

How George Davis Unwittingly Proved the Importance of Having an Appellate Lawyer

By Locke E. Bowman

Many a person can justly complain that his journey through the criminal justice system was buffeted by random winds of fate. George Davis is among them.

I first spoke with Davis in March 2001, after I'd skimmed his three volumes of appellate record over the course of a half hour in the clerk's office at the Illinois Appellate Court in Chicago. What I'd read was enough to convince me that Davis, serving a 48-year sentence for murder at the time of our conversation, had been shafted.

Davis had twice stood trial in the Cook County, Illinois criminal court and twice been convicted by a jury (the first conviction had been overturned on appeal (*People v. Davis*, 287 Ill. App. 3d 46 (1st Dist. 1997)) for being the triggerman in a drive by, gang-style shooting that occurred late one night on the south side of Chicago in the spring of 1991. A 17-year-old boy, Lethon Rogers, who likely was dealing drugs for a street gang, died from a single gunshot to his chest. The state's case rested on the testimony of a single eyewitness, one Anthony Fisher, who testified that he had been standing next to the victim at the time of the shooting. Fisher was a dubious sort who, immediately after the shooting, had fled the city. Several months later, he returned to Chicago; met with prosecutors; and testified that he had seen Davis stand up through the open T-top of a black and gold Trans Am, point a gun at the 17 year old victim and shoot.

There was no physical evidence linking Davis to the crime. The murder weapon was never found. Evidence at the scene could be viewed as suggesting (as Davis's trial attorney had argued) that a person standing on the sidewalk, possibly Fisher himself, had fired the shot that killed Rogers. In short, the case against Davis was far from airtight.

The post-trial motion filed after Davis's second conviction preserved nearly a score of issues from those trial proceedings: among them, the motion challenged various pre-trial and trial rulings regarding a number of evidentiary issues; the motion claimed a violation of *Brady v. Maryland*, 373 U.S. 83 (1963) based on the revelation (for the first time at trial) that a state witness had gotten financial assistance from the prosecution in obtaining a commercial driver's license; and the motion claimed that the prosecution's closing argument had been inflammatory and prejudicial.

The last issue had particular promise. The prosecutor had suggested in his closing that corroboration of Anthony Fisher was to be found in the fact that the investigating detective arrested George Davis after speaking with a number of *other* witnesses at the scene. A recent Illinois Appellate Court case, *People v. Williams*, 159 Ill. App. 3d 612 (5th Dist. 1987), had held that an argument like this, which attempted to make substantive use of statements that *non*-testifying witnesses had given to the police, was highly prejudicial and warranted reversal. With this issue, and the *Brady* issue, there was certainly meat for an appeal, particularly given how thin the state's evidence had been.

But the Assistant Cook County Public Defender assigned to Davis's appeal saw nothing worth pursuing. He filed a motion to withdraw from the case under *Anders v. California*, 386 U.S. 738 (1967) together with a supporting brief. When, as in Illinois, the state affords a convicted person the right to a direct appeal, the defendant has a Sixth Amendment right to counsel – at state expense if he is indigent. *Douglas v. California*, 372 U.S. 353 (1963). *Anders* purports to resolve the conflict created when a lawyer appointed in an indigent's appeal can find no appellate issues worthy of presentation to the court and, thus, concludes that the appeal is “wholly frivolous.” 386 U.S. at 744. In such a case, prosecuting the appeal is certainly a waste

of time, may be unethical, and *Anders* holds that, if the appellate court concurs in the lawyer's assessment of the case, he should be permitted to withdraw.

Care must be taken, though, to protect the constitutional rights of the indigent appellant. With that concern in mind, *Anders* directs counsel to prepare a brief listing all possible issues, with citations to the record and to relevant legal authorities. *Id.* at 744-45. Later Supreme Court decisions have approved alternate procedural approaches, but all require an exhaustive examination of potential grounds for appeal as a precondition for allowing counsel to withdraw. *See Smith v. Robbins*, 528 U.S. 259 (2000); *McCoy v. Ct. of Appeals of Wisc., Dist. 1*, 486 U.S. 429 (1988), discussed below. In Illinois, the *Anders* procedure continues to be required. *People v. Jones*, 38 Ill. 2d 384 (1967).

In Davis's particular case, the *Anders* motion and brief reflected abject dereliction of duty. The "brief" consisted of a lengthy recitation of the evidence at trial, followed by two "arguments;" the first was captioned "The defendant was proved guilty of first degree murder beyond a reasonable doubt" and the second was entitled "The trial judge did not abuse his discretion in sentencing the defendant to 48 years for first degree murder." (A copy of the brief is on file with the author.) Whose side was this lawyer on? His brief contained not a word about the numerous evidentiary rulings Davis's trial lawyer had challenged, the *Brady* issue, or the prosecutor's improper closing argument. Without elaboration, he concluded, "The defendant was given a fair trial. There is no meritorious issue that can be successfully argued on appeal."

Davis was by no means the only indigent appellant from Cook County, Illinois to have an *Anders* motion filed in his case in 2001. I had been researching the Cook County Public Defender's practices with respect to the filing of *Anders* motions at that particular point in history and had learned (through the Public Defender's response to a Freedom of Information

Act Request) that the office was filing those motions in close to half of its assigned cases: the data showed that over the course of the most recent 19 month period for which statistics were available at the time of my phone conversation with Davis, the Cook County Public Defender filed *Anders* motions in 49% of its appellate cases.

I saw that as unpardonable. The appellate records could not conceivably justify so many *Anders* filings. No one casually familiar with the quality of justice in the Cook County criminal courts would accept the proposition that fully half of the convictions were the result of error-free proceedings. I decided to file a class action lawsuit against the Public Defender alleging that the due process and Sixth Amendment rights of indigent appellants were being violated wholesale because the Public Defender was using *Anders* as a docket management tool.

For that I needed a plaintiff. Which is what led to my perusal of Davis's appellate record and to my eventual phone call with him in March of 2001. He was a pleasant sounding man, with a deep voice and an air of resignation; he was fully aware of the procedural hole into which his case had fallen: the *Anders* motion, likely to be granted, would not only foreclose his direct appeal, but would probably waive any possible collateral attack on his conviction in the state courts as well as procedurally defaulting any claims for federal *habeas* review.

I explained to Davis what I had in mind, telling him that it was to be a civil case challenging the global problem of the overuse of *Anders* motions. I made sure to emphasize to Davis that I had no intention of taking on his appeal; that was not my object. And I told him that, even if we won the case, the victory would probably come too late to do him any good in his appeal. Nonetheless, he was willing enough to be one of the plaintiffs in my planned litigation, figuring that to do so would do him no harm and might get some notice for his predicament.

A couple of weeks after our conversation, I got a short note from Davis thanking me for my interest in his case, gently pointing out that I'd mistakenly called him "Gary Davis" in the Retainer Agreement I'd sent him ("I must inform you my first name is George," he said), and sharing an immediate problem he was facing in his case. He'd received a letter from the Illinois Appellate Court clerk's office that had been generated as a result of the Public Defender's *Anders* filing. That letter, Davis explained, informed him that he had the opportunity to file with the court "an explanation in writing as to why I think there are issues of merit in my appeal." For Davis, this presented a problem: "I'm not too knowledgeable in writing briefs, so if you can give me some direction as to whom I can turn to for assistance I truly would appreciate your help."

There was, of course, no one to whom Davis could turn for help. I'd made clear that my relationship with him was limited to the civil litigation; I wasn't going to ghost-write a brief for his appeal. I told Davis that he should make his own submission to the Appellate Court that attached or copied the post-trial motion filed by his trial counsel, making sure to ask the Appellate Court to consider each of the issues that had been preserved in that motion.

The class action lawsuit that I shortly thereafter filed against the Cook County Public Defender (*Jefferson, et al. v. Fry*, No. 01 CH 3316 (Cir. Ct. Ck. Cty.)) met an early demise. In the summer of 2001, a Cook County Circuit Court judge granted the Public Defender's motion to dismiss the case. The suit, that judge reasoned, was at bottom an attack on the Appellate Court itself: the Public Defender was submitting *Anders* motions in half its cases, but the Appellate Court, whose sagacity the Circuit Court judge was in no position to question, was undisputedly *granting* virtually all of these motions. If the Public Defender was failing in its responsibilities to appellate clients, that was a matter to be addressed at the appellate, not the trial level. (The

Circuit Court's decision was not the subject of a written order. A transcript of the argument and the ruling is on file with the author.)

The dismissal of the suit posed several difficulties. The next litigation step in the civil context, we thought, would be to file a motion for a supervisory order in the Illinois Supreme Court. We gave serious consideration to doing so. But before we could act, plans were announced to disband the Cook County Public Defender's appellate division and to transfer all Cook County criminal appeals to the Illinois Office of the State Appellate Defender. OSAD had formerly handled all criminal appeals in Illinois counties other than Cook as well as a substantial minority of the Cook County appeals. With the disbanding of the Cook County Public Defender's appeals division, OSAD was to take over all appeals from Cook County. OSAD makes judicious and relatively sparing use of the *Anders* procedure.

But that still left the problem of what to do about George Davis. Having argued in the now-dismissed class action case that Davis had been denied a lawyer for a meritorious appeal, I felt obligated either to step in and do the appeal myself or find a lawyer to handle it. Time was of the essence. The Public Defender's *Anders* motion had been pending for several months and was more than ripe for decision.

Fortunately (for me and, as it was to eventually turn out, for Davis), Ed Shin, a young attorney then at the Chicago office of Jenner & Block, agreed to do the appeal as a pro bono project. As a precaution, I filed a motion in Davis's case explaining that new counsel would soon be stepping in to withdraw the PD's *Anders* motion and brief the case; my motion asked the Appellate Court to stay the ruling on the pending *Anders* motion to allow new counsel time to come aboard. Three weeks later, in late August, I received an order from the court granting that motion and staying any ruling for 30 days.

But then a very strange thing happened. In September, I got a telephone call from Davis at the penitentiary advising that he'd just received a ruling from the Appellate Court dismissing his appeal. I explained that that was impossible because of the order I'd received just a few days earlier. I was wrong. In the three week interval between the filing of my motion and the issuance of an order granting the stay, the same panel of judges – in a striking act of bureaucratic incompetence – had somehow allowed an opinion to issue *granting* the PD's *Anders* motion and dismissing Davis's appeal.

The Court's 14-page order (*People v. George Davis*, No. 1-99-4339 (Ill. App. 1st Dist. August 14, 2001) (unpublished pursuant to Illinois Supreme Court Rule 23)) observed that Davis's response to the *Anders* motion "recite[d], virtually verbatim, excerpts from his amended post-trial motion" (was he expected to have submitted something more original?) and then proceeded to mow through every issue from that motion en route to concluding that the appeal should be dismissed. The issues I had noticed got the cold shoulder. The court found nothing improper in the prosecutor's closing argument, noting that, even if the argument were improper, it did not materially affect the verdict. *See id. at 12*. And moreover, according to the court, "the record [did] not support the allegation of a *Brady* violation." *Ibid.*

After consulting with a clerk in the Appellate Court, I filed a new motion asking the court, in light of the unusual procedural snafu, to vacate its dismissal order, to reinstate the appeal and to permit Davis's new counsel to brief the issues in the case. When, to my surprise and relief, the court issued an order granting that motion, I assumed the victory would likely be pyrrhic: having already once affirmed Davis's conviction, I figured there was zero chance the court would seriously consider reversing course when it ultimately resolved the case. Davis would get his procedural due, but there'd be no relief for him.

I did not share these thoughts with the enthusiastic young man who'd volunteered to take over the appeal; I wished him luck.

Two years later, though, George Davis had an extraordinary reversal of fortune. On September 29, 2003, with the benefit of Ed Shin's excellent brief, the Appellate Court rendered a decision reversing Davis's conviction and remanding the case for a new trial. *People v. Davis*, No. 1-99-4339 (Ill. App. 1st Dist. September 29, 2003) (unpublished pursuant to Illinois Supreme Court Rule 23). In this opinion, the court analyzed the state's closing argument at length, calling the prosecutor's suggestions about the non-testifying witnesses "highly improper" and "unfair" and ruling that, with the evidence closely balanced, the improprieties in the state's closing required a new trial. *Id.* at 10-15. The court did not decide the *Brady* issue, but made clear, for the benefit of the parties and the trial court on remand, that the possible failure to have disclosed financial assistance given to one of the state's witnesses was an obvious violation of the discovery rules. *Id.* at 15-16.

The procedural twists in the Illinois Appellate Court offer undeniable empirical evidence – via an experiment that will never be exactly replicated, one hopes – for the proposition that an appellate advocate can affect the outcome of a case. *Anders* was premised on this notion. As the Court put it, "[t]he constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an advocate in behalf of his client." 386 U.S. at 744. For that reason, *Anders* dictated that motions to withdraw from appointed criminal appeals should only be granted where the appeal is "wholly frivolous," such that there are no issues of even arguable merit. *Ibid.* The implicit corollary to this reasoning is that in all other cases – where the issues are at least arguable – advocacy matters.

The Appellate Court's August 2001 dismissal order in Davis's case is misguided first and foremost for having presumed to decide the case in a vacuum, having before it nothing but the Public Defender's "argument" – for affirmance – and Davis's (lamentably "verbatim") recitation of the post-trial motion. Even with the appellate issues in such an embryonic condition, there's no excusing the court's failure to acknowledge that Davis's appeal presented questions worthy of argument by an advocate on each side. After all, it took 14 pages of densely worded legal prose for the Appellate Court to resolve all the issues in favor of the state. *Res ipsa loquitur* – the thing speaks for itself: if that much effort is required to state and reject the claims on appeal, then by definition they are worthy of briefing and argument.

The Appellate Court – a good court, filled with well-intentioned jurists – had plainly become desensitized to these issues. It had grown accustomed to the steady stream of *Anders* motions it was receiving from the Public Defender and had become comfortable affirming convictions and sentences based on nothing more than the PD's assurances that the defendant had been treated fairly and that no issues remained for appeal.

The Supreme Court has on several occasions revisited the *Anders* problem. *Anders* itself required an appointed appellate lawyer seeking leave to withdraw from a case to submit a brief with record citations to anything that might arguably support an appeal and to furnish relevant case citations. 386 U.S. at 744-45. Since *Anders*, the Court has twice approved alternate procedural approaches for counsel seeking to withdrawal from a no-merit appeal: it is also appropriate, the Court decided in 1988, for counsel's submission actually to argue the reasons why the identified issues are not worthy of being briefed. *McCoy v. Ct. of Appeals of Wisc., Dist. 1*, 486 U.S. 429 (1988). And, in 2000, the Court concluded that the obligations of an appointed attorney in a no-merit appeal would be adequately discharged by a submission that

provided detailed citations to the factual and procedural history of the case together with counsel's attestation that the appeal lacked merit and that counsel's evaluation of the appeal had been explained to the client. *Smith v. Robbins*, 528 U.S. 259, 265 (2000).

As noted above, Illinois continues to require, even in the wake of *Smith v. Robbins*, that the particular procedure described in *Anders* itself be followed by appointed counsel seeking to withdraw from an appeal. See *People v. Jones*, 38 Ill. 2d 384 (1967); *People v. Vega*, No. 1-99-3135 (Ill. App. 1st Dist. March 8, 2000), motion for supervisory order denied *sub nom. Fry v. Frossard*, No. 89184 (Ill. April 26, 2000). Whatever the variance in procedure, the United States Supreme Court has never deviated from the basic principle that the system is obligated to "ensure" that appellate representation is afforded to every indigent criminal appellant whose appeal is not frivolous. *Smith v. Robbins*, 528 U.S. at 277. Care must be taken if such insurance is to be afforded in practice. The interest in docket management is important; justice suffers when the courts are clogged with pointless appeals. The Court has made clear that the Sixth Amendment affords no right to a state-subsidized, frivolous appeal. *Id.* at 278. But the process of sorting the frivolous appeals from the possibly meritorious ones has to be scrupulous and fair: otherwise, the very right to counsel on appeal will be swallowed whole. See *ibid.*

That nearly happened to George Davis. The August 2001 dismissal order reflects a cavalier assumption that appellate counsel's arguments wouldn't matter to the outcome. As an *a priori* matter, this was wrong: "[m]ere speculation that counsel would not have made a difference is no substitute for actual appellate advocacy, particularly when the court's speculation is itself unguided by the adversary process." *Penson v. Ohio*, 488 U.S. 75, 87 (1988). And, of course, it was dramatically and obviously wrong in fact, as the September 2003 order reversing Davis's conviction indisputably shows.

Last April, after a lengthy negotiation with the State’s Attorney of Cook County (and with an impending date in May for his *third* jury trial), George Davis, without admitting guilt, entered a nolo contendere plea to the charge of murder and received a sentence equivalent to the time he’d already served, thereby walking out of prison a free man. The plea spared Davis the possibility of an additional 14 years of imprisonment – time he would certainly have served, but for his improbable appellate victory (and might have served, if he’d been convicted a third time).

Davis, nearly shafted, was strangely fortunate in the end. And he knows it. Davis sees himself as having moved into the sunlight after a long time in the shadows. He has plans. And it is by no means lost on him that appellate advocacy matters. “If that damn *Anders* brief had stuck, I’d still be locked up in there,” he pointed out on a recent afternoon in my office. That’s true. We hold the fates of our clients in our hands.

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