IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JULY TERM 2010

JIMMY LEE MAHONE,

Appellant,

v. Case No. 5D09-1931

STATE OF FLORIDA,

Appellee.
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Opinion filed July 23, 2010

Appeal from the Circuit Court
for Orange County,
Stan Strickland, Judge.

Jimmy L. Mahone, Miami, pro se.

Bill McCollum, Attorney General, Tallahassee, and Douglas T. Squire, Assistant Attorney General, Daytona Beach, for Appellee.

COHEN, J.

Jimmy Lee Mahone appeals from a resentencing after the trial court set aside his Prison Releasee Reoffender designation, pursuant to State v. Huggins, 802 So. 2d 276 (Fla. 2001). Mahone was convicted in 2000 of burglary of an unoccupied dwelling. He filed a motion to correct illegal sentence which the trial court properly granted. Mahone was then transported back to Orange County where he was resentenced. Although it is difficult to discern specific errors in Mahone's pro se appeal, he does raise one error that renders the remaining issues moot. Mahone asserts the trial court erred in failing to appoint counsel for his resentencing. We agree and reverse.

At all times through trial and the initial appeal, Mahone was found insolvent and appointed counsel.[1] The order granting his Florida Rule of Criminal Procedure 3.800(a) motion specifically found Mahone entitled to counsel. It further stated, "Should he [Mahone] desire the appointment of counsel, he must submit an application for a determination of indigent status." The record does not reflect whether Mahone filed such an application.

Section 27.52(1), Florida Statutes, requires that "a person seeking appointment of a public defender . . . based upon an inability to pay must apply to the clerk of the court for a determination of indigent status . . . ." At the initial stages of a criminal prosecution, this is routinely accomplished. It is more complicated when the defendant is housed within the Department of Corrections outside the milieu of the trial court. The better practice, when such an application is not filed as directed, would be to set a status conference once the defendant is returned to the jurisdiction of the trial court to address the requirements of section 27.52(1).

In this case, Mahone specifically sought appointment of counsel as part of his request for resentencing. An indigent defendant is entitled to appointed counsel at resentencing after prevailing on a rule 3.800 motion. Wells v. State, 789 So. 2d 1092, 1093 (Fla. 2d DCA 2001). Additionally, the resentencing order and trial court minutes are devoid of a Faretta[2] inquiry. This is required before proceeding to resentencing without the benefit of counsel. See Chestnut v. State, 578 So. 2d 27, 28 (Fla. 5th DCA 1991).

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[1] The Office of the Public Defender initially represented Mahone. After a conflict was discovered, that office withdrew, and replacement counsel was appointed.

[2] Faretta v. California, 422 U.S. 806 (1975).

This court further notes that following resentencing, apparently still without the required application for determination of indigency status, the trial court found Mahone insolvent for purposes of appeal, yet refused to appoint counsel. The State concedes error. See Libretti v. State, 854 So. 2d 804, 804 (Fla. 2d DCA 2003). This is not a case where the record reflects a waiver of counsel or a refusal to complete the required affidavits of insolvency. Accordingly, we reverse and remand for a new sentencing hearing.

REVERSED AND REMANDED.

ORFINGER, J., concurs.
GRIFFIN, J., concurs specially, with opinion.

GRIFFIN, J., concurring specially. 5D09-1931

Mahone has made it clear that he wants counsel for his resentencing, and the State concedes on appeal that we should reverse and remand for appointment of counsel for the resentencing. I point out, however, that the trial court in its order granting appellant's motion to correct illegal sentence specifically said that Mahone was entitled to be represented and informed the appellant that if he wished to have appointed counsel, he must file an affidavit of insolvency. No such affidavit appears in the record, and the appellant does not claim on appeal that he complied with the court's directive. Rather, he seems to rely on the notion that because he had been given appointed counsel nine years earlier in his direct appeal, he is automatically entitled to appointment of counsel now. Moreover, we have no way of knowing what transpired when Mahone showed up for resentencing without counsel and without having filed an affidavit because appellant has not provided us with a transcript of the resentencing hearing. As for the denial of appellate counsel for this appeal, that decision was made by a different judge.