

SC88404

IN THE
SUPREME COURT OF MISSOURI

STATE EX REL. MARTY ROBINSON

Relator,

v.

THE HONORABLE FRANK CONLEY,

Respondent.

RESPONDENT'S BRIEF

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INTRODUCTION

This is an action in prohibition filed by the Director of the State Public Defender System, J. Marty Robinson, against the Honorable Frank Conley a senior circuit judge appointed by this Court to handle the case of *State v. Joseph J. Snyder* in which a criminal defendant is charged with first degree murder and six other felonies.

There is no dispute that Snyder is, and throughout the course of the litigation has been, indigent. Snyder was initially represented by a public defender, but Michael K. Kielty, a private attorney from St. Charles Missouri, entered an appearance for Snyder after Snyder's family paid \$5,000 towards his fee of \$25,000 to \$50,000. Kielty was never paid again, and venue was changed to Boone County. In April 2006 Snyder wrote the court and expressed his desire to "fire" Kielty as he alleged Kielty was not working in his best interests, would not return his calls or letters, would not visit him and would not file requested motions or even discuss them. On May 25, 2006 Kielty asked for leave to withdraw, and did so again on July 13, 2006.

On August 13, 2006 the circuit court after a hearing, allowed Kielty to withdraw from the case finding, among other things, that there were no funds to take depositions or to conduct other discovery, that Snyder was indigent, estranged from his family and that he had been in jail since 2004 and had no funds and no ability to raise funds for his defense, and that Kielty could not properly defend Snyder. The court appointed the Public Defender to represent Snyder.

The Director of the State Public Defender System now seeks a writ of prohibition reversing the decision of Judge Conley. Specifically, Relator asks that this Court issue a permanent writ retroactively preventing Judge Conley from allowing Kielty to withdraw and appointing the Public Defender to represent Snyder, or in the alternative directing Attorney Kielty to pay \$5,000 to the Circuit Court or Snyder to be used to retain other private counsel (Appellant's Brief at 53). In either case Relator asks for a permanent writ prohibiting Judge Conley from appointing the Public Defender to represent Snyder, even though Snyder is admittedly indigent, and the circuit court has found that Kielty cannot properly defend him.

STATEMENT OF FACTS

Joseph Snyder is currently charged with first degree murder, two counts of attempted first degree murder, first degree burglary and three counts of armed criminal action, all arising out of a home invasion in Warren County on September 19, 2004 (E, 14-16)¹. A complaint was filed on October 2, 2004 in Warren County and Snyder was arraigned on October 4, 2004 and applied for representation by the Public Defender (E, 73). On October 22, 2004 Christine Goulet Taylor a public defender entered her appearance for Snyder (E, 73).

Counsel Kielty was paid \$5,000 by Snyder's family on the understanding that he would be paid \$25,000 to take the case through a plea and \$50,000 to try the case (E. 31-32). Kielty entered his appearance on November 29, 2004, and Public Defender Goulet successfully moved to withdraw on December 9, 2004 (E, 74). On December 4, 2005 represented by Kielty, Snyder had a preliminary hearing (E 74-75). On January 4, 2005 a defense motion for change of judge was granted (E, 75). The defense also filed a motion for change of venue on January 4, 2005 (E, 75). On January 18, 2005 Judge Frank Conley was appointed by this Court to handle the case

¹ Respondent will follow Relator's convention of referring to the consecutively paginated index of exhibits as E followed by the relevant page numbers.

(E, 76)². An order of change of venue to Boone County was issued on April 8, 2005 and received in Boone County on April 18, 2005 (E, 1, 76).

On November 9, 2005 additional charges were filed in Warren County arising out of the same September 19, 2004 incident (E, 79). Counsel Kielty, of St. Charles, continued to represent Snyder in the new case (E, 79-82). The defense moved for a change of venue and a change of judge on January 4, 2006 in the second case (E, 82). On February 7, 2006 Judge Conley was appointed in the second case (E, 82). A motion to consolidate the two cases was filed on May 24, 2006, and on May 30, 2006 the second case was transferred to Boone County (E, 82). On July 13, 2006 the two cases arising out of the September 19, 2004 home invasion were consolidated into a single Boone County case, charging seven felonies (E, 88).

Counsel Kielty never received any payment towards his fee beyond the original down payment of \$5,000, despite appearing on seven occasions in Boone County, including an evidentiary suppression hearing, and on numerous occasions in Warren County (E, 31-32, 59-60, 86). On April 12, 2006 Snyder wrote the trial judge asking to appear in court so that he could fire Kielty, whom he alleged was not working in his best interests, would not return his calls or letters or see him in person and would not

² The Warren County docket sheet lists January 18, 2005 as the date Judge Conley was appointed (E, 76). The Boone County docket refers to an order assigning Judge Conley in a docket entry of May 10, 2005.

discuss or file motions requested by Snyder (E, 21). Kielty appears to have sought leave to withdraw on both June 21, 2006 and July 13, 2006 (E, 88).

On July 13, 2006 the Circuit Court approved Kielty's withdrawal contingent on the Public Defender entering an appearance (E, 88). The Missouri State Public Defender found Snyder ineligible for services and requested that the court refrain from allowing private counsel to withdraw (E, 22-25). The Circuit Court held a hearing on the matter on August 8, 2006 (E, 27-58). At the hearing, Kielty asserted that "I am at this point due to his inadequate financial resources at a severe disadvantage, unable to present him with an adequate defense because I don't have the resources to investigate the case or adequately prepare which would include but not be limited to depositions" (E, 32). Later Kielty asserted "Time wise, resource wise I'm not capable of doing it, not adequately for Mr. Snyder's defense" (E, 37). A representative from the Public Defender asked the court not to allow Kielty to withdraw and offered to appoint Kielty as an unpaid special public defender and allow him to request funds for depositions and expert services from the public defender system (E, 41). Kielty indicated, that he had worked on the case over 100 hours, and had earned the \$5,000 that he had been paid, that he acted in good faith but that Snyder "doesn't believe I will have adequate resources to properly represent him and protect his rights nor do I" (E, 44). Kielty went on to state that the "\$5,000 fee and the resources that I have - - I'm the only attorney in my office, I have two secretaries - - I don't think is adequate to represent his needs without the proper resources." (E, 44). Kielty stated that in order to prepare

the case properly he would have to set his practice aside for the better part of a month and that he could do that if he was paid an hourly rate (E, 45). The Public Defender's representative declined to pay Kielty an hourly rate for his work insisting that the \$5,000 he had received was within the range of payment paid to contract counsel in such cases (E, 46). The trial court indicated that was not what contract counsel in another case told him he was being paid and the Public Defender indicated that all contracts were not the same (E, 46).

Following the hearing the circuit court made the following findings:

COURT FINDS FROM ORAL ARGUMENT HEARD THIS DATE, THAT DEFT.'S FAMILY PAID \$5,000 IN 2004 TOWARDS THE FEE OF ATTORNEY KIELTY; THAT FOR A TRIAL OF THIS TYPE, WHEN THE DEFT, IS CHARGED WITH 1ST DEGREE MURDER AND SIX OTHER CRIMINAL CHARGES, THAT HIS ULITMATE FEE WOULD BE BETWEEN \$25,000 AND \$50,000; THAT THERE ARE NO FUNDS WITH WHICH TO TAKE DEPOSITION OR TO CONDUCT OTHER DISCOVERY; THAT SINCE THE CASE HAS BEEN TRANSFERRED TO COLUMBIA, MISSOURI FROM WARREN COUNTY, THAT COUNSEL HAS MADE SEVEN APPEARANCES IN COURT, TOGETHER

WITH NUMEROUS APPEARANCES IN WARREN COUNTY; COURT FURTHER FINDS THAT DEFT. IS ESTRANGED FROM HIS FAMILY AND HAS HAD NO CONTACT WITH HIS MOTEHR WHO WAS TO PAY ADDITIONAL ATTORNEY'S FEES FOR OVER TWO YEARS; COURT FURTHER FINDS THAT DEFT. IS INDIGENT AND WITHOUT ANY FUNDS OR ABILITY TO RAISE FUNDS FOR HIS DEFENSE AND THAT DEFT. IS NOW CONFINED IN JAIL AND HAS BEEN SO CONFINED SINCE HIS ARREST IN 2004; COURT FURTHER FINDS THAT DEFT. REQUIRED ASSISTANCE OF COUNSEL AND THAT HIS PRESENT COUNSEL CANNOT PROPERLY DEFEND DEFT. DEFT'S ATTORNEY GIVEN LEAVE TO WITHDRAW UPON SAID COUNSEL'S ORAL REQUEST AND THE WRITTEN REQUEST OF THE DEFT. COURT FURTHER FINDS THAT DEFT. QUALIFIES FOR REPRESENTATION BY THE PUBLIC DEFENDER AND PUBLIC DEFENDER APPOINTED TO REPRESENT DEFT. WITH FURTHER HEARING SET FOR 1:30 P.M. ON AUGUST 15, 2006 FOR THE

PURPOSE OF TRIAL SETTING. FC/SENIOR JUDGE

(DG)

(E, 59-60)

The Public Defender sought and received a preliminary writ in prohibition from the Missouri Court of Appeals Western District against Judge Conley's decision to allow Kielty to withdraw and appoint the Public Defender to the Snyder case (E, 91). Following full briefing, the Court of Appeals determined that it had improvidently granted the preliminary writ of prohibition and denied the petition for writ of prohibition (E, 94).

ARGUMENT

The Honorable Judge Conley acted within his jurisdiction and discretion in allowing private counsel to withdraw and appointing the Office of the Public Defender in a first degree murder case, when the case had been transferred from Warren County to Boone County, the private attorney was a sole practitioner from St. Charles County who had no prospect of being paid beyond an initial down payment from now estranged relative of the defendant, and the defendant was unquestionably indigent, and counsel did not believe he had the resources to adequately protect the defendant's rights. (Addresses Points I & II).

A. STANDARD OF REVIEW

Prohibition is only available in three rare categories of cases, These are 1) when a judicial or quasi judicial body acts without subject matter or personal jurisdiction, 2) when a tribunal lacks the power to act as contemplated, and 3) when absolute irreparable harm may result absent justifiable relief or when an important question of law was decided erroneously and relief is not available on appeal and the aggrieved party may suffer considerable hardship and expense because of erroneous decision. *State ex rel. Riverside Joint Venture v. Missouri Gaming Commission*, 969 S.W.2d 218, 221 (Mo. banc 1998).

The determination of whether defense counsel should be allowed to withdraw from a criminal case is within the discretion of the trial court and will be reviewed for abuse of that discretion. *State v. Christeson*, 50 S.W.3d 251, 261 (Mo. banc 2001).

“Judicial discretion is abused when the trial court’s ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration.” *Id* at 261.

A person is eligible for representation by the Public Defender if he does not have the means at his disposal or available to him to obtain counsel on his behalf and he is indigent *State ex rel. Gordon v. Copeland*, 803 S.W.2d 153, 155 (Mo. App. S.D. 1991) *citing* §600.086.1 RSMo 1986. Section 600.086.3 RSMo 2000 provides that “the court in which the case is pending shall have the authority to determine whether the services of the public defender may be used by the defendant.”

B. THE DECISION TO ALLOW COUNSEL TO WITHDRAW

The Public Defender does not appear to allege that the Circuit Court lacked subject matter or personal jurisdiction or that it otherwise did not have the power to act as it did in allowing Kielty to withdraw. Such an argument would be frivolous as trial courts are charged with deciding such an issue. Rather, the Public Defender quarrels with the discretionary decision to allow Attorney Kielty to withdraw from the criminal case of *State v. Snyder*, a decision based on the finding made after a hearing that “present counsel cannot properly defend deft.” (E, 60). The Public Defender asserts it suffers “irreparable harm” from this decision of the Circuit Court (See Relator’s Brief 16).

But this argument is without merit. Any injury that can be corrected by this Court must flow from the forced representation of an ineligible client, as the Public

Defender is not injured by carrying out its statutory mission of defending those eligible for its services, and the decision to allow Kielty to withdraw because he cannot properly represent his client is independent of whether Snyder is eligible for Public Defender services. Further, at the hearing, the Public Defender's Office dealt with the argument that Kielty could not afford the expense necessary to defend Snyder by offering to appoint Kielty as a Special Public Defender – without pay – so that he could apply for funds for depositions and experts (E, 41). This was an acknowledgment by the Public Defender that Snyder, who is admittedly indigent – (Relator's Brief 47) – is eligible for Public Defender services. Snyder cannot be eligible for Public Defender services under the statute, but only when the Public Defender does not have to pay the attorney representing Snyder out of its budget. Either Snyder is eligible or he is not. The Public Defender, by admitting Snyder is indigent and offering to provide a special public defender to represent him, acknowledges that Snyder is eligible for services. Their quarrel is really with paying for the services. There is no irreparable injury, which brings the decision to allow Kielty to withdraw within the scope of the writ of prohibition.

As this is not a proper case for prohibition it is not necessary to review the merits of the decision to allow Attorney Kielty to withdraw under the abuse of discretion standard. But there was no abuse of discretion in this case. It can not be said that the decision to allow Kielty withdraw was against the logic of the circumstances and so arbitrary and unreasonable as to shock the sense of justice and

indicate lack of careful consideration, which is the standard of review *See State v. Christeson*, 50 S.W.3d at 261.

Joseph Snyder wrote the trial court on April 12, 2006 asserting his desire to discharge Kielty because Kielty was allegedly not working in his best interests, would not return calls or letters or visit, and would not file requested motions or discuss them with Snyder. (E-21) At the August 8, 2006 hearing on withdrawal, Kielty stated he could not present an adequate defense because he did not have the resources to investigate or adequately prepare the case (E. 32). Kielty indicated his office did not possess the resources to do the case *pro bono* (E, 37). Kielty stated that Snyder did not believe Kielty had adequate resources to properly represent or protect his rights and that Kielty agreed with him (E, 44). Kielty stated “He’s looking at you know, even potentially having you know capital charges brought against him. \$5,000 and the resources that I have - - I’m the only attorney in my office, I have two secretaries – I don’t think is adequate to represent his needs without proper resources.” (E, 44). Counsel indicated that in order to adequately prepare the case he would have to set the rest of his practice aside for the better part of a month (E, 45).

The Public Defender issued a written determination that Snyder was ineligible for Public Defender services on August 4, 2006 (E, 22-25). But at the hearing on withdrawal on August 8, 2006 offered to appoint Kielty as an unpaid Special Public Defender – apparently despite Snyder’s alleged ineligibility for services (E, 41). The Public Defender indicated that it would accept requests from Kielty for “expert

services and depositions and other court costs” (E, 41) and later reiterated the offer referring to “case related expenses such as depositions experts and so forth” (E, 45)³.

The decision of the trial court to allow attorney Kielty to withdraw was well within the trial court’s discretion based on the record before the trial court. Snyder’s dissatisfaction with Kielty combined with Kielty’s repeated assertions that he did not have the resources to adequately protect Snyder’s rights were a red flag that Snyder’s right to a fair trial was in jeopardy. Snyder has a right to a fair trial the first time, not just a right to a fair trial eventually following reversal of the case for conflict of interest or some other effective assistance of counsel claim. *See State ex rel. Wolfrum v. Weesman*, 225 S.W.3d 409 (Mo. banc 2007) (trial court should do its utmost to protect the defendant’s right to adequate and competent representation, and should not have ordered case to proceed to trial with admittedly unprepared counsel as the argument that the case can ultimately be retried by competent and prepared counsel is unsupportable).

As *Wolfrum* teaches, the trial court should do its utmost to protect the defendant’s rights to adequate and competent representation. That is what happened.

³ In its current brief the Public Defender asserts its willingness to pay Kielty’s hotel costs and mileage. (Relator’s Brief 34). It did not favor Kielty or the trial court with this offer, creating the fair inference that Kielty would be expected to pay those expenses out of his pocket while trying a murder case in Boone County.

That is neither an abuse of discretion nor error. It is a fair inference from the record that even had Kielty been forced to accept appointment as a special Public Defender and received reimbursement for depositions experts and court costs, that the financial burden of setting aside his practice for a month without pay to prepare for trial, and for an additional period to try the case would apparently create a conflict of interest adversely affecting representation. The trial court made the only reasonable decision in putting the defendant's interest first and allowing Kielty to withdraw.

C. THE APPOINTMENT OF THE PUBLIC DEFENDER

The Public Defender acknowledges that Snyder is indigent (Relator's Brief 25). But the Public Defender alleges that Snyder was ineligible for services "because he had the means at his disposal or available to him to obtain counsel as shown by the fact that he actually obtained Kielty." (Relator's Brief 25). Snyder's family hired Kielty but after the initial installment ceased paying him (E, 31-32). The fact that Snyder's family paid an attorney a down payment in 2004 does not show that Snyder had the means available to him or at his disposal in 2006 to obtain counsel. The family had no duty to pay an attorney for Snyder and the circuit court had no duty to keep Kielty in the case after concluding, as it did properly, after a hearing, that Kielty could not adequately defend Snyder (E, 59-60). See *State ex rel. R.J. Gordon v. Copeland*, 803 S.W.2d 153, 160 (Mo. App. S.D. 1991) (rejecting claim by Public Defender that juvenile whose parents could afford counsel was ineligible for public

defender services on the theory that he had the means to obtain counsel available to him or at his disposal).

Further, in this case, the Public Defender offered to appoint Kielty as a Special Assistant Public Defender so long as he worked without pay in representing Snyder (E 41). Section 600.086.1 RSMo 2000, the statute on eligibility for public defender representation, focuses on indigence and the lack of means to obtain counsel as the test for eligibility. As a practical matter the position the Public Defender took in the trial court and takes in this Court concedes that Snyder is eligible for Public Defender representation under the statute. Snyder is according to the Public Defender eligible for representation by Kielty as unpaid Special Public Defender. This concession necessarily implies that Snyder is eligible for Public Defender representation⁴.

⁴ Relator argues that Kielty should not have taken the case in the first place without a higher retainer and that attorneys such as Kielty not taking cases with high fees but low retainers would enable defendants to hire private attorneys who charge lower fees “such as those attorneys who do contract work for the Public Defender.” (Relator’s Brief 48). Presumably if this really happened on a large scale, it would lower the Public Defender’s work load by increasing the percentage of cases taken on and completed by counsel willing to accept lower fees and driving out higher priced attorneys less likely to complete all their cases. While explaining the Public Defender’s motive for wishing to punish Kielty and use him as an example, this

Snyder was and is eligible for Public Defender representation under the test set out in §600.086.1 RSMo 2000. The circuit court did no err in appointing the public defender to represent Snyder.

D. THE REQUEST THAT KIELTY BE REQUIRED TO RETURN HIS FEE TO
THE DEFENDANT

The Public Defender acknowledges that a trial court's decisions regarding attorney's fees are matters within the trial court's discretion (Relator's Brief at 43) *citing Granat v. Scott*, 766 S.W.2d 748, 749 (Mo. App. E.D. 1989). The Public Defender however asserts that the trial court abused its discretion by not ordering Kielty to pay to Snyder the \$5,000 Snyder's family had paid Kielty, so that Snyder can hire another private lawyer, or by not ordering Kielty to pay the money to the court to be held in escrow to pay a new lawyer (Relator's Brief 51-52). The Public Defender suggests that if the \$5,000 proves insufficient to retain private counsel and the Public Defender undertakes representation the \$5,000 "could go to the Public Defender as part of a limited cash contribution or to pay Public Defender liens." (Relator's Brief 51).

The Public Defender does not assert that Kielty did not perform services that have a fair market value of at least \$5,000 in exchange for the initial \$5,000 payment

economic theory neither makes Snyder ineligible for services nor makes Judge Conley's decision, to protect Snyder's rights in this case, an abuse of discretion.

toward his fee. The Public Defender acknowledges that the remedy of requiring counsel who earned his partial fee to return it as the price of withdrawal “may seem novel” (Relators Brief 50). In fact the Public Defender appears to cite no case in which this has ever occurred in any jurisdiction, relying instead on *In re Marriage of Redmond*, 131 P3d 1167, 1170 (Colo. Ct. App. 2005), a case in which the Colorado Court of Appeals held that a court may in theory order a refund of fees by a court appointed special advocate, appointed to make recommendations about the best interests of a child, if the advocate acted in violation of the Rules of Professional conduct. *In re Marriage of Redmond* has nothing to do with the fact patten in this case⁵.

The fact that the Public Defender’s proposed remedy, of requiring an attorney to refund properly earned fees as the price of withdrawal from a case, is so novel as to be unprecedented defeats the argument that the trial court abused its discretion by not ordering this remedy. In fact the argument turns the concept of abuse of discretion on

⁵ *In re Marriage of Redmond*, 131 P.3d 1167, (Colo. Ct. App. 2005) is a case in which the Colorado Court of Appeals actually reversed an order for refund of fees, finding that the trial court’s loss of confidence in the special advocate was an inadequate reason for ordering a refund of fees, and the appellate court remanded the case for determination of whether a violation of rules of professional conduct occurred.

its head. If a trial court abuses its discretion by not issuing a novel and unprecedented order simply because the Public Defender asks it to, without any real legal authority, the idea of discretion would be greatly expanded in so far as a court disagrees with the Public Defender

E. SUMMARY

The trial court in this case acted well within its discretion in allowing private counsel to withdraw and appointing the Public Defender to represent an admittedly indigent defendant when the trial court concluded, and the conclusion was well supported in the record, that private counsel could not adequately represent the defendant. The trial court did not abuse its discretion by not creating the novel remedy of requiring an attorney to return his already earned partial fee in order to withdraw from a case.

CONCLUSION

Respondent prays that the preliminary writ prohibition be quashed and the petition for writ of prohibition be denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06(b) and contains___ words, excluding the cover, this certification and the appendix, as determined by Microsoft Office Word 2003 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free and

3. That two true and correct copies of the attached brief, and two floppy disks containing a copy of this brief, were mailed, postage prepaid, this 20th day of August, 2007, to:

J. Gregory Mermelstein, Woodrail Centre, 100 West Nifong, Building 7 Suite 100, Columbia, MO 65203;

A single brief was mailed to:

Hon. Frank Conley, Special Judge, Boone County Circuit Court, 705 East Walnut St., Columbia, MO 65201; Christy Blakemore, Circuit Clerk Boone County Circuit Court, 705 East Walnut St., Columbia, MO 65201; Michael K. Kielty, 301 N. Kingshighway, St. Charles, MO 63301; Michael Wright, Warren County Prosecutor, 104 W. Main St., Ste E. Warrenton, MO 63383; and Joseph J. Snyder, Warren County Jail, 104 West Main St., Warrenton, MO 63383.

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