State Notes

TOPICS OF LEGISLATIVE INTEREST

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Assigned Appellate Counsel for Plea-Based Convictions
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A recent 6-3 opinion of the United States Supreme Court reinstated a Michigan law barring the appointment of an attorney to assist in preparing an appeal for a defendant who pleads guilty, nolo contendere (no contest), or guilty but mentally ill (*Kowalski* v *Tesmer*, Docket No. 03-407, 12-13-04). The Court's ruling, however, did not address the question of the prohibition's constitutionality.

The case involved Public Act 200 of 1999, which amended the Code of Criminal Procedure to prohibit, with certain exceptions, the appointment of appellate counsel to indigent defendants who plead guilty, no contest, or guilty but mentally ill (GBMI). The case also involved the practice of some Michigan courts to deny appointed appellate counsel, even before Public Act 200 was approved. (Some courts began denying such appointments after the adoption of Proposal B of 1994, which amended the Michigan Constitution to provide that a defendant who pleads guilty or no contest is not entitled to an appeal as of right.)

The U.S. Supreme Court did not reach the issue of the statute's constitutionality because the Court ruled that the attorneys who brought the action lacked standing to challenge the law on behalf of indigent criminal defendants. In so ruling, the Supreme Court reversed the U.S. Court of Appeals for the Sixth Circuit. Although a three-judge panel of the appellate court had upheld the law, the full Sixth Circuit Court heard the case and ruled, 8-4, that Michigan's prohibition against appointed appellate counsel was unconstitutional.

Proposal B of 1994

Senate Joint Resolution D of Michigan's 1993-94 legislative session was approved by a two-thirds majority of both the Senate and the House of Representatives, and was placed on the statewide ballot for the November 1994 general election as Proposal B. The State's voters approved the ballot proposal, which became part of the State Constitution of 1963.

Proposal B amended Article I, Section 20, which enumerates the rights of the accused in a criminal prosecution, to specify that, except as provided by law, an appeal by an accused who pleads guilty or no contest is by leave of the court. Previously, all criminal defendants, including those who pleaded guilty or no contest, had a right to an appeal. Proposal B's proponents argued that defendants admitting their guilt or choosing not to contest the criminal charges against them should not automatically be entitled to an appeal and that such appeals crowded the Court of Appeals' docket and imposed unnecessary financial burdens on that Court.

Public Acts 374 and 375 of 1994 served as implementing legislation for the constitutional amendment. Public Act 374 amended the Code of Criminal Procedure to provide that all appeals from final orders and judgments based upon pleas of guilty or no contest are by application for leave to appeal. Public Act 375 amended the Revised Judicature Act to specify that the Court of Appeals has jurisdiction of an appeal from a final order or judgment from the circuit court or the former Detroit Recorder's Court that is based upon a plea of guilty or no contest.

Denial of Appointed Counsel

Judicial Practice. Under Article I, Section 20, an accused has the right "to have such reasonable assistance as may be necessary to perfect and prosecute an appeal". That right applies, however, "as provided by law, when the trial court so orders". Neither the Constitution nor State law, however, specifically provided whether a defendant had a right to court-appointed counsel in applying for leave to appeal a plea-based conviction.

Although Proposal B did not change this provision, judges in some circuits began denying appointed appellate counsel to indigents who pleaded guilty or no contest after Proposal B was adopted. Subsequently, the Michigan Supreme Court amended the court rule regarding the appointment of lawyers, on an interim basis, to require that courts "liberally grant" timely requests for appointed appellate counsel in cases involving a conviction following a guilty or no contest plea. Evidently, however, Michigan trial courts inconsistently handled requests for court-appointed attorneys for indigent defendants seeking leave to appeal a plea-based conviction. The interim rule was amended in 2000 to reflect the provisions of Public Act 200 of 1999. Also in 2002, the Michigan Supreme Court ruled in *People* v *Bulger* that it lacked the authority to adopt the interim rule (462 Mich 495). (More information about the case appears at the end of this article.)

Public Act 200. In 1999, the Legislature passed and Governor Engler signed into law Public Act 200 of 1999. Under that Act, except as explicitly required or allowed, a defendant who pleads guilty, guilty but mentally ill, or no contest may not have appellate counsel appointed for review of the defendant's conviction or sentence. The Act requires the trial court to appoint appellate counsel for an indigent defendant who pleads guilty, GBMI, or no contest if any of the following apply:

-- The prosecuting attorney seeks leave to appeal.
-- The defendant's sentence exceeds the upper limit of the recommended minimum sentence range of the applicable sentencing guidelines.
-- The Court of Appeals or the Supreme Court grants the defendant's application for leave to appeal.
-- The defendant seeks leave to appeal a "conditional" plea under Michigan Court Rules.

(Michigan Court Rule 6.301(C)(2) provides that a defendant, with the consent of the court and the prosecutor, may enter a conditional plea of guilty, no contest, guilty but mentally ill, or not guilty by reason of insanity, which preserves for appeal a specified pretrial ruling or rulings and entitles the defendant to withdraw the plea if the ruling is overturned on appeal.)

Public Act 200 also allows a trial court to appoint appellate counsel for an indigent defendant who pleads guilty, GBMI, or no contest if all of the following apply:

-- The defendant seeks leave to appeal a sentence based on an alleged improper sentencing guidelines scoring of an offense variable or a prior record variable.
-- The defendant objected to the scoring or otherwise preserved the matter for appeal.

-- The sentence imposed by the court constituted an upward departure from the sentencing guidelines upper limit of the minimum sentence range that the defendant alleges should have been scored.

In addition, the Act requires the court to advise a defendant who pleads guilty, GBMI, or no contest that, if the plea is accepted, the defendant waives the right to have an attorney appointed at public expense to assist in filing an application for leave to appeal or to assist with other postconviction remedies, except as described above. Upon sentencing, the court must give the defendant a nontechnical and easily understood form that the defendant may complete and file as an application for leave to appeal.

Kowalski* v *Tesmer

Three indigents who were denied appellate counsel after pleading guilty and two attorneys who served as court-appointed appellate counsel filed an action in the U.S. District Court for the Eastern District of Michigan, challenging Michigan courts' denial of appointed counsel after plea-based convictions. In 2000, one day before Public Act 200 was to take effect, the District Court ruled that both this practice and Public Act 200 were unconstitutional because they denied indigents their rights to due process and equal protection. The Court issued an injunction prohibiting Michigan judges from denying appellate counsel to any indigent who pleaded guilty.

In 2002, a panel of the U.S. Court of Appeals for the Sixth Circuit reversed the District Court's ruling. The panel barred the suit by the indigents who were denied appellate counsel, because they had not pursued the matter in Michigan courts where the denial occurred, but held that the attorneys had third-party standing to assert the rights of indigents who would be denied appointed appellate counsel in the future. The appellate panel also held that Public Act 200 did not violate the U.S. Constitution. The full Sixth Circuit granted a rehearing, and upheld the panel's ruling regarding standing, but overturned its holding that Public Act 200 was constitutional.

When the case reached the U.S. Supreme Court, the only parties challenging the law were the two attorneys. In reviewing the case, the U.S. Supreme Court addressed the question of whether the attorneys had third-party standing to assert the rights of indigents who would be denied appointed appellate counsel following a guilty or no contest plea. The Court applied a three-part test, established through a body of case law, requiring that a third-party demonstrate an "injury in fact", that the party asserting the right have a "close relationship" with the person who possesses the right, and that the matter being challenged pose a "hindrance" to the possessor's ability to protect his or her own interests.

The attorneys claimed an "injury in fact" flowing from their reduced number of cases resulting from the Michigan system of denying appointed appellate counsel. In the majority opinion, Chief Justice Rehnquist wrote that this was assumed sufficient to meet the first part of the third-party standing test.

The attorneys cited the attorney-client relationship as meeting the "close relationship" part of the test of third-party standing, specifically future relationships with clients who will request

and be denied appointed appellate counsel. While the Court has recognized the attorney-client relationship as sufficient for third-party standing in some cases, it pointed out that an "*existing* attorney-client relationship is…quite distinct from the *hypothetical* attorney-client relationship" claimed by the attorneys in this case (emphasis in original). The Court held that the attorneys did "not have a 'close relationship' with their alleged 'clients'; indeed, they have no relationship at all".

As for the "hindrance" part of the third-party standing test, the attorneys claimed that, without appointed appellate counsel, the usual avenues of appealing denial of counsel are effectively out of the reach of indigent defendants. The Court, however, cited cases in which indigent defendants have challenged the denial of counsel in Michigan's Court of Appeals and Supreme Court and petitioned the U.S. Supreme Court for writ of certiorari (review of the case). While the U.S. Supreme Court agreed that an attorney would be valuable in appealing the denial of appointed counsel, it held that lack of legal representation is not "the type of hindrance necessary to allow another to assert the indigent defendants' rights".

The Court held that the attorneys did "not have third-party standing to assert the rights of Michigan indigent defendants denied appellate counsel", and reversed the ruling of the Sixth Circuit Court of Appeals.

The Question of Constitutionality

Since the U.S. Supreme Court in *Kowalski* held that the attorneys did not have standing, the Court found it unnecessary to rule on the constitutionality of the prohibition against appointed counsel for defendants who plead guilty or no contest. The Michigan Supreme Court, however, ruled in *People* v *Bulger* that the denial of appointed appellate counsel is constitutional, though it did not rule specifically on the constitutionality of Public Act 200. (The case involved a court's denial of appointed counsel before Public Act 200 took effect.)

In *Bulger*, the Michigan Supreme Court held "that neither the state nor the federal constitution requires the appointment of counsel" in a plea-based conviction. The case involved a defendant who pleaded guilty to possession with intent to deliver of less than 50 grams of cocaine and possession of marijuana, and subsequently requested the trial court to appoint an attorney to prepare his application for leave to appeal.

Since Article I, Section 20 of the State Constitution includes the phrase "as provided by law" regarding appointment of appellate counsel, the Court ruled that the Constitution "does not afford defendant the right to appointed counsel". The Court also ruled that, while "due process requires that the state provide the accused counsel" at trial, "the federal constitution does not require the appointment of appellate counsel on discretionary review".

Since the Michigan Supreme Court's ruling in *Bulger*, the Court has denied leave to appeal in similar cases. One of those, *Halbert* v *Michigan*, has been accepted for review by the U.S. Supreme Court, which therefore will have another opportunity to rule on the constitutionality of Michigan's law.