12-7-83

IN THE SUPREME COURT OF FLORIDA

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

REPLY BRIEF OF PETITIONER

JIM SMITH
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STATEMENT OF THE FACTS

While it is true that Kimball was at the jail as a result of a telephone call from Fitzpatrick's girlfriend, that call was regarding "a couple of prisoners who might need attorney's services." (TT-49) That was the basic reason for Kimball's presence at the jail, Id., and as he put it, [the visits] "Primarily they were for the purpose of my getting a retainer." (TT-50)

ARGUMENT IN REPLY

Respondent does not and understandably cannot do anything more than provide the belief, unsupported by either law or reason, that a state attorney's office is a law firm within the meaning of the Code of Professional Responsibility.

Without responding to the legal argument presented against the position of the District Court of Appeal, Respondent appears to adopt and present the position that the mere appearance of impropriety is sufficient to serve as a proper basis for disqualification of an entire prosecutor's office.

To the cases cited in our earlier brief and those appearing in the annotation referred to therein, we rely upon Young v. State, 465 A.2d 1149 (Md. 1983), as what is probably the latest judicial expression on the issue. There, the defendant was represented by a public defender who was appointed to the state attorney's office before the defendant's case came to trial. Because of this relationship, the defendant moved to disqualify the entire prosecutor's office urging only that disqualification was necessary to preserve public confidence in the criminal justice system and the integrity of the bar. Like Fitzpatrick here, the defendant recommended the appointment of a special prosecutor to represent the state in further proceedings against him.

The Maryland Court noted the existence of the few jurisdictions which have adhered to the rule Respondent urges but noted the many others that prefer to base entire disqualifications

on actual impropriety. Interestingly, this Court's decision in Thompson v. State, 246 So.2d 760 (Fla. 1971), was included as one of those belonging in the latter group. Also, United States v. Caggiano, 660 F.2d 184 (6th Cir. 1981), and its discussion of the ABA Committee on Professional Ethics opinion relating to DR 5-105(D) was relied heavily upon to conclude that the mere appearance of impropriety is not of itself sufficient to warrant disqualification of an entire state attorney's office. Citing State v. Jones, 429 A.2d 936 (Conn. 1980), the court considered the appearance of impropriety alone as "simply too slender a reed on which to rest a disqualification order except in the rearest of cases." 465 A.2d at 1153.

Such a "rare case" is that which has already been recognized by this Court in Thompson v. State, supra, as involving one in which the defender turned prosecutor in some way acts to the detriment of the defendant. The state therefore urges that this Court specifically and directly reaffirm the rule in Thompson, supra, and apply it to the issue of disqualification of an entire prosecutor's office.

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 22nd day of November, 1983.