

Summary of SC94295, *State of Missouri v. Andrew L. Lemasters*

Appeal from the Newton County circuit court, Judge Timothy W. Perigo

Argued and submitted December 3, 2014; opinion issued February 24, 2015

Attorneys: Lemasters was represented by William J. Swift of the public defender's office in Columbia, (573) 777-9977; and the state was represented by Adam S. Rowley of the attorney general's office in Jefferson City, (573) 751-3321. The Missouri Association of Prosecuting Attorneys, which filed a brief as a friend of the Court, was represented by Boone County Prosecuting Attorney Daniel K. Knight of Columbia, (573) 886-4100, and Jason H. Lamb of the office of prosecution services in Jefferson City, (573) 751-0619.

This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: A man convicted of sodomy appeals the judgment, alleging the trial court should have disqualified the prosecutor's office, which had hired his original defense attorney before his trial, and made an error in its written judgment against him. In a unanimous decision written by Judge Paul C. Wilson, the Supreme Court of Missouri affirms the judgment not to disqualify the prosecutor's office, which was not required by the rules of professional conduct and did not create an appearance of impropriety or cast doubt on the fairness of the man's trial. But the Court does vacate the portion of the judgment erroneously stating the man was convicted of two counts rather than one count of sodomy and remands (sends back) the case for entry of a corrected judgment that reflects what actually occurred.

Facts: The state charged Andrew Lemasters in Newton County with two counts of first-degree statutory sodomy for conduct toward his young daughter. In August 2012, the trial court appointed the state public defender's office to represent Lemasters. Later that month, an assistant public defender entered her appearance on behalf of Lemasters. She had little direct contact with Lemasters – one interview of about 15 minutes – though she did appear in court to argue, unsuccessfully, to have Lemasters' bond reduced. About a month after entering her appearance on Lemasters' behalf, the public defender changed jobs, going to work for the Newton County prosecutor's office, which was prosecuting the charges against Lemasters. In an interoffice memorandum she wrote to the public defenders who were preparing to represent Lemasters at his preliminary hearing and in other communication regarding his case and his family's calls, his original attorney used language derogatory toward Lemasters and his family, indicating her frustration with the case, as well as toward the likelihood that Lemasters could mount a successful defense. In February 2013, Lemasters moved to disqualify the entire Newton County prosecutor's office from his case due to its new attorney's former representation of him. During a hearing regarding the motion, the attorney testified she did not participate in prosecuting any individuals – including Lemasters – whom she previously represented and had not discussed any of those cases with anyone in the prosecutor's office other than to identify which defendants she previously represented. The court overruled Lemasters' motion. During the instruction conference at the June 2013 trial, the court noted the state had elected to dismiss one of the two sodomy counts. The jury found Lemasters guilty of the remaining count, and the trial court sentenced him to 31 years in prison for that count. In its written judgment, however, the trial

court writes that Lemasters was convicted of two counts of first-degree sodomy. Lemasters appeals.

AFFIRMED IN PART; VACATED AND REMANDED IN PART WITH DIRECTIONS.

Court en banc holds: (1) The trial court did not abuse its discretion in overruling Lemasters' motion to disqualify the entire Newton County prosecutor's office from participating in his case.

(a) There is no basis in the rules of professional conduct requiring such a result. Because Lemasters' original attorney was a former governmental attorney by virtue of her employment with the public defender's office, Rule 4-1.11(a)(2) prohibited her from representing the state while employed by the prosecutor's office, and Rule 4-1.9(c) prohibited her from revealing information relating to her representation of Lemasters or using such information to his disadvantage. The evidence shows the attorney complied with her obligations under both rules, and Lemasters points to no evidence showing she violated them. Lemasters' conflict under subdivision (a) of Rule 4-1.11 is not imputed to the other attorneys in the prosecutor's office under subdivision (b) of the rule because the imputation of a conflict extends only to other lawyers in the "firm" with which the lawyer is associated, and a prosecutor's office is not a "firm." Under subdivision (d) of the rule, a current governmental attorney (which Lemasters' original attorney is) is prohibited only from representing the government in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment. But Lemasters' original attorney was not in private practice or nongovernmental employment – she was in governmental employment with the public defender's office.

(b) The trial court's decision not to disqualify the entire prosecutor's office due to Lemasters' former defense attorney's conflict under Rule 4-1.11(a) did not create an appearance of impropriety or cast doubt on the fairness of Lemasters' trial. The standard for determining whether an appearance of impropriety exists is judged not from the defendant's perspective but on whether a reasonable person, with knowledge of all the facts and circumstances, would have grounds to find an appearance of impropriety and doubt the trial's fairness. The facts in Lemasters' case, however, preclude any appearance of impropriety that otherwise might have cast doubt on the fairness of his trial. The evidence showed the prosecutor's office followed the prudent course, removing Lemasters' former defense attorney completely from his prosecution. It also showed the former defense attorney did not divulge any of Lemasters' confidential information to the prosecutors working on his case. The evidence also shows the other attorneys in the prosecutor's office did not know about Lemasters' former attorney's derogatory comments; as such, they have no bearing on whether the trial court should have disqualified those other attorneys.

(2) The trial court erred – as Lemasters argues and the state concedes – in entering a written judgment reflecting convictions of two counts of statutory sodomy when, in fact, Lemasters was convicted of only one count. This is a clerical error because the judgment does not reflect what actually was done. The case is remanded for entry of an amended judgment reflecting only one conviction for first-degree sodomy.