No. 94213-7

Supreme Court
of the State of Washington

State of Washington, Respondent
v.
Alan J. Smith, Petitioner

Reply to State's Answer to Petition for Review

Alan J. Smith
Petitioner Pro Se

Alan J. Smith #381201, DW207
Washington State Penitentiary
1313 N. 13th Ave

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A. Identity of Petitioner

Petitioner pro se, Alan Smith, replies to State's answer to pro se petition for review.

B. Contested Facts

1. Respondent asserts that: "The facts of the case are adequately set out in the Court of Appeals opinion." My petition has identified one fact not in the record, underlying the opinion. I have identified two more, which are of little consequence for purposes of this ~~no~~ reply.

2. Respondent states that defendant filed appellant's brief. However, I vainly exercised every energy to prevent counsel from filing his brief on my behalf and likewise to get a ~~pro se b~~ briefing schedule for my SAG, ~~n compliance~~ pursuant to Anders v. California. While respondent's statement is legal axiom for general circumstances, it is emphatically false under the present circumstances.

3. Respondent states that I did not file an unequivocal motion to represent myself. Again, I have strenuously asserted my rights to self-representation under Anders for the purpose of briefing my SAG. Anders guarantees both that I have control over the briefing and that I have advocacy. I have shown, in an unopposed motion, that the RAPs concerning submittal of appellant's SAG are not in compliance with Anders. Hybrid representation is a reasonable remedy, where SAG is non-frivolous.

Argument:

C. Agreed ~~Facts~~ Legal Points

Respondent made no answer to my motions of 08/23/16 and 12/14/16. Unfortunately I cannot provide copies to append. State has effectively conceded certain legal points:

1. Critical confession was inadmissible
2. Appellate counsel was prejudicially ineffective
3. I have concurrent rights under Anders to self-representation and to advocacy, which is to say, effective assistance, which is to say substitution of appellate counsel

In effect, the State has conceded the entire substance of my petition for review. Yet the State still opposes my petition. This raises a new issue:

Is respondent's opposition to review prosecutorial misconduct? ; and the corrolary:

Should ~~not~~ the criminal charges be summarily dismissed?

~~This is the obvious reason why the Court of Appeals has quite stubbornly invoked a myriad of procedures to uphold my incarceration on procedural grounds, and strenuously avoid ruling on the merits.~~

I will not waive my double jeopardy protection and thus need an opportunity to brief whether dismissal is to be with prejudice. Where it is manifestly clear that there is no factual or legal basis for deprivation of liberty, the common-law remedy has always been summary vacation of charges. I suggest that expedited review is the appropriate compromise.

D. Argument - New Issues Raised in Answer

1. Whether the Court of Appeals may procedurally abstain from inquiry into the circumstances of a substitution motion by imposing a requirement that defendant waive assistance of counsel in order to exercise self-representation (answer at 1).

The answer depends upon circumstances. For example, Anders guarantees control by appellant of his own case if he raises nonfrivolous grounds over counsel's abstention. At the same time, it guarantees advocacy. I.d., ~~at~~ 386 us 738, 744-45, 18 L Ed 2d 493, 87 S Ct 1396 (1967).

Even more relevant, respondent has conceded prejudicial ineffectiveness. What the Court of Appeals did under different, past circumstances is moot.

2. Whether a defendant has a right to nominal counsel on appeal. Answer at 3.

This inquiry is also moot. Evitts v. Lucey, cited by respondent states, "nominal representation on appeal as of right - like nominal representation at trial - does not suffice to render the proceedings constitutionally adequate...." I.d., 469 U.S. 387, 396

3. Whether appellant has a constitutional right to hybrid representation. Answer at 4

This question is natural, since my petition puts forward both effective assistance and self-representation in Issue 1. It is a fair question.

The answer is circumstance-specific. The Court of Appeals abstained from ruling on the merits of my insufficient evidence and coercion claims. It did not find my SAG frivolous. As such, Anders

guarantees vigorous investigation by the court, appellant's control over his briefing, and advocacy. One ~~point~~ further point conceded to my 12/14/16 motion is that RAP 18.3(a)(2) is in conflict with Anders and Penson v. Ohio 488 US 75, 109 S Ct 346, 102 L Ed 2d 300 (1988). RAP 10.10(f) is even more onerously in conflict with Anders, depriving the appellant of control over his own pro se briefing. Standby counsel is meant to function very much like the Anders assurances, valid under the present circumstances. Thus, standby counsel stands a good chance of being an acceptable remedy to a nonideal situation.

4. Whether appellate attorney who raises some, but not all, nonfrivolous grounds is thereby immune to claims of ineffectiveness. Answer at 4-5.

The controlling standard is from Smith v. Robbins, 528 US 259, 288, 145 L Ed 2d 756, 120 S Ct 746 (1999):

"appellate counsel who files a merits brief need not (and should not) raise every nonfrivolous claim.... Generally, only when ignored issues are clearly stronger than those presented [by counsel], will the presumption of effective assistance of counsel be overcome."

Counsel made no claim of clear error by the trial court, which oddly does not make his brief frivolous, strictly speaking. However, it is manifestly obvious that my ~~claims~~ pro se claims are stronger than those presented by counsel.

5. Whether Anders applies (answer at 6).

Anders applies whenever an appellant submits a statement of additional grounds. The relevant RAPs are designed, imperfectly, to comply with Anders. An Anders brief is an alternate form of compliance.

6. Whether "the decision of the Court of Appeals provides a sufficient explanation why review [of sufficiency of evidence claim] is not warranted."

De novo review of constitutional claims by the reviewing court is always warranted, because it is mandated by the emphatic ~~language~~ and imperative language of the Bill of Rights as interpreted by the Court. It's no more complicated than that.

E. Conclusion

The Supreme Court should expedite review of the decision of the Court of appeals.

Petitioner is capable of managing his own case. Thus, he should be granted standby counsel in strict observance of the controls upon his attorney that he has requested, in accord with his constitutional rights, in his motion ~~of~~ pursuant to RAP 1.2, filed 04/04/17, to permit substitution and hybrid representation on review.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 27th April 2017 at Walla Walla, Washington

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