STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: September 17, 2013)

STATE OF RHODE ISLAND	:	
	:	
V.	:	**C.A. No. PM 12-4128**
	:	
LEROY ROBINSON	:	

DECISION

GIBNEY, P.J. Leroy Robinson, an indigent sexual offender, seeks appointed counsel and permission to proceed in forma pauperis on appeal to the Superior Court from a Magistrate's decision.

I

Facts and Travel

On February 10, 2006, a jury found Leroy Robinson guilty of two counts of First Degree Child Molestation. See Judgment of Conviction and Commitment, Mem. in Supp. of Obj., Ex. 5. As a result of his conviction, Mr. Robinson was required to register as a sexual offender under the Sexual Offender Registration and Community Notification Act, R.I. Gen. Laws §§ 11-37.1-1 et seq. See Sec. 11-37.1-3. On March 12, 2008, the Sex Offender Board of Review (Board) issued a decision classifying Mr. Robinson as a Level III risk to re-offend.[1] See Risk Assessment Report, Rec. Ex. 2. Mr. Robinson filed a request with this Court on May 9, 2012 to review the Board's classification. See Appeal Request, Rec. Ex. 2. Pursuant to § 11-37.1-14, counsel was appointed to represent Mr. Robinson.

[1] A Level III classification, the highest possible under the relevant guidelines, indicates that an individual presents a high risk of re-offending. See R.I. Admin. Code 49-2-1:1.13.3.

On December 18, 2012, Superior Court Magistrate Flynn affirmed the Board's classification of Mr. Robinson as a Level III risk to re-offend and ordered community notification to take place. See State v. Robinson, No. 12-4128, Dec. 18, 2012, (Order) (Flynn, M.). That same day, Mr. Robinson filed a notice of appeal, seeking review of the Magistrate's decision by a Superior Court Justice pursuant to R.I. Gen. Laws § 8-2-39.2(j). Through counsel, Mr. Robinson filed an ex parte Motion to Proceed In Forma Pauperis on appeal and requested that the Magistrate appoint counsel for his appeal. See Supplemental Mot. to Proceed, ¶¶ 1, 4. The Magistrate declined to rule on the motion or the request for counsel on the grounds that he lacked the authority. See id. at ¶¶ 2, 5. Mr. Robinson's counsel then addressed a letter to the Presiding Justice of this Court requesting that this Court permit Mr. Robinson to proceed in forma pauperis and grant his request for counsel for his appeal from the Magistrate's decision.[2] See id. at ¶ 2.

II

Law and Analysis

Under §§ 11-37.1-13 and 11-37.1-14, a sexual offender is entitled to a review in Superior Court of the Sex Offender Board of Review's classification of his or her risk level and has a statutory right to appointed counsel for that review. See Secs. 11-37.1-13(2)-(3) and 11-37.1-14(3). The Legislature has designated the Superior Court Drug Court Magistrate to hear and decide "all matters that may come before the superior court pursuant to chapter 37 of title 11[.]" Sec. 8-2-39.2(f). Any "party aggrieved by an order entered by the Drug Court Magistrate shall be entitled to a review of the order by a justice of the superior court." Sec. 8-2-39.2(j).

[2] Mr. Robinson's counsel filed a Supplemental Motion to Proceed In Forma Pauperis with this Court on April 12, 2013.

A

Request for Appointed Counsel

Sections 11-37.1-13, 11-37.1-14 and 8-2-39.2 are silent as to whether an indigent sexual offender's right to appointed counsel continues when he or she seeks review of a Magistrate's decision by a Superior Court Justice. Nevertheless, in State v. Leon, No. PM-2012-1859 (R.I. Super. Ct., filed Mar. 12, 2013), this Court held that Evan Leon, an indigent sexual offender, was entitled to appointed counsel on appeal from a Magistrate's decision increasing his risk classification "in order to ensure that the requirements of due process and equal protection [were] satisfied." See id. at 21. Mr. Robinson asks this Court to rely on its decision in Leon and grant his request for counsel on appeal.

As this Court stated in Leon, sexual offender registration and notification pursuant to §§ 11-37.1 et seq. is a civil, rather than a criminal, process because its primary purpose is to protect the public rather than punish the offender. See id. at 7-8 (citing State v. Germane, 971 A.2d 555, 593 (R.I. 2009)). Unlike a criminal defendant's right to counsel under the Sixth Amendment, an indigent civil litigant's right to appointed counsel under the Due Process and Equal Protection Clauses of the Fourteenth Amendment is not categorical or automatic. See Halbert v. Michigan, 545 U.S. 605, 610-11 (2005); Lassiter v. Dep't of Social Services, 452 U.S. 18, 31-32 (1981). The determination of whether an indigent civil litigant is entitled to counsel on appeal requires a careful analysis of the nature of the interest at stake, the nature of the appellate proceedings, the risk of erroneous deprivation, and any countervailing interest of the State. See MLB v. SLJ, 519 U.S. 102, 120-21 (1996); Lassiter, 452 U.S. at 26-28. In Leon, this Court considered, inter alia, the nature of the interest at stake, the complexity and novelty of the legal issues presented on appeal, the ability of the offender to represent himself, and the severity of the

harm the offender might suffer as a result of an erroneous decision. See Leon, No. PM-2012-1859, at 10-18. The balance of the relevant factors in that case suggested that Mr. Leon would be effectively deprived of his right to an appeal if he were not afforded the assistance of counsel. Id. at 20. Whether this balance weighs in favor of providing counsel, however, will necessarily vary depending on the individual facts and circumstances of each case.[3]

Against such a changeable backdrop, imposing a categorical rule as to when counsel is constitutionally required would be anathema to due process's commitment to flexibility. See Gagnon v. Scarpelli, 411 U.S. 778, 788 (1973) ("[D]ue process is not so rigid as to require that the significant interest in informality, flexibility, and economy must always be sacrificed."). When the facts and circumstances are susceptible to great variation, "[i]t is neither possible nor prudent to attempt to formulate a precise and detailed set of guidelines to . . . determin[e] when the providing of counsel is necessary to meet the applicable due process requirements[.]" Lassiter, 452 U.S. at 32 (internal quotation omitted); see also Halbert, 545 U.S. at 610 ("Cases on appeal barriers encountered by persons unable to pay their own way . . . 'cannot be resolved by resort to easy slogans or pigeonhole analysis.'") (quoting MLB, 519 U.S. at 120 (1996)). Instead, "the decision whether due process calls for the appointment of counsel" should be answered on a case-by-case basis "in the first instance by the trial court, subject . . . to appellate review." Lassiter, 452 U.S. at 31-32; see also Wood v. Georgia, 450 U.S. 261 (1981) (Where "the 'need for counsel . . . derives, not from the invariable attributes of [the] hearing, but rather

[3] In addition, the complexity and depth of the appellate proceeding is likely to vary based on the merits of each appeal. It is left to the discretion of the Superior Court Justice whether to conduct a second hearing, receive further evidence, or recall witnesses. See Administrative Order No. 94-12(h). The discretion to forego a full evidentiary hearing can expedite the review of cases where the merits are relatively straightforward. See Germane, 971 A.2d at 582 (In sexual offender classification proceedings, the "state has an . . . interest in expediting the risk level assessment and judicial review processes[.]").

from the peculiarities of particular cases,' we left it to the state tribunals to identify, on a case-by-case basis, the situations in which fundamental fairness requires appointed counsel.") (quoting Gagnon, 411 U.S. at 789). Accordingly, the Drug Court Magistrate, who is most familiar with the facts and circumstances of each case, should determine on a case-by-case basis whether due process and equal protection require an indigent offender to continue to receive the assistance of counsel on appeal to the Superior Court.

B

Permission to Proceed In Forma Pauperis

"The waiver of appeal costs and the providing of a free transcript to a plaintiff in a civil action" is an "additional dimension in the assertion of indigents' rights." Kelly v. Kalian, 442 A.2d 890, 893 (R.I. 1982). Our Supreme Court has "recognized . . . that trial courts have inherent authority to waive appeal costs upon a showing that the party is indigent and that the appeal is not frivolous[.]" Id. at 892-93 (In "compelling circumstances[,]" a civil litigant may be allowed to "appeal from a judgment of the Superior Court at state expense."); see also Jones v. Aciz, 109 R.I. 612, 289 A.2d 44 (R.I. 1972) (District Court has inherent authority to waive costs of appeal provided in statute governing civil appeals from District Court to Superior Court for indigent litigants). At common law, the power of trial courts "to remit fees on petition in forma pauperis did not have its origin in any statute, but was in fact exercised as one of the inherent powers of the courts themselves[.]" Jones, 109 R.I. at 622, 289 A.2d at 50 (internal quotation omitted). A statute that provides for an appeal and prescribes the payment of certain costs of the appeal does not deprive a trial court of its inherent power to waive those costs, unless there is a clearly disclosed legislative intent to do so. See id. at 624-25, 289 A.2d at 51.

Section 8-2-39.2(f) designates the Drug Court Magistrate "to hear and decide as a superior court justice" all challenges to sex offender risk assessments that come before the Superior Court. That section further provides that sexual offenders are entitled to have a justice of the Superior Court review the Drug Court Magistrate's decision. See Sec. 8-2-39.2(j). The costs of appeal from a Magistrate's decision are prescribed by administrative order, rather than by statute. Pursuant to Administrative Order No. 94-12, a party seeking review of a Magistrate's decision by a Superior Court Justice is not required to pay a filing fee but must order and pay for a transcript.[4] See Administrative Order 94-12(b). There is nothing in either section 8-2-39.2 or Administrative Order No. 94-12 to suggest that the Drug Court Magistrate, acting as a Superior Court Justice, cannot exercise the inherent power of a trial justice to waive appeal costs for an indigent. Thus, the Drug Court Magistrate may allow an indigent sexual offender to proceed in forma pauperis on appeal.[5]

III

Conclusion

In light of this Court's finding that the Magistrate should decide in the first instance whether Mr. Robinson is entitled to proceed in forma pauperis and receive the assistance of appointed counsel on appeal, this Court remands this motion to the Magistrate for consideration.

[4] Administrative Order No. 2000-20 waives the filing fee for sex offenders' initial challenge of their risk assessments under § 11-37.1-13. See Administrative Order No. 2000-20.

[5] In comparison, the Federal Magistrate Act expressly circumscribes the jurisdiction of federal magistrate judges. A federal magistrate judge may consider a motion to proceed in forma pauperis "and if the decision is to grant such a motion, the magistrate may enter such an order. If the decision is to deny, however, the magistrate must make such a recommendation to the district judge who will then take final action." Woods v. Dahlberg, 894 F.2d 187, 187 (6th Cir. 1990) (citing 28 U.S.C. § 636(b)(1)(B)).

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE: State of Rhode Island v. Leroy Robinson

CASE NO: PM 12-4128

COURT: Providence Superior Court

DATE DECISION FILED: September 17, 2013

JUSTICE/MAGISTRATE: Presiding Justice Alice Bridget Gibney

ATTORNEYS:

For Plaintiff: Katherine E. Godin, Esq.

For Defendant: Alison DeCosta, Esq.