No. 34746 - State of West Virginia v. DeAaron Fields

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RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Davis, C.J., dissenting:

The appellant, DeAaron Fields, argued that his trial counsel of choice was improperly removed by the trial court. The majority opinion rejected Mr. Fields' argument and affirmed his conviction for first degree murder. For the reasons set out below, I dissent.

The Trial Judge Became an Advocate for the State

The record in this case overwhelmingly supports Mr. Fields' contention that his counsel of choice, David D. Perry, was improperly removed as his attorney. After a painstakingly thorough review of the record in this case, I have reached the conclusion that the trial judge overstepped his neutrality role and became an advocate for the State when the trial court removed Mr. Perry as counsel for Mr. Fields. The record demonstrates that the State's case had fallen apart on the eve of trial. In an effort to salvage the case for the State, the trial court took the unprecedented step of removing Mr. Perry. To understand how I have reached this conclusion, it is necessary to first chronologically review the documentation filed in this case leading up to Mr. Perry being removed as counsel for Mr. Fields.

> – June 2, 2004 Mr. Perry filed a notice of appearance while the case was under the juvenile jurisdiction of court. At that time, Mr. Perry was retained by Mr. Fields' parents for the nominal sum of $1.00.

– June 29, 2004 Mr. Perry filed a motion for bail, which was denied on July 7, 2004.

– July 7, 2004 the case was transferred to the adult jurisdiction of court.

– October 8, 2004 Mr. Fields was indicted for first degree murder.

– October 28, 2004 Mr. Fields was arraigned.

– November 8, 2004 Mr. Perry filed a motion in limine, motion to preserve certain evidence, motion to disclose vehicle evidence, motion to inspect vehicle, eight specific discovery motions, and two omnibus discovery motions.

– November 18, 2004 Mr. Perry filed a motion to disclose grand jury testimony.

– November 29, 2004 Mr. Perry filed proposed voir dire questions, jury instructions and another motion in limine.

– November 29, 2004 the trial court filed an order setting the case for trial on December 8, 2004.

– December 3, 2004, five days before trial, the State served its first discovery requests.

– December 6, 2004 Mr. Perry provided the State with a witness list.

– December 8, 2004 the court filed an order formally appointing Mr. Perry to represent Mr. Fields.

– December 8, 2004, the trial date, the State, over defense objections, requested the case be continued.

– December 21, 2004 the court filed an order granting the State's request to continue the trial and set a new trial date for February 1, 2005.

– January 21, 2005 Mr. Perry filed a notice of alibi and a general response to the State's discovery requests.

– January 24, 2005 Mr. Perry filed additional proposed jury instructions.

– January 26, 2005 Mr. Perry filed a supplemental witness list.

– January 26, 2005 Mr. Perry filed a notice of hearing to address all pending pretrial motions.

– January 27, 2005 the State filed a motion to continue the trial.

– January 27, 2005 Mr. Perry filed a supplemental witness list.

– January 28, 2005 the State filed a supplement to its discovery disclosure.

– January 28, 2005 Mr. Perry filed a memorandum opposing the State's request to continue the trial, a motion to dismiss the indictment because of perjured grand jury testimony, a motion to dismiss the indictment because of prejudicial delay in bringing the defendant to trial, and a motion to dismiss the indictment because of prosecutorial misconduct.

– January 31, 2005 a hearing was held, during which the trial court removed Mr. Perry and the State's prosecutor from the case.

– February 1, 2005 Mr. Perry filed a motion for speedy trial and a notice of appearance as retained counsel.

– February 2, 2005 the court filed two orders, without any findings, dismissing Mr. Perry as appointed counsel.

In looking at the history of the documentation in this case, it is impossible to discern anything that Mr. Perry did which would have warranted his removal from the case.

In fact, the record suggests that he was very aggressive in his representation of Mr. Fields. More importantly, none of the documentation in this case revealed a motion being filed by the State, asking the trial judge to resolve a discovery dispute.

1. The trial judge *sua sponte* raised discovery issues. The issue of a discovery dispute in this case was not raised by the State. During the January 31, 2005 hearing, the trial judge *sua sponte* confronted Mr. Perry about discovery issues. Specifically, the trial court criticized Mr. Perry for not adding the addresses of witnesses to his general witness list and failing to provide the State alibi witness information within the time period required by the rules of criminal procedure. To the extent that Mr. Perry failed to provide addresses of witnesses and failed to timely file alibi information, the State never filed a motion to bring these matters to the court's attention.

Rule 16(d)(2) of the West Virginia Rules of Criminal Procedure sets out the procedure to be followed when a party fails to comply with discovery requests. The following is stated under Rule 16(d)(2):

> If at any time during the course of the proceedings *it is brought to the attention of the court* that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances.

(Emphasis added). Rule 16(d)(2) neither expressly nor implicitly grants a trial judge

authority to sua sponte raise a discovery issue as was done in this case. "Disputes about . . . discovery are brought to the court by a motion for a protective order under Rule 16(d)(1) or a motion to compel or for sanctions under Rule 16(d)(2)." *United States v. McVeigh*, 954 F. Supp. 1441, 1449 (D. Colo. 1997). *See State ex rel. Rusen v. Hill*, 193 W. Va. 133, 140, 454 S.E.2d 427, 434 (1994) ("Once a circuit court receives a motion requesting sanctions or relief for discovery violations, the circuit court should order, to the full extent required by the discovery rules or the court order, an immediate disclosure.").

2. The sanction of removing Mr. Perry was not supported by the alleged discovery violations. Assuming, for the sake of argument, that the State had properly moved the trial court for sanctions against Mr. Perry for failing to provide addresses for witnesses and failing to timely provide alibi witness information, the penalty of removing Mr. Perry as counsel has no support in our law. Professor Cleckley has addressed the issue of sanctions for discovery violations in criminal cases as follows:

> The trial court may sanction parties for failure to comply with legitimate discovery requests, and it has broad discretion to impose sanctions it deems just under the circumstances. In exercising its discretion, the trial court should impose the least severe sanction that will accomplish the desired result of prompt and full compliance with the discovery requirements. This is particularly true, when the party violating the discovery is the defendant. The court should first consider the reasons for the failure to disclose, including the party's bad or good faith, the extent to which the opponent has been prejudiced by the failure to disclose, and the feasibility of curing the prejudice by the granting of a continuance.

Franklin D. Cleckley, Vol. I, *Handbook on West Virginia Criminal Procedure*, p.I-746 (1993).

In the instant case, assuming that the trial court properly had the discovery issues before it, a constitutionally appropriate response or sanction by the court would have been an order compelling disclosure of addresses for the witnesses or precluding the witnesses from testifying. *See* Syl. pt. 1, *State v. Ward*, 188 W. Va. 380, 424 S.E.2d 725 (1991) ("Where a trial court is presented with a defendant's failure to disclose the identity of witnesses in compliance with West Virginia Rule of Criminal Procedure 16, the trial court must inquire into the reasons for the defendant's failure to comply with the discovery request. If the explanation offered indicates that the omission of the witness' identity was willful and motivated by a desire to obtain a tactical advantage that would minimize the effectiveness of cross-examination and the ability to adduce rebuttal evidence, it is consistent with the purposes of the compulsory process clause of the sixth amendment to the United States Constitution and article II, section 14 of the West Virginia Constitution to preclude the witness from testifying."). This Court has noted that "[b]ecause [removal] of a criminal defendant's chosen counsel raises problems of a constitutional dimension, it is a harsh remedy that should be invoked infrequently." *State ex rel. Blake v. Hatcher*, 218 W. Va. 407, 415, 624 S.E.2d 844, 852 (2005) (internal quotations and citation omitted).

3. Mr. Fields' constitutional right to counsel of choice was violated. Mr. Fields' parents retained Mr. Perry to represent him for a nominal fee of $1.00. The trial court later appointed Mr. Perry. Subsequent to Mr. Perry's removal, Mr. Fields' parents once again retained Mr. Perry. The trial court denied Mr. Perry's efforts to remain in the case. Regardless of whether Mr. Perry was characterized as a retained or appointed lawyer during the initial representation, he was Mr. Fields' retained counsel of choice after the trial court erroneously removed him.

Under the facts of this case, the trial court's refusal to allow Mr. Perry to represent Mr. Fields, for alleged discovery violations, denied Mr. Fields his constitutional right to counsel of choice. A case which helps illustrate the implications of the constitutional right to counsel is the recent United States Supreme Court decision in *United States v. Gonzalez-Lopez*, 548 U.S. 140, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006).

In *Lopez* the defendant was charged, in a federal court in Missouri, with conspiracy to distribute marijuana. The defendant's family hired attorney John Fahle to represent him. After the defendant's arraignment, the defendant contacted a California attorney, Joseph Low, to discuss whether Mr. Low would represent him, either in addition to or instead of Mr. Fahle. Mr. Low agreed to be co-counsel. During a proceeding before a federal magistrate, Mr. Low's provisional acceptance to practice in the federal district court

was revoked because he passed a note to co-counsel during the proceeding.[1] Subsequent to the hearing, the defendant informed Mr. Fahle that he wanted Mr. Low to be his only attorney. Mr. Fahle filed a motion to withdraw and a motion seeking sanctions against Mr. Low for contacting the defendant while Mr. Fahle represented him. Mr. Low filed an application for admission pro hac vice. The federal district court denied his application without comment. Eventually the district court indicated that its decision not to allow Mr. Low to represent the defendant was a sanction because Mr. Low had contacted the defendant while the defendant was represented by counsel.[2] The defendant was ultimately convicted. The defendant appealed to the Eighth Circuit Court of Appeals. The Eighth Circuit reversed the defendant's conviction on the grounds that the defendant's Sixth Amendment right to paid counsel of his choosing was violated, because of the grounds relied upon by the district court to deny Mr. Low's application for admission pro hac vice. The Government appealed to the United States Supreme Court. The Supreme Court affirmed the Eighth Circuit's decision based upon the following:

> The Government contends, however, that the Sixth Amendment violation is not "complete" unless the defendant can show that substitute counsel was ineffective within the meaning of *Strickland v. Washington*, 466 U.S. 668, 691-696, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)_– *i.e.*, that substitute counsel's performance was deficient and the defendant was prejudiced by it. In the alternative, the Government contends that the

[1]The hearing was held before Mr. Low had an opportunity to file a motion for admission pro hac vice.

[2]The district court also noted that the sanction was being imposed because Mr. Low had made contact with a defendant in an unrelated case who was also represented by counsel.

defendant must at least demonstrate that his counsel of choice would have pursued a different strategy that would have created a "reasonable probability that . . . the result of the proceedings would have been different," *id*., at 694, 104 S. Ct. 2052– in other words, that he was prejudiced within the meaning of *Strickland* by the denial of his counsel of choice even if substitute counsel's performance was not constitutionally deficient. . . .

. . . .

. . .[T]he Sixth Amendment right to counsel of choice . . . commands, not that a trial be fair, but that a particular guarantee of fairness be provided– to wit, that the accused be defended by the counsel he believes to be best. "The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause." *Strickland*, *supra*, at 684-685, 104 S. Ct. 2052. In sum, the right at stake here is the right to counsel of choice, not the right to a fair trial; and that right was violated because the deprivation of counsel was erroneous. No additional showing of prejudice is required to make the violation "complete."

. . . .

We have little trouble concluding that erroneous deprivation of the right to counsel of choice, "with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as 'structural error.'" [*Sullivan v. Louisiana*, 508 U.S. 275, 282, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993).] Different attorneys will pursue different strategies with regard to investigation and discovery, development of the theory of defense, selection of the jury, presentation of the witnesses, and style of witness examination and jury argument. And the choice of attorney will affect whether and on what terms the defendant cooperates with the prosecution, plea bargains, or decides instead to go to trial. In light of these myriad aspects of representation, the erroneous denial of counsel bears directly on the "framework within which the trial proceeds," [*Arizona v. Fulminante*, 499 U.S. 279, 310, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991)]_– or indeed on whether it proceeds at all. It is impossible to know what different choices the rejected counsel would have made, and then to quantify the impact of those different choices on the outcome of the proceedings. Many counseled decisions, including those involving plea bargains and cooperation with the government, do not even concern the conduct of the trial at all. Harmless-error analysis in such a

> context would be a speculative inquiry into what might have occurred in an alternate universe.

Lopez, 548 U.S. at 144-50, 126 S. Ct. at 2561-65, 165 L. Ed. 2d 409.

The decision in *Lopez* is procedurally indistinguishable from the facts in the instant case. In both cases, defense counsel were not permitted to represent the defendants because of minor rule infractions. The decision in *Lopez* stands for the proposition that it takes more than "minor" rule infractions for a court to deny a defendant his/her right to retained counsel.

4. The trial court removed Mr. Perry because the State's case had fallen apart on the eve of trial. As previously indicated, on January 31, 2005, one day before Mr. Fields' trial was scheduled to start, the trial court held a hearing to consider, among other matters, the State's motion to continue the trial. The State offered only two reasons for needing a continuance and neither reason involved a discovery violation by Mr. Perry. The State argued that it needed a continuance because: (1) Mr. Fields' alibi witnesses would not talk to the State's investigator, and (2) the State's only eyewitness against Mr. Fields had changed his statement and was now claiming to not have remembered anything involved with the killing.

It is clear that the reasons given by the State for seeking a continuance demonstrate that its case against Mr. Fields was in trouble. I believe that, as a result of the reasons given by the State for needing a continuance, the trial court removed Mr. Perry and the State's prosecutor, in order to indirectly grant the State its second continuance. In other words, Mr. Fields' constitutional right to a speedy trial stood as an obstacle to the trial court granting the State a continuance. In an effort to get around Mr. Fields' constitutional right to a speedy trial, the trial judge became an advocate for the State by *sua sponte* charging Mr. Perry with discovery violations and eventually removing him.

It is a fundamental principle of law that "a criminal defendant is entitled to an impartial and neutral judge." *State v. Thompson*, 220 W. Va. 398, 410, 647 S.E.2d 834, 846 (2007). Moreover, this Court has held that "when a judge's conduct . . . evidences a lack of impartiality and neutrality, or when a judge otherwise discloses that the judge has abandoned his role of impartiality and neutrality as imposed by the Sixth Amendment of the United States Constitution, we will reverse and remand the case for a new trial." *Thompson*, 220 W. Va. at 410, 647 S.E.2d at 846. The facts of the instant case present an extreme example of a trial court abandoning its constitutionally required impartial and neutral role, by removing Mr. Perry, in an effort to assist the State in obtaining Mr. Fields' conviction.

Based upon the foregoing, I respectfully dissent.