Opinion Could Bring More 1925(b) Confusion

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A three-judge Superior Court panel has scolded a Dauphin County public defender for failing to preserve in a client's Rule 1925(b) statement appellate issues the attorney felt were frivolous.

But some practitioners - public defenders among them - feel that the interplay between Pennsylvania Rule of Appellate Procedure 1925(b) and the U.S. Supreme Court's 1967 holding in Anders v. California has created a Catch-22 for lawyers obligated to help clients with direct appeals despite their being convinced that the appeals are without merit.

"It's hard to expound on an issue when you don't think there is an issue," acknowledged Dauphin County Deputy District Attorney James Barker, who has represented the prosecution in Commonwealth v. Flores.

According to various opinions in the case, the appeal at issue stems from David Flores' December 2005 convictions on counts of criminal trespass and theft by deception.

Flores wanted to pursue several issues on appeal, including the sufficiency of the evidence presented against him and the discretionary aspects of his sentencing.

But his attorney, Dauphin County Chief Deputy Public Defender Anne Gingrich, filed a petition to withdraw on the grounds that she believed Flores' appeal was frivolous. Gingrich simultaneously filed an Anders brief in which she put forward issues that might have supported Flores' appeal.

"However, none of the issues in the Anders brief had been preserved in the original 1925(b) statement," Senior Judge Robert E. Colville wrote in Flores on behalf of himself and his two fellow panel members, Judges Maureen Lally-Green and Seamus P. McCaffery.

In light of the apparent inconsistency between the 1925(b) statement and Gingrich's Anders brief, the panel issued an October 2006 opinion rejecting Gingrich's withdrawal request and directing her to re-file a "proper" 1925(b) statement.

In their second opinion in the case, filed Monday, the panel concluded that Gingrich's new 1925(b) statement in Flores had again included errors leading to waiver of appellate issues.

"While the new 1925(b) statement managed to preserve one of [Flores'] issues, we note with significant dismay counsel's failure to preserve [his] other claims," Colville wrote. "When we remanded this case, we not only afforded counsel the opportunity to fix the defective 1925(b) statement, but we delineated what the errors were, thus giving her a clear chance to remedy the deficiencies.

"The most poignant example was our holding in Flores I that the sufficiency claim in the first [1925(b)] statement failed to tell us what element(s) of the case went unproven. Regrettably, the new 1925(b) statement listed no elements of any charges, despite the plain language of our Flores I opinion."

The judges went on to affirm Flores' sentence based on their review of the one issue they concluded Gingrich had properly preserved for appeal. They deemed that issue frivolous.

In an interview yesterday, Gingrich expressed frustration with the panel's conclusions.

"I am confused by the Superior Court's apparent desire for appellate counsel to manufacture specific legal and factual bases for arguments that same counsel has already found to be frivolous and to simply [satisfy] his or her ethical and constitutional obligations to the client," Gingrich said. "How is counsel to provide the Superior Court with thorough and complete legal rationale for arguments devoid of legal rationale?"

A counterpart of Gingrich's from a neighboring county described the appellate situation presented by Flores as difficult, yet all but uncommon.

"It's a heck of a mess," said Cumberland County Deputy Public Defender Timothy Clawges, who was not involved in the Flores litigation.

"There's uncertainty about how to handle it," he also said, adding later, "The clients who insist on a direct appeal when there's no meritorious issue seem to be ones with court-appointed counsel."

One Center City appellate litigator who has studied 1925(b) and its related precedent extensively said that he believes Flores places defense lawyers like Gingrich and Clawges in a paradoxical situation.

While an Anders brief is supposed to help counsel ethically extricate themselves from involvement in appeals they feel are frivolous, Pennsylvania's appellate courts are increasingly directing practitioners to include in 1925(b) statements "a specificity that is not possible in the context of an Anders brief," according to **Charles Becker** of Reed Smith, who co-chairs the Philadelphia Bar Association's appellate courts committee and has been a member of a 1925(b) task force comprised of bar association leaders from across the state.

Clawges said a possible solution would be to permit Pennsylvania criminal defense attorneys to include at the end of 1925(b) statements an Anders-minded paragraph indicating lawyers' beliefs that the issues raised therein are frivolous.

"If that were sufficient to protect a client's right . . . that would, at least on the surface, solve the problem," Clawges said.

Colville's opinion in Flores focused more on the rules that do exist than on those that might in the future.

"Appellate mandates are not hypertechnical. They are designed to foster the uniform consideration of the substantive issues in all cases," Colville wrote. "We must not proceed haphazardly - following procedure in one case, ignoring it in another - under the guise of reaching those substantive issues."

"Rules are at the heart of what lawyers do," Colville added later. "These rules are written to permit fair adjudications and to engender a sense among the citizenry that their claims will be considered when the rules are followed. We admonish counsel to adhere to the rules."

Becker said that when he read those paragraphs of Colville's decision, he was reminded of a particular line from Shakespeare's Hamlet: "The lady doth protest too much."

Becker said that Colville's filing a 17-page opinion to reject an apparently frivolous appeal is, in and of itself, proof positive that the state's courts are employing a hypertechnical interpretation of a rule that is supposed to promote convenience for the Superior Court.

While rules like 1925(b) are supposed to promote consistency, "we all know the reality is that they don't," Becker said.