

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI ex rel ADRIAN)
KINDER,)
)
Relator,)
vs.)
)
HON. MAURA B. McSHANE,)
Circuit Judge, Circuit Court of the County)
Of St. Louis, Missouri)
)
Respondent.)

Case No. SC84082

Original Writ of Prohibition Proceeding

RESPONDENT'S BRIEF

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Jurisdictional Statement

The Relator, Adrian Kinder (“Relator”) is charged in the Circuit Court of

St. Louis County with Murder in the First Degree, Armed Criminal Action, and Arson First Degree in State v. Adrian Kinder, Cause No. 00CR-4786. The case is pending before Respondent, the Honorable Maura B. McShane (“Respondent”). On August 30, 2001, Respondent sustained the States Motion To Disqualify Defense Counsel For Conflict Of Interest (Petition Exhibit 4).

On October 29, 2001, The Missouri Court of Appeals, Eastern District denied Relator’s Petition For Stop Order, Preliminary Writ of Prohibition And Permanent Writ of Prohibition.

On November 9, 2001 Relator filed his Petition For Stop Order, Preliminary Writ of Prohibition, And Permanent Writ of Prohibition in this court. On December 18, 2001, this court issued its Preliminary Writ of Prohibition.

This is an original writ of prohibition proceeding in The Supreme Court of Missouri. This court has jurisdiction over this proceeding under its supervisory powers at Mo. Const art. V sec. 4.

Statement of Facts

The Relator has been charged in the Circuit Court of St. Louis County with Murder in the First degree, Armed Criminal Action, and Arson in the First degree.

(Petition para. 5, Answer para. 5). The victim Relator is charged with killing was his mother, Sheri Kinder. The Relator's father, Kevin Kinder is an endorsed prosecution witness that the State intends to call at trial. (Petition para. 10, Answer para. 10). On July 18, 2001, The State took the deposition of Kevin Kinder. (Petition para. 11, Answer para. 11). Relator's attorney, Arthur Muegler Jr., (hereafter Muegler) appeared at the deposition and notified the assistant prosecutor that he was not only there to represent the Relator, but represented Kevin Kinder as well. (Petition para. 11, Answer para. 11). Muegler represented Kevin Kinder at the deposition and advised him in answering questions at the deposition. (Respondent's Exhibit 1 page 6, line 14, page 64, line 24, page 65, line 3-19). When asked if he had waived any conflict of interest by having Muegler represent both he and his son, Muegler instructed Kevin Kinder not to answer the question. (Respondent's Exhibit 2, page 65 line 3-19).

On August 2, 2001 the State filed a Motion to Disqualify Defense Counsel for Conflict of Interest. (Petition para. 14, Answer para. 14). The motion asserted that due to the relationship of Muegler in this case to Relator and to Kevin Kinder, a prosecuting witness, a conflict or potential conflict of interest existed that required his disqualification. (Petition Exhibit 4). At the motion hearing, the court took judicial notice of its files and of the deposition of Kevin Kinder. (Respondent's Exhibit 2 page 5 lines 22-25, page 6 lines 1-2). Both Relator and Kevin Kinder testified at the motion hearing. Relator and Kevin Kinder testified that Muegler did not discuss a conflict of interest with them prior

to Kevin Kinder's deposition. (Respondent's Exhibit 2, page 14, lines 18-20, page 17, lines 22-25 to page 18, line 1, 5-7, 14-16, page 32 lines 3-10). At the motion hearing, the court recognized that since Kevin Kinder was going to give testimony regarding the facts of Relator's case as a prosecution witness, and Muegler represented him regarding that testimony, that there was a conflict of interest and a potential conflict of interest that could arise at trial. The court stated:

I'm concerned that there is an appearance of a conflict of interest here. I don't see how you can represent a key witness to the case and at the same time represent the defendant in the case.

... when the witness is testifying in the case are you going to be representing him and objecting to questions that are being asked?

(Respondent's Exhibit 2, page 38, lines 12-20).

The court then found a conflict of interest existed and granted the State's motion to disqualify. (Respondent's Exhibit 2, page 40, line 16-18).

Relator's Petition for Stop Order, Preliminary Writ of Prohibition And Permanent Writ of Prohibition was denied by the Missouri Court of Appeals, Eastern District, on October 29, 2001. (Petition Exhibit 1A). On November 9, 2001, Relator filed his petition in this court and on December 18, 2001, this court issued its Preliminary Writ of Prohibition.

Points Relied On

Point I

Relator is not entitled to an order prohibiting Respondent Judge from enforcing the August 30, 2001 order disqualifying attorney Muegler from representing him in the underlying criminal case because Respondent Judge did not abuse her discretion in disqualifying attorney Muegler nor did she misapply the law in determining that a conflict of interest or the potential for a conflict of interest existed as a result of Muegler's dual representation of Relator and an endorsed

prosecution witness in that (a) the court did not base her decision on the rationale that a per se conflict of interest exists when a lawyer represents a defendant and an endorsed prosecution witness in the same criminal case, (b) the existence of a actual conflict of interest is not required before an attorney can be disqualified from representing both a defendant and an endorsed prosecuting witness, and (c) the state met its burden of proof in that the evidence before the court provided a factual basis for her to find that a conflict or potential for a conflict of interest existed as a result of the dual representation of Relator and the endorsed state's witness.

Principle authority relied on:

Wheat v. United States, 486 U.S. 153 (1988).

State V. Risinger, 546 S.W. 2d 563 (Mo. App. 1977).

U.S. Const. Sixth Amendment

Point II

Relator is not entitled to an order directing the trial court to conduct a hearing to determine whether Relator knowingly and voluntarily waived conflict free counsel because the court did not commit prejudicial error in not making a further inquiry of Relator after it held a hearing on the motion to disqualify and an effective waiver by Relator does not cure the constitutional violation caused by the actual or potential conflict of interest and does not have to be accepted by the

court.

Principle authority relied on:

Wheat v. United States, 486 U.S. 153 (1988).

State v. Kretzer, 898 S.W. 2d 639 (Mo. App. 1995).

Argument

Point I

Relator is not entitled to an order prohibiting Respondent Judge from enforcing the August 30, 2001 order disqualifying attorney Muegler from representing him in the underlying criminal case because Respondent Judge did not abuse her discretion in disqualifying attorney Muegler nor did she misapply the law in determining that a conflict of interest or the potential for a conflict of interest existed as a result of Muegler's dual representation of Relator and an endorsed prosecution witness in that (a) the court did not base her decision on the rationale that a per se conflict of interest exists when a lawyer represents a defendant and an

endorsed prosecution witness in the same criminal case, (b) the existence of a actual conflict of interest is not required before an attorney can be disqualified from representing both a defendant and an endorsed prosecuting witness, and (c) the state met its burden of proof in that the evidence before the court provided a factual basis for her to find that a conflict or potential for a conflict of interest existed as a result of the dual representation of Relator and the endorsed state's witness.

For a Writ of Prohibition to issue, the applicable standard of review is whether there was a clear abuse of discretion by the trial court, such that she lacked the power to act as contemplated. Chassaing v. Mummert, 887 S.W. 2d 573 (Mo. banc 1994).

The Respondent does not contend, as alleged by Relator, that a per se rule exists which disqualifies a lawyer on a conflict of interest ground in every circumstance where a lawyer represents a defendant in a criminal case and also represents an endorsed state's witness in the same criminal case. The issue before the court is whether the trial court abused her discretion in disqualifying attorney Muegler in this case because of a conflict of interest or the potential of a conflict of interest that could arise a trial. Respondent contends that conflicts of interest and potential conflicts existed in this case based on the facts of the case and the relationship of the parties therein.

In cases where the issue of a conflict of interest is raised and brought to the courts attention before trial, the court should follow the law as established by the Supreme Court

of the United States in the case of Wheat v. United States, 486 U.S. 153 (1988). In that case, the Supreme Court stated that trial courts are to be given substantial latitude in determining conflicts of interest not only in cases where an actual conflict can be demonstrated before trial, “but in the more common cases where a potential for conflict exists which may or may not burgeon into an actual conflict as the trial progresses.” Wheat, 486 U.S. at 162.

In Wheat, the defendant was charged with several drug offenses as a result of being involved in an illegal drug conspiracy. The defendant moved the court to allow him to substitute counsel and retain an attorney that had represented a codefendant in the case who had already pleaded guilty. The government objected to the substitution because the codefendant that had already plead guilty could be called as a prosecuting witness at defendants trial and thereby create a conflict of interest for the new attorney. The defendant responded that the testimony that the codefendant would give was not adverse to the defendant and therefore would not impeach him and that the potentially conflicting defendants waived their rights to conflict free counsel. The trial court denied the defendants motion to retain substitute counsel finding that a conflict of interest existed that could not be waived.

In the Majority opinion, the Court addressed the Sixth Amendment concerns raised by Relator in his brief. The Court noted its decisions outlining the development of a defendant’s right under the Sixth Amendment and stated, “in evaluating Sixth amendment

claims, ‘the appropriate inquiry focuses on the adversarial process, not on the accused's relationship with his lawyer as such’ *citing* United States v. Cronin, 466 U.S. 648, 657, n.21, 80 L. Ed. 2d 657, 104 S.Ct. 2039 (1984). The court then went on to state, “while the right to select and be represented by one’s preferred attorney is comprehended by the Sixth amendment, the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers” *citing* Morris v. Slappy, 461 U.S. 1, 13-14, 75 L. Ed. 2d 610, 103 S. Ct. 1610 (1983); Jones v. Barnes, 463 U.S. 745, 77 L. Ed. 2d 987, 103 S. Ct. 3308 (1983). Missouri courts also recognize that a defendant’s right to the lawyer of his choice is not absolute, and “entitles an accused to a lawyer who can render faithful service and give undivided loyalty, and a lawyer who is forced or attempts to serve clients with conflicting interest cannot give unto either the loyalty each deserves.” State v. Risinger, 546 S.W. 2d 563,564 (Mo. App. 1977), *citing* State v. Crockett, 419 S.W. 2d 22, 29(14) (Mo.1967). Thus, it is the proper role of the court to ensure that the participants have effective advocates free from potential conflicts. In ensuring an effective adversarial process, the court must consider the need for the efficient and effective administration of criminal justice. United States ex rel. Carey v. Rundle, 409 F. 2d 1210, 1214 (3d Cir. 1969), cert. denied, 397 U.S. 946 (1970).

Relator’s Sixth amendment rights do not require an actual conflict to be found before an attorney can be disqualified. Relator mistakenly rests his analysis on cases

where the question of a conflict is first raised after trial on a motion for post conviction relief for ineffective assistance of counsel. (Ciareli v. State, 441 S.W. 2d 695 (Mo. 1961), Gordon v. State, 684 S.W. 2d 888 (Mo. App. 1985), State v. Cox, 539 S.W. 2d 684 (Mo. App. 1976), State v. Risinger, 546 S.W. 2d 563 (Mo.App. 1977)). These cases cannot be applied to the current situation where the conflict of interest issue arose before trial. In ineffective assistance of counsel cases, the courts have the ability to look at the attorney's performance at trial to determine if an actual conflict existed that resulted in prejudice to the defendant. Movants in those cases have to prove an actual conflict because they are seeking to impugn an already imposed criminal conviction. Strickland v. Washington, 466 U.S. 668 (1984). Such is not the case when the conflict of interest issue arises before trial. In these cases, the trial court must make a determination if a conflict or potential conflict exists without "the wisdom of hindsight after the trial has taken place, but in the murkier pretrial context when relationships between the parties are seen through a glass, darkly." Wheat, 486 U.S. at 162. For this reason, the standard to be used by the trial court is if an actual conflict exists or if a potential for a conflict exists. Wheat, 486 U.S. at 163.

The facts before the Respondent trial court established that actual and potential conflicts of interest existed in this case. Kevin Kinder was endorsed as a witness for the state before attorney Muegler represented the witness at the deposition on July 18, 2001. (Petition para. 10, 11). Muegler's representation of Kevin Kinder was not on an

unrelated matter, but on the same criminal matter and for a deposition where he instructed and advised the witness how to answer questions relating to the facts of the case. The record established that Mr. Muegler did not consult with either the defendant or the witness prior to entering into the dual representation. (Respondent's Exhibit 2, page 14, lines 18-20, page 17, lines 22-25 to page 18, line 1, 5-7, 14-16, page 32 lines 3-10). The evidence presented to the court through the deposition of Kevin Kinder established that he would testify that the murder weapon was his gun and it was accessible to the Relator. (Respondent's Exhibit 1 page 68, lines 8-14, page 30, line 17, page 31 lines 1-6).

Mr. Kinder also identified property found on the Relator as belonging to the victim. (Respondent's Exhibit 1, page 66, line 20-25, page 67, line 1-4, 12-18). Mr. Kinder testified regarding behavior problems he and the victim had with Relator in the past as well as a physical altercation between the victim and Relator. (Respondent's Exhibit 1, page 48, line 11-25, page 52, line 20-25, page 53, lines 1-4). Further, the deposition revealed that Kevin Kinder was at a hotel on the day of the murder and had no alibi for the time of the offense. (Respondent's Exhibit 1, page 66, lines 2-10). Kevin Kinder was also the source of the funds that were used to pay Muegler's attorney fee for the representation of Relator. (Respondent's Exhibit 2, page 31, lines 12-25, page 32, line 1-2).

When Kevin Kinder is called as a witness at trial he will be testifying to facts that he testified to at the deposition while he was represented by Mr. Muegler. This means

that while preparing Relator's case for trial, Muegler advised Kevin Kinder with regard to his testimony as a state's witness in the case. This creates a conflict of interest. It is in Relator's best interest not to have the witness give testimony that is adverse to his defense, but if Kevin Kinder intentionally gives false testimony to favor the defense of his son, he is subject to criminal prosecution for perjury. Thus, in advising Kevin Kinder on the testimony to be given at the deposition and at trial, attorney Muegler has a conflict between serving the interests of Relator and serving the interests of the witness. Similarly, a conflict of interest exists with regards to Attorney Muegler's ability to cross-examine Kevin Kinder at trial. Kevin Kinder is the victim's spouse who identified the murder weapon as belonging to him. Mr. Kinder also has no alibi for his whereabouts at the time of the murder. As part of his defense at trial, it would be in Relator's best interest to have counsel attempt to attribute the murder of the victim to Kevin Kinder. However, this conflicts with the interest of the witness represented by attorney Muegler and again presents Muegler with a conflict in advising his clients in regards to their trial testimony. Thus, potential trial strategy on behalf of Relator is lost and attorney "has to reef his sails with a resulting lack of unfettered freedom to thoroughly and effectively cross-examine and impeach the witness". Risinger, 546 S.W. 2d at 566. The evidence before the court also established that money being used to pay Muegler's fees came from a custodial account that Kevin Kinder controlled and was money that Kevin Kinder put into the account. Since Kevin Kinder was the source of the fees being paid to Muegler,

a potential conflict of interest exists because he could be inclined to serve the interests of Kevin Kinder at the expense the Relator. Wood v. Georgia, 450 U.S. 261 (1981).

In the case at bar, the state certainly met it's burden of proof showing that Muegler had represented a witness regarding his testimony in the defendant's pending case. The trial court was presented with a motion stating that Muegler had a conflict of interest due to the professional relationship he entered into with the defendant and a state's witness regarding testimony the witness would give in the defendant's case. The court took judicial notice of its files and was presented with the evidence of Kevin Kinder's deposition. The court also heard the testimony of Relator and Kevin Kinder. The trial court read through the deposition of the witness (Respondent's Exhibit 2, page 37, lines 15-17, 23-25) and concluded that a potential conflict of interest existed and was of such a serious nature that it could arise at trial. The trial court followed the law as established by the United States Supreme Court in Wheat.

Relator argues that Kevin Kinder's testimony is not adverse to the Relator and therefore no conflict of interest exists that requires disqualifying Muegler. The defendant in Wheat used the same argument and it was rejected by the court. It is precisely because "the likelihood and dimensions of nascent conflicts of interest are notoriously hard to predict", Wheat, 486 U.S. at 162, that the trial court must be given wide latitude in cases where a potential for a conflict exists which may or may not develop into an actual conflict. Wheat, 486 U.S. at 163.

Relator argues that the representation of Kevin Kinder was a limited engagement and therefore would not cause a conflict with Relator at trial. (Petition para. 12). Here, the representation is on the same case and specifically deals with Kevin Kinder's testimony at trial. His duty to Kevin Kinder did not end with his representation at the deposition. The conclusion of the witness's case does not end the attorney client relationship. Risinger, 546 S.W. 2d at 566. It is the relationship of counsel to the parties that creates the conflict. Gordon, 684 S.W. 2d at 891.

The disqualification of defense counsel based on actual or potential conflicts of interest, even if a defendant waives his right to conflict free counsel, does not violate the Sixth Amendment and is not against good public policy. The court has an independent interest in assuring compliance with ethical standards and the appearance of fairness. Wheat, 486 U.S. at 160. The court also has an institutional interest in the rendition of just verdicts, and a legitimate interest that their judgments remain intact on appeal. Wheat, 486 U.S. at 161. Relator alleges that disqualifying defense counsel who represents a defendant and a prosecuting witness allows for the opportunity for prosecutorial abuse. As the Supreme Court in Wheat pointed out, the trial courts are aware of this possibility and are in the best position to determine if such abuse is in fact occurring in a particular case. In the case at bar, Kevin Kinder was endorsed as a witness before Muegler entered into the dual representation and the trial court found at the motion hearing that there was no abuse by the prosecutor. (Respondent's Exhibit 2, page 40,

lines 1-12).

Respondent's order disqualifying Muegler as Relator's attorney followed the law as set out in Wheat v. United States, and appropriately balanced the Sixth Amendment rights of Relator to be represented by counsel of his choice, and the right to a defense conducted by an attorney who is free from conflicts of interest. The court held a hearing on the State's motion, heard testimony and took judicial notice of its files and the deposition of the witness Kevin Kinder. Based on the evidence, the court found that a serious potential conflict of interest existed and she did not abuse her discretion in disqualifying Muegler as Relator's attorney.

Point II

Relator is not entitled to an order directing the trial court to conduct a hearing to determine whether Relator knowingly and voluntarily waived conflict free counsel because the court did not commit prejudicial error in not making a

further inquiry of Relator after it held a hearing on the motion to disqualify and an effective waiver by Relator does not cure the constitutional violating caused by the actual or potential conflict of interest and does not have to be accepted by the court.

For a Writ of Prohibition to issue, the applicable standard of review is whether there was a clear abuse of discretion by the trial court, such that she lacked the power to act as contemplated. Chassaing v. Mummert, 887 S.W. 2d 573 (Mo. banc 1994).

The court did not abuse its discretion by disqualifying Muegler after the motion hearing. Relator and the witness testified at the hearing and were questioned by Muegler regarding knowledge of the dual representation. (Respondent's Exhibit 2, page 13, lines 6-12, 15-18, page 29, line 17). Relator testified that he wished Muegler to continue as his attorney. (Respondent's Exhibit 2, page 13, lines 1-18). Muegler argued to the court that Relator consented to the representation of Muegler and, therefore, disqualification would result in a violation of his Sixth amendment right to counsel. (Respondent's Exhibit 2, page 34, lines 4-5, page 36, line 4-12). Thus, Relator has proffered his waiver of the conflict to the court. The defendant in Wheat, likewise proffered to waive the conflict in that case and it was properly rejected by the court. Wheat, 486 U.S. at 157. Here, despite the evidence of a waiver as argued by Relator, the court still disqualified Muegler thereby refusing his proffer of a waiver. The court specifically found that a conflict existed and a potential conflict could arise during trial. (Respondent's Exhibit 2, page 38,

lines 12-25, page 40, lines 16-17). The trial court is to be given substantial latitude in refusing waivers of conflicts especially in cases where a potential conflict exists which could arise at trial. Wheat, 486 U.S. at 163. Respondent, then did not abuse her discretion by rejecting Relator's waiver because she found a conflict of interest existed and potential conflicts could arise at trial. Relator is not entitled to a second hearing because the court has already refused his waiver of the conflict. Adducing further evidence regarding a knowing and intelligent waiver would not prohibit the judge from properly disqualifying Muegler. Since the court held a motion on the issue and Muegler put on evidence of waiver and argued the point to the court, the court was not required to make further inquiry. State v. Kretzer, 898 S.W. 2d 639,643 (Mo. App. W.D. 1995).

Conclusion

The Relator's preliminary writ of prohibition should not be made absolute and should be denied by the Court based on the authority and facts presented herein. Respondent Judge should not be further prohibited from enforcing her August 30, 2001 order disqualifying Muegler from serving as Relator's legal counsel in the case of State v. Kinder, Circuit Court of St. Louis County, cause No. 00CR-4786.

Respectfully Submitted,

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Rule 84.06(c) Certification

Pursuant to Rule 84.06 (c) the undersigned hereby certifies this Respondents brief contains the information required by Rule 55.03, complies with the limitations contained in Rule 84.06 (b), contains 4,478 words and 537 lines, and pursuant to Rule 84.06 (g) the disk filed with the Court has been scanned for viruses and is virus free.

Date

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Certificate of Service

The undersigned certifies that a true copy of Respondent's Brief together with a computer diskette containing same was served by First Class U.S. mail postage prepaid to Arthur Muegler Jr., Attorney for Relator, P.O. Box 230143, St. Louis, MO, 63123 on this day of 2002.

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