

No. 29837 - State of West Virginia ex rel. Charles Garland Keenan v. Honorable John W. Hatcher, Jr., Judge of the Circuit Court of Fayette County, and the State of West Virginia

FILED

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OF WEST VIRGINIA

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Davis, J., concurring in part and dissenting in part:

In this writ of prohibition proceeding the defendant below, Mr. Keenan, challenged the trial judge's appointment of a special prosecutor to try a recidivist information against him. Mr. Keenan argued that because the prosecuting attorney who had actually filed the recidivist information once represented him on one of the charges in the information, the very act of filing the information was invalid. The majority opinion has concluded that a prosecutor who once represented a defendant on a charge that forms the basis of a recidivist information can neither file the information nor prosecute the information. I concur in the majority's ruling that, under the above set of facts, a prosecutor may not try such an information. However, for the reasons outlined below, I dissent from the majority's decision that the prosecutor may not file an information under the circumstances presented by this case.

1. *Filing a recidivist information does not compromise a prior attorney-client relationship.* The majority opinion contends that allowing a prosecutor to file a recidivist information under the facts of this case "raises too great a danger that a client's confidences may be betrayed." I believe the opinion unnecessarily inflates what actually takes place and is disclosed when filing a recidivist information.

One of the requirements for establishing privileged communication between an attorney and client is that “the communication between the attorney and client must be intended to be confidential.” Syl. pt. 2, in part, *State v. Burton*, 163 W. Va. 40, 254 S.E. 2d 129 (1979). All information required to draft a recidivist information pertains to “public” information. That is, a recidivist information contains the name of a person and crimes for which the person was allegedly convicted of committing. A prosecutor, who formerly represented a defendant subject to a recidivist prosecution, is not disclosing any confidential or privileged details by stating in the information such public material.¹

2. In order to file a recidivist information a prosecutor has to disclose his or her awareness of prior charges. Although the majority opinion presents an intuitively logical analysis, that analysis contains a flaw which could be exploited by defense counsel.

Under the reasoning of the majority opinion, a prosecutor is prohibited from filing a recidivist information against a defendant if he or she previously represented the defendant on one of the underlying charges. The majority opinion contends that a prosecutor may rely on confidential information in bringing the recidivist information. This reasoning leads to the illogical result that a prosecutor will also be prohibited from alerting the trial court that a recidivist information should be filed against a defendant and

¹This situation is distinguishable from a prosecutor who discloses information about a former client to a grand jury in order to obtain an indictment. In that situation, the prosecutor would in fact be divulging privileged communication of matters that are not known to the public.

that a special prosecutor should be appointed. That is, in order for the recidivist information to be filed, someone must bring the issue to the trial court's attention. Obviously, the defendant will not disclose such information. The moment the prosecutor alerts the trial court that a recidivist information needs to be filed, the prosecutor divulges information pertaining to a prior crime committed by the defendant.

The point is simple. The facts which a prosecutor would be forced to disclose to a trial court in order to have a special prosecutor appointed to file a recidivist information are the exact same facts that will be placed in the recidivist information by a special prosecutor. Accordingly, criminal defense lawyers will necessarily, and under the majority opinion in this case correctly seek the dismissal of a recidivist information filed by a special prosecutor. This scenario will occur because the facts included in a recidivist information filed by a special prosecutor will have been initially disclosed by a prosecutor who, under the majority opinion, is now prohibited from having *any* role in the matter by virtue of his or her prior representation of the defendant.

3. *The majority opinion erects a procedural bar to bringing late-term recidivist information prosecutions.* The majority decision in this case was reached without careful attention to the different scenarios that are possible when bringing a recidivist information against a defendant. A monumental scenario overlooked by the majority opinion concerns time constraints involved when bringing a recidivist information. Statutory time constraints are imposed upon prosecutors seeking a recidivist information against defendants. This Court recognized those time constraints in syllabus point 3 of *State ex rel. Housdon v. Adams*, 143 W. Va. 601, 103 S.E.2d 873 (1958) as follows:

A person convicted of a felony cannot be sentenced under the habitual criminal statute, [W. Va.] Code § 61-11-19, unless there is filed by the prosecuting attorney with the court *at the same term, and before sentencing*, an information as to the prior conviction or convictions and for the purpose of identification the defendant is confronted with the facts charged in the information and cautioned as required by the statute.

(Emphasis added).

Moreover, in *State v. Cavallaro*, ___ W. Va. ___, ___ S.E.2d ___ (No. 29635 November 28, 2001) (per curiam), the defendant was convicted of a felony on June 1, 2000. The conviction occurred at the end of the term of court. The prosecutor filed a recidivist information against the defendant immediately after the jury returned its verdict. However, the trial judge decided to delay arraigning the defendant on the information until the following week, which began a new term of court. The trial court arraigned the defendant at the new term of court on June 6, 2000. The defendant was eventually convicted by a jury on the recidivist charge and sentenced to life imprisonment. He appealed arguing that the recidivist conviction was invalid as he was not called upon to plead to the recidivist information during the same term of court in which the underlying conviction was obtained. This Court agreed with the defendant that, “[p]ursuant to *Housdon*, the trial court was without jurisdiction . . . to permit the prosecution and sentence of [the defendant] on the recidivist information.” *Cavallaro*, ___ W. Va. at ___, ___ S.E.2d at ___, slip op. at 6.

In the instant proceeding, the majority opinion has created a situation whereby a recidivist information cannot be prosecuted in late-term *Cavallaro* type cases, only because there will be insufficient

time to locate and appoint a special prosecutor before a new term of court begins.²

4. *The procedure that should have been imposed.* As previously indicated, I agree with the majority opinion that a prosecutor should not be allowed to actually try a recidivist information against a defendant that he or she has represented on one of the convictions that formed the basis of the information. After this point, I differ with the majority. Because of the potential problems I have outlined above, I would permit a prosecutor to file a recidivist information and require the defendant to plead to that information.

The procedure I suggest would require the prosecutor to inform the court and defendant of the prior representation before the defendant is arraigned. Once this disclosure is made, the court should instruct the defendant that, because of statutory time constraints, the defendant will be arraigned on the prosecutor's information. The court should instruct the defendant that even if he or she wishes to plead guilty, he or she may plead not guilty and a special prosecutor would thereafter be appointed to accept a guilty plea. Further, if the defendant wishes to plead guilty, he or she may do so; but, a special prosecutor would be appointed for purposes of sentencing. Finally, if the defendant intends to plead not guilty, then such a plea should be entered and a special prosecutor appointed to try the case.

Based upon the foregoing, I respectfully concur in part and dissent in part from the majority

²Obviously, the problem I am addressing will only occur in those situations where a prosecutor has previously represented a defendant on an underlying criminal charge that forms the basis of a recidivist information.

opinion. I am authorized to state that Justice Maynard joins me in this concurring and dissenting opinion.