR INDIAN RIVER COUNTY, STATE OF FLORIDA**

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's Order granting Appellee's motion for an *in camera* hearing with regard to the conflict that arose between Mr. Wyatt and his current counsel. The conflict was brought to the circuit court's attention through a certification of conflict.

The following abbreviations will be utilized to cite to the record in this cause, with appropriate page number(s) following the abbreviation:

"R." -- record on appeal to this Court;

"Supp. R." -- supplemental record on appeal materials.

REQUEST FOR ORAL ARGUMENT

Mr. Wyatt has been sentenced to death. The resolution of the issues involved in this action will therefore impact whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Wyatt, through counsel, accordingly urges that the Court permit oral argument.

STANDARD OF REVIEW

The standard of review is *de novo* as this is strictly an issue of law.

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STATEMENT OF THE CASE AND FACTS

In January, 1991, Thomas Wyatt was convicted of three counts of first degree murder and related offenses. The next month he was sentenced to death. This Court affirmed his conviction and sentences on direct appeal. Wyatt v. State, 641 So. 2d 1336 (Fla. 1994), cert. denied 115 S.Ct. 1983 (1995).

In November, 1991, Mr. Wyatt was convicted of another first degree murder. He was sentenced to death in December, 1991. This Court affirmed his conviction and death sentence on direct appeal. Wyatt v. State, 641 So. 2d 335 (Fla. 1994), cert. denied 115 S.Ct. 1372 (1995).

In July 1996, per this Court's order, the former Office of the Capital Collateral Representative (CCR), assumed representation of Mr. Wyatt for his postconviction proceedings. (Supp. R. 36).

In October, 1996, this Court promulgated Rule 3.852 which set forth the procedures by which capital postconviction defendants were required to follow in their pursuit to obtain public records. However, shortly after the rule was enacted this Court stayed the effect of the rule. On March 3, 1997, this Court lifted the stay and Mr. Wyatt immediately sought to obtain public records regarding his cases.

Access to public records was not the only impediment preventing Mr. Wyatt from litigating his postconviction claims. On March 19, 1997, Mr. Wyatt filed his

initial postconviction motions requesting relief. (Supp. R. 1 - 33). In that motion, Mr. Wyatt detailed the circumstances that prevented him from receiving effective assistance of postconviction counsel. (Supp. R. 1 - 16). Mr. Wyatt averred:

Those circumstance include: the underfunding of CCR; that all clients with initial 3.850 motions due after January 1, 1997, have been denied any funding to obtain the assistance of expert witnesses; that the workload of attorneys, investigators and staff of the CCR prevents counsel from providing effective assistance; that CCR is understaffed and unable to fill present vacancies; and that there is a general uncertainty about the future of the provision of post-conviction counsel to death sentenced inmates in Florida by CCR.

(Supp. R. 10).

The following month, in April, 1997, the Capital Collateral Representative filed an Emergency Motion to Suspend Operation of Rule 3.852. On May, 14, 1997, this Court granted CCR's motion and tolled the times under Rule 3.852 until September 1, 1997 for Mr. Wyatt. (Supp. R. 149). Subsequently, this Court extended the stay until October 1, 1998, when this Court promulgated a revised version of Rule 3.852.

Mr. Wyatt's inability to access public records was accompanied by the abolition of CCR and creation of the three offices of Capital Collateral Counsels. The overhaul of the system which provided capital postconviction defendants with

representation caused Mr. Wyatt to lose his designated counsel. Thus, during this tumultuous time, this Court also stayed the time limitations under Rule 3.851 in Mr. Wyatt's case. (Supp. R. 186).

The circuit court also entered an order extending the time frames of Rule 3.851 until August 10, 1998, for Mr. Wyatt to file his Rule 3.850 motion.

Because of Mr. Wyatt's inability to access the public records to which he was constitutionally entitled (the revision of Rule 3.852 did not become effective until October 1, 1998), the circuit court recognized Mr. Wyatt's conundrum and granted further continuances for filing his final Rule 3.850 motion.

In 1999, Mr. Wyatt litigated several public records issues before the circuit court. In February, 1999, the circuit court set forth a schedule regarding public records litigation. (Supp. R. 207-208). Further, the court set filing dates for Mr. Wyatt's Rule 3.850 motions; the dates were set for November 30, 1999, and December 17, 1999.

However, in the fall of 1999, it became clear that public records continued to be withheld from Mr. Wyatt. Appellant filed a motion to continue the dates for filing Mr. Wyatt's 3.850 motions. (Supp. R. 209-215). The circuit court denied Mr. Wyatt's motion. (Supp. R. 216).

On November 29, 1999, counsel for Mr. Wyatt filed an Emergency Motion to Toll the November 30, 1999, Deadline. (Supp. R. 221- 224). Attached to the motion was Mr. Wyatt's Preliminary Amended Motion to Vacate Judgments of Conviction and Sentence. (Supp. R. 225-460).

Shortly thereafter a hearing was held at which the circuit court extended the time frames for Mr. Wyatt to file his amended Rule 3.850 motions. (Supp. R. 833). The court granted an extension of time because the Repository did not copy or send thirty-five (35) boxes of public records to Mr. Wyatt and the court failed to send Mr. Wyatt materials that, after an *in camera* inspection, the court determined were not exempt for public records production:

THE COURT: The repository has been a disaster since the onset. . . . It's been a disaster since the start and I'm sure this is not the only case that is effected by the repository. So just from what's happened in this case I'm not going to be placing blame for the records not getting back to CCRC at this point in time, . . .

As I stated earlier because I was remiss in not getting the in-camera inspection documents to Mr. Tomasino and the other parties I am going to extend the time frame for the amended 3.850 . . .

(Supp. R. 833).

On February 7, 2000, undersigned counsel filed a Certification of Conflict with the circuit court. Counsel also requested that the court toll the time in which to file Mr. Wyatt's amended Rule 3.850 motions.

The court scheduled a hearing for March 20, 2000, regarding the conflict issue. When the court realized that Mr. Wyatt was not physically present, but only appearing by phone, the court ordered the hearing rescheduled so that Mr. Wyatt could be physically present. (Supp. R. 877). At that hearing, undersigned informed the Court:

A conflict of interest has arisen involving Mr. Wyatt . . .

* * *

. . . we are unable due to client confidentiality to divulge what the basis of the conflict is. Having Mr. Wyatt's presence here can confirm that we have talked to him, have fully advised him of the basis of the conflict and went over the applicability of waiver as he is not waiving the basis of confidentiality, so having him here in person is not going to --

(Supp. R. 878).

Subsequently, the court reset the hearing for June 20, 2000. Shortly before June 20th, the circuit court *sua sponte* cancelled the hearing and reset the hearing for August 8, 2000.

On August 8, 2000, the circuit court held a hearing on the conflict issue. At the start of the hearing, without any notice, the Appellee made an *ore tenus* motion for an *in camera* hearing in which undersigned counsel would be compelled to reveal the factual basis of the conflict between he and his client. (R. 15). In support of the motion, Appellee cited to Brooks v. State, 762 So. 2d 879 (Fla. 2000). (R. 17).

Undersigned informed the court that the basis of the conflict stemmed from a conflict between clients represented by the Capital Collateral Counsel - Northern Region (CCC-NR). Thus, Rule 4-1.7 of the Rules of Professional Conduct governed undersigned's duties to bring the matter before the court and secure conflict free counsel for Mr. Wyatt:

Rule 4-1.7. Conflict of interest; general rule

(a) Representing Adverse Interests. A lawyer shall not represent a client if the representation of that client will be directly adverse to the interests of another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the lawyer's responsibilities to and relationship with the other client; and

(2) each client consents after consultation.

(R. 18). Undersigned informed the court that "the continued representation of Mr. Wyatt would result in violation of the rules of professional conduct." (R. 19).

Furthermore, undersigned informed the court that even if the court held an *in camera* hearing, undersigned could not divulge the facts creating the conflict because to do so would breach the attorney/client privilege and may be detrimental to Mr. Wyatt's postconviction appeals. (R. 19-20). Undersigned informed the court that none of the exceptions to Rule 4-1.6 of the Rules regulating the Florida Bar applied to Mr. Wyatt's case. (R. 19- 20).

Undersigned informed the court that:

-- attorney/client confidences are just that no matter where they go to whether it be sealed, but it would still have to go to you, to a court reporter, to people that have access to that.

There's nothing that's suppose to be able to disturb attorney/client confidences unless it fits one of those two categories.

(R. 21). In fact, the court indicated that undersigned's analysis was always his understanding of the attorney/client privilege. (R. 21). However, the court indicated that the Brooks case appeared to sway his understanding. (R. 21).

Undersigned argued that the Brooks case involved one of the exceptions to the Rule relating to disclosure of attorney/client communications -- that in the Brooks case, the capital defendant alleged that his trial counsel was being

ineffective. (R. 23). While Mr. Brooks was dissatisfied with his counsel, Mr. Wyatt had no such complaint. Undersigned informed the court: "there's not any issue at all that Mr. Wyatt is dissatisfied with our representation. . . . We are not here because we cannot work together or we cannot get along." (R. 24).

Furthermore, undersigned reiterated: "neither of [the State's] cases are instructive here because both of those cases dealt with an issue when the client was upset with the lawyers' representation." (R. 24).

After hearing from the parties, the court stated:

It's just that I don't know of any other way to do this, to resolve the conflict, other than order the in-camera inspection, but in view of the fact that this is [a] somewhat novel issue I'm going to propose entering an order that will kind of cover or try to cover both basis in this.

I'm going to enter the order to stay -- stay it's execution for 30 days **to give CCR the right to certify this and attempt to obtain interlocutory relief from the Supreme Court of Florida.**

I'm treating this [as] a discovery motion. I'm granting it. I would encourage CCR to take an interlocutory appeal on this issue. I think it needs to be addressed. It needs to be definitively settled ...

(R. 29)(emphasis added).

The following day, the judge entered a written order reflecting his oral pronouncement. (R. 10). This appeal follows.

SUMMARY OF ARGUMENT

The circuit court erred in treating Mr. Wyatt's Certification of Conflict as a discovery matter and in granting Appellee's *ore tenus* motion for an *in camera* hearing which would force undersigned to reveal privileged attorney/client communications.

ARGUMENT I

THE LOWER COURT ERRED IN GRANTING APPELLEE'S MOTION TO CONDUCT AN *IN CAMERA* HEARING AND COMPEL MR. WYATT TO DISCLOSE THE FACTUAL CIRCUMSTANCES CREATING A CONFLICT BETWEEN HE AND HIS POSTCONVICTION COUNSEL.

Florida Statute, § 27.703 states:

27.703 Conflict of interest and substitutional of counsel.

(1) If, **at any time** during the representation of two or more persons, **the capital collateral regional counsel determines** that the interests of those persons are so adverse or hostile that they cannot all be counseled by the regional counsel or his or her staff without conflict of interest, the sentencing court **shall**, upon application by the regional counsel, designate another regional counsel and, only if a conflict exists with the other two counsels, appoint one or more members of The Florida Bar to represent one or more of such persons.

Fla. Stat. § 27.703 (1999)(emphasis added). Mr. Wyatt and his collateral counsel complied with the provision of Fla. Stat. § 27.703 in filing a certification of conflict with the circuit court.

In early 2000, CCC-NR determined that the interests of Mr. Wyatt and other CCC-NR clients were adverse. Accordingly, undersigned filed a Certification of Conflict with the lower court. Under the statute governing situations where conflicts arise, the circuit court **shall** remove CCC-NR and appoint conflict free counsel for Mr. Wyatt. The statute does not provide the circuit court with any discretion to compel collateral counsel to divulge the factual circumstances leading to the conflict. As the statute indicates, the collateral counsel determines whether a conflict exists.

Additionally, the statutory provision requiring CCC-NR's withdrawal in cases of conflict do not require disclosure of any kind. Section 27.703(1), Fla. Stat. (1999). By the terms of the statutory provision, no factual basis need be set further and the withdrawal motion shall be granted "upon application."

This Court has addressed the conflict situation previously. Prior to 1998, the statute pertaining to public defender conflicts of interest was virtually identical to § 27.703. Section 27.53(3) stated:

If at any time during the representation of two or more indigent the public defender shall determine that the interests of those accused are so adverse or hostile that they cannot all be counseled by the public defender or his or her staff without conflict of interest, or that none can be counseled by the public defender or his or her staff because of conflict of interest, it shall be the public defender's duty to move the court to appoint other counsel.

Florida Statutes 27.53(3) 1997. This Court and the district courts of appeal, when asked to interpret 27.53(3), repeatedly held that "once a public defender moves to withdraw from the representation of a client based on a conflict due to adverse or hostile interests between the two clients . . . a trial court **must** grant separate representation." Guzman v. State, 644 So. 2d 996, 999 (Fla. 1994); see also Babb v. Edwards, 412 So. 2d 859, 860 (Fla. 1982); Blackwood v. State, 755 So. 2d 699, 700 (4th DCA); Leslie v. State, 720 So. 2d 559, 560 (4th DCA 1998); Crowe v. State, 701 So. 2d 431 (5th DCA).

The Babb case settled the conflict among the district courts of appeal as to whether § 27.53(3) required trial courts to consider and weigh numerous factors before appointing conflict free counsel. 412 So. 2d at 859. This Court held that the plain language of 27.53(3) specifically prohibited the lower courts from inquiring as to the factual basis of the conflict, when the public defender certified the interests of multiple clients were adverse. Babb at 862.

Like the former 27.53(3), the plain language of § 27.703 leaves no doubt that upon certification by the collateral counsel that a conflict exists, the circuit court must appoint conflict-free counsel. Undersigned counsel informed the lower court that continued representation of Mr. Wyatt would be adverse to his own interests and adverse to the interests of other CCC-NR clients. (R. 24) Upon that certification, the lower court had no choice but to assign Mr. Wyatt conflict-free counsel.

Furthermore, an *in camera* hearing wherein undersigned is compelled to reveal the facts surrounding the conflict is untenable because collateral counsel is prohibited from revealing the factual circumstances surrounding the conflict because the conflict is based, in part, upon information which is privileged.

Florida Rule of Professional Conduct 4-1.6 makes clear that undersigned **must not** disclose the information obtained from Mr. Wyatt:

Rule 4-1.6 Confidentiality of Information

(a) Consent Required to Reveal Information. A lawyer **shall not** reveal information relating to representation of a client except as stated in subdivisions (b), (c), and (d), unless the client consents after disclosure to the client.

(b) When Lawyer Must Reveal Information. A lawyer shall reveal such information to the extent the lawyer reasonable believes necessary:

(1) to prevent a client from committing a crime; or

(2) to prevent a death or substantial bodily harm to another.

(c) When Lawyer May Reveal Information. A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to serve the client's interest unless it is information the client specifically requires not to be disclosed;

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and client;

(3) to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved;

(4) to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(5) to comply with the Rules of Professional Conduct.

Rule 4-1.6, Rules of Professional Conduct (emphasis added). None of the exceptions to the rule that counsel "**shall** not reveal information relating to representation of a client" apply in Mr. Wyatt's case. As counsel stated at the August 8th hearing:

. . . there's not any issue at all that Mr. Wyatt is dissatisfied with our representation.

* * *

We are not here because we cannot work together or we cannot get along. **The reason we are here is because of 4-1.7 that continued representation of Mr. Wyatt would be adverse to his own interest and adverse to interests to other clients in our office.**

(R. 24)(emphasis added).

The circuit court's order granting the State's *ore tenus* motion for an *in camera* hearing and treating the matter as a motion for discovery was in error.

The court's reliance on Brooks v. State, 762 So. 2d 879 (Fla. 2000), and Trepal v. State, 754 So. 2d 702 (Fla. 2000), in treating the certification of conflict as a discovery issue is misplaced. In Brooks and Trepal, this Court addressed whether information was discoverable when a defendant claimed that trial counsel was ineffective.

In Brooks, a trial attorney moved the trial court to allow him to withdraw. 762 So. 2d 879, 889. The trial attorney cited a conflict with his client based on "Brooks' indications of dissatisfaction and Brooks' increasing hostility directed to [trial counsel]." Id. Thus, the trial court conducted an *in-camera* hearing to determine if the motion should be granted. Id. Unlike Mr. Wyatt's case, Brooks's

dissatisfaction with his trial attorney prompted the court to hold an *in camera* hearing to determine if he should allow trial counsel to withdraw. Thus, the attorney was able to reveal the factual basis surrounding his motion to withdraw because, while the information may have been considered privileged, it fell within one of the exceptions to ethical prohibition against revealing attorney/client communications. See Rule 4-1.6(c)(4), Rules of Professional Conduct.

As undersigned informed the circuit court the conflict in Mr. Wyatt's case did not concern any dissatisfaction by Mr. Wyatt in regard to collateral counsel's representation. Rather, the conflict concerned adverse interests between Northern Region clients, including Mr. Wyatt. Information that is obtained from attorney/client communications is not discoverable by the State under these circumstances.

In Trepal, this Court found that the attorney/client privilege between a defendant and his trial attorney was waived in postconviction once a defendant raised an ineffective assistance of counsel claim. 754 So. 2d at 707. Again, the conflict in Mr. Wyatt's case does not concern any claims regarding ineffective assistance of counsel (either at trial or in postconviction). Therefore, the factual circumstances related to information learned through counsel's representation of Mr. Wyatt cannot be disclosed.

Clearly, the circumstances surrounding the conflict are not included in any of the exceptions to the rule prohibiting undersigned from revealing attorney/client confidences. Because the attorney/client privilege cannot be disturbed, it was error for the lower court to order counsel for Mr. Wyatt to divulge the confidential information in an *in camera* review.

CONCLUSION

Based upon the foregoing argument, reasoning, citation to legal authority and the record on appeal, appellant, THOMAS ANTHONY WYATT, urges this Court to reverse the lower court's order granting an *in camera* hearing and compelling Mr. Wyatt to divulge the factual circumstances surrounding his conflict with collateral counsel.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief has been furnished by United States Mail, first class postage prepaid, to all counsel of record on May 7, 2001.

CERTIFICATION OF TYPE SIZE AND STYLE

This is to certify that the Initial Brief of Appellant has been reproduced in a 14 point Times New Roman type, a font that is not proportionately spaced.

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