OA 12.7-83

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA)
)
Petitioner,)
)
v.) Case No. 63,752
)
LARRY E. FITZPATRICK)
)
Respondent.)

INITIAL BRIEF OF PETITIONER

JIM SMITH
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TOPICAL INDEX

CITATIONS OF AUTHORITY

STATEMENT OF THE CASE AND FACTS

Respondent, Larry E. Fitzpatrick, was arrested in early August, 1982 for conspiracy to traffic in cocaine and two other counts of sale of a controlled substance.

An attorney named Greg Kimball visited the county jail on two times during the month of August for purposes of soliciting business. (Hearing on motion to disqualify held November 23, 1982, TT-49). While there on each occasion he visited Fitzpatrick. Kimball understood Fitzpatrick to have already been represented by counsel (TT-51) and visited Fitzpatrick as a "social nicety". (TT-49) Kimball was married to Fitzpatrick's ex-wife.(TT-47)

During these visits, Kimball and Fitzpatrick agreed that Kimball should have as little to do with the situation as possible. (TT-52) Although Kimball recalled nothing confidential being disclosed to him, he did testify that Fitzpatrick probably would not have talked to him at all had Kimball been there in any other capacity.

Considering the above testimony, the trial court found as a matter of fact that confidential conversations transpired as covered by EC 4-1 and DR 4-101 of the Code of Professional Responsibility.

Kimball then became an assistant state attorney. Fitzpatrick moved to disqualify the entire office of the state attorney based on Kimball's contact with him.

The trial court denied the motion to disqualify find-

ing in addition to the above, that Kimball was in no way involved in the prosecution of the case against Fitzpatrick and that Kimball has never disclosed to any other assistant state attorney the contents of any of his conversations with Fitzpatrick. Declining to consider the Office of the State Attorney, Seventh Judicial Circuit, as a "law firm", the trial court refused to disqualify the entire office from prosecuting Fitzpatrick.

Fitzpatrick then went to the Fifth District Court of Appeal seeking a writ of prohibition or in the alternative a writ of mandamus contending that based on the relationship which existed between him and Kimball, prosecution by the State Attorney's office should be eihter prohibited or that the State Attorney be removed from further representation. On December 22, 1982, the Fifth District Court of Appeal ordered Stephen Boyles as State Attroney for the Seventh Judicial Circuit to respond to the petition and answer at least the three questions contained therein. The court sought answers regarding the appropriate remedy, whether Fitzpatrick was required to show prejudice and whether the office of the state attorney was a law firm within the meaning of this Court's decision in Babb v. Edwards, 412 So.2d 859 (Fla. 1982). Response to that order was filed by the state attorney and on April 20, 1983, the court issued its writ of certiorari to the trial court directing that the order denying disqualification was quashed and that the cause be remanded for the entry of an order consistent with the opinion.

At request of the trial judge, the State of Florida, by and through undersigned counsel, filed a motion for rehearing and that was denied on May 25, 1983. On that same date, a notice to invoke the discretionary jurisdiction of this Court was filed as well as a motion to stay the operation and enforcement of the court's writ of certiorari. The motion to stay was denied June 14, 1983, and on October 17, 1983, this Court determined to accept jurisdiction and the cause is now before the Court.

POINT ON APPEAL

THE CONSTITUTIONAL OFFICE OF STATE ATTORNEY FOR ANY JUDICIAL CIRCUIT IS NOT A LAW FIRM WITHIN THE MEANING OF DR 5-105(D), CODE OF PROFESSIONAL RESPONSIBILITY, AND EVEN THOUGH ONE ASSISTANT WITHIN THAT OFFICE IS ETHICALLY PROHIBITED FROM PROSECUTING A GIVEN INDIVIDUAL, THE ENTIRE OFFICE IS NOT LIKEWISE DISQUALIFIED.

ARGUMENT

At issue is whether an ethical obstacle preventing a single prosecutor from proceeding against a defendant necessarily obstructs an entire prosecuting office despite the fact that there is neither evidence nor even suggestion that anything will occur to the defendant's detriment.

The Fifth District Court of Appeal has answered the question in the affirmative specifically holding that a state attorney's office is a law firm within the meaning of DR 5-105(D) and thus, prosecution by that office is absolutely prohibited.

The district court correctly noted that the decision in Babb v. Edwards, 412 So.2d 859 (Fla. 1982), turned solely upon a matter of statutory operation and not on a determination that a public defender's office is a law firm within the meaning of the Code of Professional Responsibility. The court then, however, relied upon two district court cases mentioned in Babb which held that such an office is a firm. Being unable to detect any difference in terms of potential for conflict between a public defender's office and a state attorney's office, the district court concluded that for purposes of Canon 5 of the Code,

a state attorney's office is a law firm.

That this conclusion is erroneous, one need only refer to this Court's decision in Thompson v. State, 246 So.2d 760 (Fla. 1971), as the proper starting point for an analysis of the issue. There, the court considered whether the employment of a defendant's lawyer by a prosecutor per se creates a situation inherently violative of due process. Utilizing a test enunciated in State v. Bryan, 227 So.2d 221 (Fla. 2d DCA 1969), the Court answered the question in the negative provided that the former defender turned prosecutor neither acts directly against his former client nor provides information or assistance to those who would prosecute the former client.

The obvious danger potentially involved in such a situation is that information given in confidence will be revealed to the detriment of the given defendant. The rationale of Thompson is specifically directed to that possibility. While the decision does not explicitly consider the ability of a prosecutor's office to maintain prosecution, this is nevertheless strongly suggested since Thompson was ultimately prosecuted by the office for which the particular attorney worked.

Research on the precise issue reveals only scant authority standing for the proposition that such a situation automatically creates the presumption of prejudice so that an entire prosecuting office is disqualified. See e.g., People v. Shinkle, 415 N.E.2d 909 (N.Y. 1980). The greater number of

courts have declined to adopt such a rule. See Annotation, 31 ALR 3rd 953 (1970).

To the authorities contained in that annotation, we specifically refer to and rely upon the following as excellent examples of reasoned judicial thought directed to the issue. In State v. Bell, 345 So.2d 1090 (La. 1977), the defendants were convicted in a rather notorious trial involving the deaths of police officers and demonstrators. At the first trial on the charges, the defendants were represented by an attorney who later became an assistant district attorney and was so employed at the time of the defendant's second trial. Also, other assistant district attorneys were assistant public defenders while the office of the public defender was handling the case. In response to a claim that the entire prosecutor's office should have been disqualified because of this inter-employment, the Lousiana Supreme Court referred to its earlier decisions which clearly utilized the essentials of our Bryan test and rejected the contention. See also Pisa v. Commonwealth of Massachsetts, 393 N.E. 2d 386 (Mass. 1979); United States v. Rossbach, 701 F.2d 713 (8th Cir. 1983).

Perhaps the most persuasive authority is found in United States v. Caggiano, 660 F.2d 184 (6th Cir. 1981). There, Caggiano, an attorney, and five others were charged with several offenses arising out of a complex series of transactions, the object of which was allegedly to defraud Elvis Presley out of a jet airplane or airplanes. Caggiano was represented by a private-

ly retained attorney, Phil Canale, who not only was lead counsel in a first mistrial proceeding but also was extensively involved in the preparation of the other defendants' cases. After a subsequent indictment was returned and numerous motions were filed, an interlocutory appeal was taken. While the appeal was pending, in May, 1980, Canale was appointed Assistant United States Attorney for the Western District of Tennessee. Because of this appointment, Caggiano and other defendants moved to disqualify the entire United States Attorney's office because of the alleged conflict of interest of Canale. The trial court denied the motion to disqualify since no defendant had made a showing of actual prejudice by the direct or indirect, intended or unintentional, giving of information by Canale bearing upon any defenses, strategies, or confidences.

On appeal, the court directly addressed the merits of this claim and, most importantly, directly discussed DR 5-105(D) of the ABA Code of Professional Responsibility which is virtually identical to our own rule. Unlike the district court below, the court had no difficulty in immediately identifying a difference between a private law firm and lawyers representing the government. The court noted that the ABA Committee on Professional Ethics likewise recognized the differences between private attorneys and government lawyers. In formal opinion 342, 62 A.B.A.J. 517 (1976), the committee discussed the situation similar to this case where a lawyer leaves private practice for government service. The opinion of the committee was that other government

lawyers in the office are not disqualified from handling matters in which their new associate was involved in his former practice. The court quoted directly from the opinion and we do likewise since the committee opinion is not only persuasive and compelling but also that which we submit should control disposition of the issue.

> "'When the disciplinary rules of Canons 4 and 5 mandate the disqualification of a government lawyer who has come from private practice, his governmental department or division cannot practicably be rendered incapable of handling even the specific matter. Clearly, if DR 5-105(D) were so construed, the government's ability to function would be unreasonably impaired. Necessity dictates the government action not be hampered by such a construction of DR 5-105(D). The relationships among lawyers within a government agency are different from those among partners and associates of a law firm. The salaried government employee does not have the financial interest in the success of department representation that is inherent in private practice. The important difference in the adversary posture of the government lawyer is recognized by Canon 7: the duty of the public prosecutor to seek justice, not merely to convict, and the duty of all government lawyers to seek just results rather than the result desired by a client. The channeling of advocacy toward a just result as opposed to vindication of a particular claim lessens the temptation to circumvent the disciplinary rules through the action of associates. Accordingly, we construe DR 5-105(D) to be inapplicable to other government lawyers associated with a particular government lawyer who is himself disqualified by reason of DR 4-101, DR 5-105, DR 9-101(B), or similar disciplinary rules."' 660 F.2d at 190

The facts in Caggiano, supra, indicate total involvement by the attorney with the defendant. In spite of this and because of evidence showing that the relationship would in no way affect the continued prosecution of the defendant, the entire office was not disqualified.

In contrast, the facts here show only that Kimball, probably by virtue of his particular marital status, only "dropped in on" Fitzpatrick while visiting the jail on other legal-related matters. Although the trial court found that confidential communications were made, there is absolutely no showing that Kimball ever represented Fitzpatrick much less did anything in terms of preparation of a defense. Most importantly, Kimball was in no way involved in the preparation of the state's case and even Fitzpatrick has not contended that Kimball disclosed the contents of the conversations.

These facts, when compared to the fact situations appearing in the cases above, simply do not and cannot compel the conclusion that the state attorney's office is a law firm within the meaning of the Code. This conclusion simply overlooks the "logical answer to the abstract question". Thompson, supra, at 763.

It is the state's position therefore that the law in this State should be that a state attorney's office is not necessarily and automatically disqualified from prosecution simply and only because a present prosecutor is ethically precluded from proceeding against the defendant. Such an inclusive

and complete disqualification should only be required if and when the two-step test of Bryan, supra, cannot be satisfied. At the very least, a hearing should be conducted not for purposes of requiring a defendant to demonstrate prejudice, but to allow the state to demonstrate the absence of prejudice in the form of evidence that the defender turned prosecutor has not and will not act directly against his former client nor provide information or assistance to those who would.

CONCLUSION

Based on the above and foregoing it is respectfully requested that the Court quash the decision of the Fifth District Court of Appeal with directions that the order denying disqualification of the trial court be reinstated and thus allowing prosecution of the Respondent to proceed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail to Dan R. Warren, Esquire, Post Office Box 5355, Daytona Beach, Florida 32018, this 4th day of November, 1983.

Of Counsel