

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
FOURTH DISTRICT

CASE NO. 4D06 2717
Filed July 10, 2006

CLIFF BARNES, ST. LUCIE COUNTY JUDGE,

Petitioner,

PETITION FOR WRIT OF MANDAMUS

vs.

DIAMOND LITTY, 19TH CIRCUIT PUBLIC DEFENDER,
BRUCE COLTON, 19TH CIRCUIT STATE ATTORNEY,
KEN MASCARA, ST. LUCIE COUNTY SHERIFF, et al.,

Respondents.

_____ /

The Petitioner requests that this Honorable Court issue a Writ of Mandamus compelling Respondents to each comply with the constitutional, statutory, and procedural rules which the Legislature and Florida Supreme Court long ago put in place to provide for a meaningful First Appearance Hearing for all citizens accused of a crime who cannot immediately make bond. Specifically, Petitioner requests that this Honorable Court order Sheriff Ken Mascara to comply with Florida Rules of Criminal Procedure 3.111(c), Public Defender Diamond Litty to comply with Florida Rules of Criminal Procedure 3.111(c), 3.130, 3131, State Attorney Bruce Colton to comply with Section 27.02, Florida Statutes, and Chief Judge William Roby, Circuit Judges Ben

Bryan, Burton Conner, Scott Kenney, Dan Vaughn, and County Judges Kathryn Nelson, Philip Yacucci, and Tom Walsh to comply with the United States Constitution, Florida Constitution, Sections 901.07, 903.046, and 907.041 Florida Statutes, and Florida Rules of Criminal Procedure 3.111, 3.130, and 3.131, and 3.132. In addition, Petitioner requests this Honorable Court to order Chief Judge Roby to remove Judge Walsh, or Judge Walsh to disqualify himself, from handling First Appearance hearings pursuant to Paragraph E, Canon 3 of the Code of Judicial Conduct.

Chief Judge William Roby and the other judges ("First Appearance judges") are hereby named as respondents to this petition although their names are omitted from the caption pursuant to Florida Rule of Appellate Procedure 9.110(e)(1) and (2). Accompanying this Petition is an appendix prepared pursuant to Florida Rule of Appellate Procedure 9.220. The symbol "A" indicates the appendix; the number following "A" indicates the page number stamped in the lower-right corner of each page in the appendix. All emphasis is supplied unless otherwise indicated. As grounds for the petition, petitioner states as follows:

I. BASIS OF JURISDICTION

Florida's Constitution gives this Honorable Court jurisdiction over petitions of writs of mandamus under Article V, Section 4(b)(3). Florida's Supreme Court has adopted Florida

Rule of Appellate Procedure 9.030(b)(3) which also gives jurisdiction.

Mandamus is the appropriate remedy for violations of the Florida Rules of Criminal Procedure . See *Public Defender v. State*, 714 So.2d 1083 (Fla. 3d DCA 1998) (First Appearance judges ordered to follow 3.130 re: timing of indigency determinations).

II. STATEMENT OF FACTS

1. Petitioner is a recently elected (2004) County Judge in St. Lucie County and is familiar with the procedures currently used by the first appearance judges in St. Lucie County, and by the practices of the Sheriff, Public Defender and State Attorney. Before being elected County Judge, Petitioner served as County Commissioner for 12 years and practiced primarily criminal law in St. Lucie County for almost 23 years. Petitioner was recognized by the Florida Supreme Court as a Board Certified Criminal Trial Lawyer for 15 years. In three different periods, for a total of about 6 years, Petitioner worked as an Assistant Public Defender for the 19th Circuit.

2. Relief of the type requested here would normally be filed by the circuit's Public Defender, as in *Public Defender v. State* 714 So.2d 1083 (Fla. 3rd DCA 1998). However the Public Defender of the 19th Circuit, Diamond Litty, is married to one of the first appearance judges, Tom Walsh. Litty is also herself a

respondent. Thus, there is no other party appropriate to bring this petition.

3. The Sheriff of St. Lucie County, Ken Mascara, has been appointed by St. Lucie County to run the Jail. He is therefore responsible for the actions of the booking officer. In St. Lucie County, the booking officer makes no effort to immediately determine apparent indigency and to place such defendants in immediate and effective contact with the office of Public Defender Diamond Litty. This action is not performed for hours, often just before a defendant's first appearance. Usually, indigent defendants are temporarily appointed the Public Defender at First Appearance, but receive no representation.

4. Chief Judge William Roby has arranged for the county judges (except Petitioner) to share First Appearance duty on weekdays. Circuit judges who reside in St. Lucie County share the weekends with the county judges. Thus, county judges Philip Yacucci, Kathryn Nelson, and Tom Walsh do the bulk of the First Appearance hearings.

5. The First Appearance judges' procedures, approved by Chief Judge Roby, do not meet the procedural and due process requirements set forth in the Florida Supreme Court's Criminal Rules of Procedure, Florida Statutes, case law, and the Florida and United States Constitution.

6. First Appearance Hearings in St. Lucie County are held over video, wherein the defendants are never in the physical presence of the judge. The defendants first see a video explaining their rights, and are then brought before the judge on camera. The judge advises them of their rights, the charges, reviews the complaint affidavit for probable cause and reviews a criminal history when available. The judge then makes a temporary appointment of the Public Defender to those who appear indigent from their financial affidavits. The judge normally then sets a monetary bond.

7. In probable cause arrests the First Appearance judges usually approve the monetary bond already set by the booking officer using the standard bond schedule for St. Lucie County. In warrant arrest cases, the bond already set by the issuing judge is rarely changed by the First Appearance judges. The judges believe that "collegiality" prevents them from changing another judge's bond even though that was set without any input from the accused or their attorney, and with little or no information about the accused.

8. The First Appearance judges almost never pause in the proceedings to allow defendants to confer with their newly appointed lawyer before setting bond, and almost never elicit any input from the defendant, Assistant Public Defender, or Assistant

State Attorney as to circumstances supporting a possible non-monetary release.

9. Often defendants are denied bond without a proper motion from the State for Pretrial Detention.

10. For defendants arrested on out of county warrants, judges refuse to change the warrant amounts - apparently believing they have "no jurisdiction".

11. Where defendants' criminal history sheets contain references to Failures to Appear, judges almost never ask about the circumstances of same. (Petitioner has observed that in this county, and indeed circuit, many FTA's have been issued in error where defendants were either incarcerated on their hearing date, or due to clerical errors).

12. Seldom are any defendants released at First Appearance on purely non-monetary conditions. Recently, some of the judges have begun releasing a few defendants to the Pre-trial Supervision program authorized by Chief Judge Roby which is a form of non-monetary release. However, the requirements to be admitted into the program are far stricter than that required by the rules and laws pertaining to First Appearance that entitle defendants to be considered for a less restrictive form of non-monetary release, such as ROR. For example, a defendant with the assets can bond out on a violent felony with no supervision

pending trial, while an indigent defendant may have strict supervision on the most trivial of charges.

13. The First Appearance procedures as described place an enormous financial burden on defendants who are able to meet their monetary bonds, and on the taxpayers who pay to house those who can't. It also has the effect of denying pretrial release to most indigent defendants.

14. A recent study by a national expert, Dr. Alan Kalmanoff of the Institute for Law and Policy Planning, has found that typically 70% of the inmates in the St. Lucie County jail are awaiting trial, 53% are minimum security, and 10% are misdemeanants with no pending felony (who average 63 days in custody). Even more shocking is that, of original arrestees, only about 3% are released on ROR pending trial.

15. It has been estimated that St. Lucie County, with a population of about one sixth of Palm Beach County nevertheless has about half as many inmates.

16. Often the First Appearance Hearing, at which no determination of guilt is made, serves in all practicality as an indigent defendant's sentencing since Dr. Kalmanoff's study reveals that 23% of defendants released from our jail (including all releases, even to DOC) are for "time served", and many others serve "State Attorney Time" as we in the profession call it -

i.e. their charges are simply dropped after they serve days, weeks, or months after being held on a bond they cannot make.

17. The Public Defender does not provide immediate communication to all apparently indigent defendants who have just been arrested and booked at the jail, nor does she seek the setting of a reasonable bond at First Appearance. Litty has publicly taken the position that her office will not represent defendants, despite being appointed at First Appearance, for 21 days or until the State has filed formal charges, and that she has to wait for the "paperwork" **(A-2)**.

18. On weekdays, the Public Defender appears at First Appearance through one assistant stationed at the jail. This lawyer was funded by the St. Lucie County Commission while Petitioner served on that board and at his request. However, the assistant rarely speaks for defendants, even after having been appointed.

19. The Public Defender does not appear for First Appearances at all on the weekends, despite that being the busiest arrest period.

20. Petitioner has observed in his court that most misdemeanor defendants who can not make monetary bond do not see an Assistant Public Defender until their arraignment - usually several weeks later- when they are conveyed a plea offer. In 2005 these

defendants would often have served the maximum sentence on 60 day offenses before being seen.

21. Petitioner has also observed that in the 18 months that he has been handling criminal cases the Public Defender has never tried a case in his court and has only applied for several bond reductions out of the thousands of defendants who have sat awaiting trial on misdemeanors.

22. To Petitioner's knowledge Litty's office has never, in her fourteen years of tenure, ever complained to the judges about the improper procedures in this county, or brought a Writ of Habeas Corpus to this Court to litigate a bond that her indigent client could not afford.

23. Litty, however, has been a vocal proponent of jail expansion, and has actually sued St. Lucie County seeking funding for the expansion. Ironically, her attorney Robert Watson of Stuart has written a letter to the County pointing out the problems with First Appearance hearings in the county and stating that "For twenty six years I have seen first appearance hearings in this Circuit and I can't for the life of me understand why anyone goes through the trouble other than to facially satisfy the requirement...that such hearings be held..."

23. Not surprisingly, Litty publicly prides herself on her close ties with the State Attorney and Sheriff **(A-1,2,4)**. Dr.

Kalmanoff (who Litty publicly described as an "idiot") recently documented the problems with Litty's lack of advocacy for the poor, and its detrimental effects on the local criminal justice system and taxpayers (**A-3,4,5,6,7**).

24. State Attorney Bruce Colton usually sends an assistant to appear at first appearance on weekdays, but they rarely speak on behalf of victims and law enforcement. Colton does not have any attorneys appear on the weekends.

25. Petitioner has obtained recordings of the hundreds of First Appearance hearings conducted by Judge Tom Walsh on 43 days between December 5, 2005 and May 19, 2006, and has reviewed most of them. Petitioner observed:

a. His hearings usually last, at most, several minutes per defendant.

b. He makes no effort to determine circumstances about a defendant's background that would give him the ability to make a fact-based decision whether the defendant would be a flight risk or danger to the community, and how to decrease the possibility of same without incarceration or monetary bond.

c. Despite non-monetary bond being the presumed method of release under the law, Petitioner found only one case where Judge Walsh granted same.

d. He rarely cites any facts to justify any pretrial

release condition more restrictive than ROR, and almost always imposes purely monetary conditions.

e. Judge Walsh routinely tells defendants he is setting their bond pursuant to the "standard bond schedule".

f. He routinely tells defendants he "can't" change bonds other judges have previously set on arrest warrants.

g. Petitioner could not find one instance where Judge Walsh released a defendant on the Pre-trial Release Program established by Chief Judge Roby's Administrative Order even though the program is far stricter than the type of non-monetary pretrial release contemplated by the law.

h. In one case, State v. Moran, heard on April 27, 2006, he actually warned the County's contracted Pre-trial Services provider, Sandy Sticco, that she would be committing a "felony" if she kept talking since she wasn't a lawyer and to "step away" (**A-8,9**). Shortly after expressing his disdain for the new program (**A-8**), he refused to hear from Ms. Sticco about that defendant's circumstances that had already qualified her for the Pre-trial Release Program (**A-9**).

15. At a recent County Commission meeting regarding jail overcrowding, Ms. Sticco advised the commissioners that Ms. Litty's assistant at First Appearance appeared to be intimidated by her boss' husband, Judge Walsh.

III. STANDING

Regarding that part of the writ sought that pertains to the First Appearance judges, Petitioner has on many occasions, for well over a year, advised Chief Judge Roby verbally and in writing of the most important deficiencies in the procedures. Petitioner has provided Roby with this Court's opinion in *Puffinberger v. Holt* , 545 So.2d 900 (Fla. 4th DCA 1989), and Roby himself provided Petitioner with the Florida Supreme Court's opinion in *State v. Norris* , 768 So.2d 2000 (Fla. 2000). Roby has never claimed the First Appearance procedures adhere to the law, but while Petitioner was conducting First Appearances, rebuked Petitioner for not being "collegial" and honoring the methods used by the other judges. The Chief Judge denied Petitioner's request for a meeting of First Appearance judges to discuss the applicable law, and on July 25, 2005 removed Petitioner from conducting first appearances because of their disagreement. More recently, Roby refused to issue an administrative order detailing the proper procedures for the First Appearance judges to follow. The normal routine as described above has, in effect, become a de facto administrative order, with discipline meted out for judges who wander from it into the requirements of law that are there to protect the

accused.

Petitioner is required by the Code of Judicial Conduct, to "...strive to enhance and maintain confidence in our legal system"(Preamble), "...participate in establishing, maintaining, and enforcing high standards of conduct"(Canon 1), and "...be faithful to the law...and not be swayed by partisan interests, public clamor, or fear of criticism"(Canon 2). It is in this spirit that this Petition is filed.

Petitioner has no other remedy available to address any of the improper First Appearance procedures complained of which are committed by the various respondents.

IV. NATURE OF RELIEF SOUGHT

Petitioner seeks a Writ(s) of Mandamus directed to: Sheriff Ken Mascara to ensure that his booking officers immediately advise defendants that if they are unable to afford a lawyer one will be provided immediately at no charge, and if a defendant advises they cannot afford a lawyer that the booking officers immediately and effectively place the defendant in contact with the office of the Public Defender; Public Defender Diamond Litty to ensure that her assistants are available to communicate with all defendants who contact her office after their booking, that they provide effective advice and seek the setting of a reasonable bail for these defendants

prior to the formal indigency determination, and that her assistants attend and advocate for their new clients at all First Appearance hearings;

State Attorney Bruce Colton to ensure that his assistants attend and represent the State at all First Appearance Hearings;

Chief Judge William Roby to issue an administrative order setting forth proper procedures to be followed uniformly by the various named circuit and county judges, and those unnamed who may come later, which strictly follow the dictates of the statutes, rules, and case law cited herein;

Chief Judge Roby to order the removal of Judge Tom Walsh from participating in First Appearance Hearings; and

Judge Tom Walsh to recuse himself from further First Appearance Hearings.

IV. ARGUMENT

For clarity, Petitioner will review the law in the chronological order of the First Appearance process:

In Florida Rules of Criminal Procedure 3.111, the Florida Supreme Court requires that counsel "shall be provided to indigent persons in all prosecutions punishable by incarceration". The time for providing this counsel is "as soon as feasible after custodial restraint or at the first appearance...whichever occurs earliest." It also imposes the

duty on the booking officer to "immediately" advise a defendant of the right to counsel and that if he cannot afford to pay a lawyer, that one will be provided "immediately" at no cost. Where a defendant advises that he cannot afford counsel, the rule requires that the booking officer "immediately and effectively" place the defendant in communication with the office of the Public Defender. The rule also requires Public Defenders, when they are contacted by a defendant who is in custody and appears indigent, to "tender such advice as is indicated by the facts of the case, seek the setting of a reasonable bail, and otherwise represent the defendant pending a formal judicial determination of indigency". Respondents Sheriff Mascara and Public Defender Litty are in violation since most defendants in St. Lucie County are not placed in "immediate" communication and the Public Defender offers no help with bail determination.

Rule of Criminal Procedure 3.130 then requires the First Appearance judge to appoint the Public Defender to indigent defendants "no later than the time of the first appearance and before any other proceedings at the first appearance" and this has been held to mean what it says in *Public Defender v. State*, 714 So.2d 1083 (Fla. 3rd DCA 1998). The Rule requires that, once counsel is appointed, that the First Appearance judge go no further with the proceedings "until the defendant and counsel

have had an adequate opportunity to confer, unless the defendant has intelligently waived the right to be represented by counsel".

As illustrated above, the Florida Supreme Court is obviously interested in all defendants having an effective advocate at First Appearance, and especially with indigent defendants receiving early and effective representation at this important hearing, where their freedom pending trial is determined. As indicated in the facts at bar, Respondent judges are in violation of these requirements in that after appointing counsel they proceed with no pause for the Public Defender to confer with their new clients regarding circumstances that would support reasonable conditions of their pretrial release. In that she doesn't confer with her clients to determine same, argue same, or request the First Appearance judges to pause as required for the time to present their case for pretrial release, Respondent Public Defender is in violation of this rule.

Section 27.02, Florida Statutes, states that the State Attorney "shall appear" in all state courts within the circuit and prosecute "all" criminal matters "in which the state is a party", except for situations specifically mentioned (and irrelevant to this discussion). It does not provide an exception for First Appearance Hearings, weekends, the 19th Circuit, or for any discretion on the part of any State Attorney. Respondent

State Attorney Bruce Colton is in violation of this law for his failure to provide an assistant to appear for all First Appearance Hearings.

Regarding the amount or exact nature of the pretrial release, the Eighth Amendment to the United States Constitution forbids "excessive bail". Article 1, Section 14 of the Florida Constitution requires that, in all but capital cases, defendants "shall be entitled to pretrial release on reasonable conditions" and allows pretrial detention only where "no conditions of release can reasonably protect the community from risk of physical harm to persons, assure the presence of the accused at trial, or assure the integrity of the judicial process".

Section 907.041, Florida Statutes, provides that it is the Legislature's intent to allow the Florida Supreme Court to set the procedures in its rules for pretrial release, but specifically creates a "presumption in favor of release on non-monetary conditions" for all but the "dangerous crimes" it then enumerates. However, monetary conditions are not to be imposed automatically under the statute even for the dangerous crimes - only where the judge determines that they are "necessary" to ensure the defendant's presence, prevent physical harm to others, or insure the integrity of the judicial process. The Legislature specifically states its intention to reduce "...the costs of

incarceration by releasing until trial, those persons not considered a threat to the community ...". The statute then sets numerous criteria for allowing judges to totally deny pretrial release but in ALL cases, the State Attorney is charged with the responsibility of filing a proper motion for same, and there are strict procedural requirements for the subsequent hearing.

In Section 903.046, Florida Statutes, The Legislature establishes a broad list of minimum factors that a judge setting or changing bond "shall consider" in determining pretrial release including: the nature of the offense, weight of evidence, and possible danger to the community and victim(s), the defendant's family ties, length of residence in the community, employment, financial resources, mental condition, criminal history, failure to appear history, and source of funds for bail. For defendants with a history of failing to appear in the same case, nonmonetary bonds are not allowed unless the defendant proves circumstances beyond his control (such as clerical errors, incarceration, etc.).

In its Criminal Rules of Procedure 3.131, the Florida Supreme Court requires that, aside from capital and life felonies, every defendant "shall be entitled to pretrial release on reasonable conditions" and that "There is a presumption in favor of release on nonmonetary conditions..." Unless the State

has filed a Motion for Pretrial Detention, the First Appearance judge "shall conduct a hearing...(and)...shall impose the first ... or any combination of" the prioritized conditions. The first preferred type of release is personal recognizance (ROR), then an unsecured monetary appearance bond (of the type used in Federal Court), then restrictions on residence and travel, and finally the method preferred in St. Lucie County - the bail or cash bond. As did the Legislature, the Supreme Court specifies in the rule that the judge "shall" consider "all available factors" and sets forth a list of considerations similar to that provided by the Legislature.

This Court reviewed the requirements imposed on a judge setting or changing bond in *Puffinberger v. State*, 545 So.2d 900 (Fla. 4th DCA 1989), a case out of Martin County (also 19th Circuit), with former 19th Circuit Judge Martha Warner writing the opinion. The Court emphasized the need for judges to "specifically" address, on the record, the conditions set out in Florida Rule of Criminal Procedure 3.131 and Section 903.046, and granted the defendant's Writ of Habeas Corpus for the trial court's failure to do so. The Court also noted that excessive bail is "tantamount to a denial of bail".

More recently, in *Resendes v. Bradshaw*, 32 Fla. L. Weekly D1236, this Court made clear that a judge may not, on his own,

deny pretrial release to a defendant without a properly filed Motion for Pretrial Detention. In *Resendes*, the defendant, who was on felony probation, appeared at first appearance on a burglary warrant. The judge was apparently aware of two outstanding misdemeanor warrants and a prior failure to appear, and so denied bond on his own. The Court ruled that, in the absence of a proper motion, the judge erred by not addressing conditions of pretrial release as set forth in Rule 3.131, and granted Habeas Corpus.

In *State v. Norris*, 768 So.2d 1070 (Fla. 2000), the Florida Supreme Court recognized that judges setting bonds on warrants prior to an arrest are conducting "ex parte" proceedings without input from defendants, and that these defendants therefore are entitled to the same independent hearings at First Appearance, with the same criteria to be applied pursuant to Rule 3.131, as defendants arrested by officers on probable cause. This is true regardless of whether the First Appearance judge is a county or circuit judge.

Regarding defendants arrested in St. Lucie County on warrants issued in another county, Section 901.07 makes it clear that they are to be afforded a First Appearance Hearing in this county and have the bond determined by the judge in this county.

Respondent judges are in violation of the United States

Constitution, Florida Constitution, Rule 3.130, 3.131, and Section 901.07, 903.046, and 907.041 in that they: a)do not pause after appointing the Public Defender to allow the client and his/her new client to confer b)make no attempt to elicit from the accused or Public Defender any personal information that would mitigate towards a favorable form of pretrial release c)do not specifically address, on the record, the factors listed under Florida law for consideration, d)often deny bond without the presence of a Motion for Pretrial Detention filed by the State, e)give deference to monetary bonds set by the booking officer according to the standard bond schedule, f)set their own bonds according to the monetary standard bond schedule, g)refuse to change bonds other judges have set on warrant cases, h)refuse to change bonds set on arrests made on out of county warrants and i)in general, fail to grant defendants the presumption of pretrial release on non-monetary grounds.

As the courts have repeatedly ruled, the laws and rules cited above are not aspirational goals - they are clear, settled, mandatory, nondiscretionary requirements for booking officers, Public Defenders, State Attorneys, and judges to follow to insure that the accused have a fair determination of pretrial release. It is unconscionable that these officers are incarcerating persons for not obeying laws through a procedure that does not

itself follow the law.

Regarding the participation of Judge Walsh in First Appearance Hearings, it is an obvious conflict of interest for him to be hearing cases where his wife is the attorney, even if she herself does not appear before him. The appearance of impropriety is strong, and the possibility of an actual conflict has already been illustrated by Ms. Sticco, who has publicly voiced the concern that his wife's assistants who appear before him appear "intimidated" by him. Canon 3, Section E of the Code of Judicial Conduct requires his removal from this position.

V. CONCLUSION

Wherefore, Petitioner respectfully requests that this Honorable Court grant the relief requested under section 4 "Nature of Relief Sought".

Respectfully submitted,

Cliff Barnes
St. Lucie County Judge
Fla. Bar No.: 329681
218 South 2nd St.
Ft. Pierce, FL 34950
(772) 462-1474

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by hand (Courthouse Box) to the Public Defender 216 South Second St., Ft. Pierce, FL 33450, State Attorney 411 South Second St., Ft. Pierce, FL 34950, Sheriff 4700 West Midway Rd., Ft. Pierce, FL 34982, and Chief Judge Roby and Judges Bryan, Conner, Kenney, Vaughn, Nelson, Walsh, and Yacucci, 218 South Second St., Ft. Pierce, FL 34950 this _____ day of July, 2006.

Cliff Barnes
St. Lucie County Judge

