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Roy Powell v. Commonwealth of Kentucky

Reply Brief 1976-SC-0363

REPLY BRIEF

SUPREME COURT OF KENTUCKY

FILE NO. 76-363

ROY POWELL — APPELLANT

VS. — APPEAL FROM NICHOLAS CIRCUIT COURT
HON. JOHN P. LAIR, JUDGE

4157

COMMONWEALTH OF KENTUCKY — APPELLEE

REPLY BRIEF FOR APPELLANT

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CERTIFICATE OF SERVICE:

I hereby certify that a copy of the foregoing Reply Brief for Appellant has been mailed postage prepaid, to Hon. John P. Lair, Judge, Nicholas County Courthouse, Carlisle, Kentucky 40311; Hon. G. L. Tucker, Commonwealth Attorney, 18th Judicial District, Carlisle, Kentucky 40311; and Hon. Robert F. Stephens, Attorney General, Commonwealth of Kentucky, Capitol Building, Frankfort, Kentucky 40601, this 4th day of August, 1976.

J. Vincent Aprile II

TABLE OF CONTENTS AND AUTHORITIES

PAGE

QUESTIONS TO WHICH BRIEF ADDRESSED..... 1

ARGUMENTS

I. THE APPELLANT WAS DENIED HIS RIGHT TO FULL AND EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE CONSTITUTION OF THE UNITED STATES BECAUSE HIS COURT-APPOINTED ATTORNEY'S PROSECUTORIAL POSITION AS A CITY ATTORNEY CONSTITUTED A CONFLICT OF INTEREST..... 2

Dawson v. Commonwealth, Ky., 498 S.W.2d 128 (1973)..... 2,3

Cole v. Commonwealth, Ky., 441 S.W.2d 160 (1969)..... 2,3

RCr 11.42..... 2

Dawson v. Cowan, 531 F.2d 1374 (6th Cir. 1976)..... 4

Harris v. Thomas, 341 F.2d 560 (6th Cir. 1965)..... 4

Karlin v. State, 47 Wis.2d 452, 177 N.W.2d 318 (1970)..... 5

Argersinger v. Hamlin, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972)..... 6

Campbell v. United States, 352 F.2d 359 (D.C. Cir. 1965)..... 8

Johnson v. Zerbst, 304 U.S. 458, 463, 58 S.Ct. 1019, 82 L.Ed.1461 (1938)..... 9

Carnley v. Cochran, 369 U.S. 506, 82 S.Ct. 884, 8 L.Ed.2d 70 (1962)..... 9

II. THE TRIAL COURT'S APPOINTMENT OF A CITY PROSECUTOR TO REPRESENT APPELLANT AT HIS FELONY TRIAL WAS CONTRARY TO PUBLIC POLICY NECESSITATING REVERSAL OF APPELLANT'S CONVICTION..... 11

Dawson v. Cowan, 531 F.2d 1374 (6th Cir. 1976)..... 11

CONCLUSION..... 11

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COMMONWEALTH OF KENTUCKY — APPELLEE

REPLY BRIEF FOR APPELLANT

The purpose of the above-captioned reply brief is to respond to the arguments raised by appellee in his brief.

MAY IT PLEASE THE COURT:

QUESTIONS TO WHICH REPLY BRIEF ADDRESSED

I.

WAS APPELLANT DENIED HIS RIGHT TO FULL AND EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE CONSTITUTION OF THE UNITED STATES BECAUSE HIS COURT-APPOINTED ATTORNEY'S PROSECUTORIAL POSITION AS A CITY ATTORNEY CONSTITUTED A CONFLICT OF INTEREST?

II.

WAS THE TRIAL COURT'S APPOINTMENT OF A CITY PROSECUTOR TO REPRESENT APPELLANT AT HIS FELONY TRIAL CONTRARY TO PUBLIC POLICY NECESSITATING REVERSAL OF APPELLANT'S CONVICTION?

ARGUMENTS

I.

THE APPELLANT WAS DENIED HIS RIGHT TO FULL AND EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE CONSTITUTION OF THE UNITED STATES BECAUSE HIS COURT-APPOINTED ATTORNEY'S PROSECUTORIAL POSITION AS A CITY ATTORNEY CONSTITUTED A CONFLICT OF INTEREST.

Appellee contends that "appellant is not entitled to a reversal of his conviction simply because his court-appointed trial counsel also held the position of city attorney" because both "this Court and the Sixth Circuit Court of Appeals have . . . rejected a per se rule of conflict of interest under the same circumstances presented by the case at bar" (Appellee's Brief, p. 3). A careful examination of the cases cited by appellee is necessary to demonstrate the fallacy of his contention.

In Dawson v. Commonwealth, Ky., 498 S.W.2d 128 (1973), this Court referred to Cole v. Commonwealth, Ky., 441 S.W.2d 160 (1969), as "dispositive" of the issue of whether there was a "conflict of interest because the trial [defense] counsel was City Attorney."

A perusal of the Cole decision reveals that the defendant had claimed ineffective assistance of counsel in his action for post-conviction relief pursuant to RCr 11.42; Cole claimed that Fuqua, one of the two lawyers appointed to represent him at his trial, was the City Attorney of Russellville and "hostile" to him. Furthermore, Cole alleged that both Fuqua and the other appointed attorney were inadequately prepared.

This Court in Cole declined to discuss the potential for conflict in the roles of City Attorney and defense counsel, but merely held that "there was sufficient evidence to support the findings of the trial court that this charge [of ineffective

assistance of counsel] was unfounded." Cole v. Commonwealth, supra, at 161. After noting that Cole made "no claim that there was any conflict of interest on the part of" his other defense attorney, this Court emphasized that Cole's evidence proved "no hostile act by either lawyer." Id.

In Cole, a discussion of the merits of the "conflict of interest" issue was avoided on procedural grounds. This Court reasoned that since "Cole knew at the time Fuqua was appointed and at the time Cole originally appealed...[his conviction] that [Fuqua] was a [city] prosecutor," the "conflict of interest" question "could have been raised on that [direct] appeal" and it was "now too late" to raise that issue in a post-conviction action. Id.

In view of the cursory treatment afforded the "conflict of interest" issue in Cole, the opinion in that case can hardly be described as "dispositive" of the question of whether a defense counsel's position as a City Attorney generated a conflict of interest. It is obvious that this Court's reliance in Dawson, supra, on the Cole decision as a controlling precedent was a judicial miscalculation which fails to survive scrutiny.

Appellee's reliance on the Cole decision as the controlling authority on the issue at bar smacks of blind adherence to apparent precedent, the folly of which Jonathan Swift, a seventeenth century English satirist, exposed:

> It is a maxim among these lawyers that whatever has been done before may legally be done again; and therefore they take special care to record all the decisions formerly made against common justice and the general reason of mankind. These, under the name of precedents, they produce as authorities. . .

Appellant in the instant case urges this Court to examine carefully the conflict inherent in the dual role of city prosecutor and appointed defense counsel as examined in depth in appellant's original brief (Appellant's Brief, pp. 7-14) and to adopt a per se rule that one involuntarily represented by an attorney in a prosecutorial position will be presumed not to have had a fair trial. This Court has not discussed this precise issue in either the Dawson or Cole opinions and the question is a significant one for those who are represented by appointed counsel. If Dawson and Cole are interpreted by this Court as rejecting the per se rule set out above, appellant urges this Court to re-examine its position on this important matter and to adopt the proposed rule.

Appellee has misconstrued the holding of Dawson v. Cowan, 531 F.2d 1374 (6th Cir. 1976). Appellee stated: "Dawson argued that the appointment of the city attorney as his defense counsel per se denied him the effective assistance of counsel. The Sixth Circuit Court rejected this argument and reaffirmed its holding in Harris v. Thomas, 341 F.2d 560 (6th Cir. 1965). Dawson v. Cowan, [citation omitted]" (Appellee's Brief, p. 2). In actuality, the Sixth Circuit Court neither rejected the argument nor reaffirmed the holding in Harris v. Thomas, supra.

The federal circuit court in Dawson outlined the defendant's argument that a rule that a city attorney is per se disqualified for appointment to represent an indigent defendant should be adopted, and Harris v. Thomas, supra, overruled. Then the Court explained:

> Per se rules frequently are fashioned when there is an unusually high risk of prejudice to a party and the proofs of prejudice may be difficult to establish; or when an important social policy will be served by a prophylactic rule; or a

> more definite standard is required to guide official conduct in future cases; or when case by case analysis places an unjustifiable burden on limited judicial resources. We should not consider overruling our prior decision in Harris v. Thomas, where we rejected a per se rule, without a record that permits us to give proper weight to these considerations. Since Dawson's petition was disposed of on motion without an evidentiary hearing, this record is an inadequate vehicle. We are also concerned that the adoption of a per se rule might make it difficult or impossible to secure appointed counsel for indigent defendants in sparsely settled communities where there are a few lawyers, and most of all of them may have some governmental affiliation. For these reasons, and because our determination of another issue is dispositive of this appeal, we decline at this time to review our earlier decision in Harris v. Thomas. Dawson v. Cowan, supra, at 1376; emphasis added.

Obviously, the Sixth Circuit Court of Appeals merely decided to postpone any re-examination of Harris v. Thomas, supra, until it was faced with a more extensive record in a case where conflict of interest because of a dual role as city attorney and defense counsel was the principal issue; it did not "reject" the defendant's argument or "reaffirm" its holding in Harris v. Thomas, supra.

In Dawson v. Cowan, supra, the Sixth Circuit Court of Appeals did express concern that "the adoption of a per se rule might make it difficult or impossible to secure appointed counsel for indigent defendants in sparsely settled communities where there are few lawyers, and most or all of them may have some governmental affiliation." Id., at 1376. However, the Supreme Court of Wisconsin in Karlin v. State, 47 Wis.2d 452, 177 N.W.2d 318 (1970), discussed that same potential problem and concluded that in those "counties where lawyers are few" and "a municipal attorney" may not "avoid what is properly

regarded as the duty of the bar to represent criminal defendants," the following procedure should be utilized:

> In such cases, however, the defendant should be fully apprised of the fact that his appointed counsel is a municipal attorney whose daily duties require him to operate on a close and cooperative basis with police authorities, and the trial judge should avoid making such appointments even when the choice of attorneys may be limited where extensive efforts to impeach police officers or to question police procedures are potentially significant in the case. It would therefore be only in the unusual and the very simple case where we would consider the appointment of a municipal attorney appropriate, recognizing, however, that the defendant, once being fully apprised of the potentiality of conflict, may nevertheless proceed to be so represented. Such an election, however, would constitute a waiver to the ineffectiveness of counsel on the grounds of a conflict of interest. Id., 177 N.W.2d at 322.

The progmatic concerns of the Sixth Circuit Court of Appeals could surely be resolved by the procedure delineated in Karlin, supra.

Furthermore, it should be realized that the legal profession has the wherewithal to remedy the shortage of available defense attorneys in any rural area.

The United States Supreme Court in Argersinger v. Hamlin, 407 U.S. 25, 37 n.7, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972), addressing the question of whether a shortage of lawyers would hinder the implementation of the announced rule that no person could be imprisoned for any offense unless he was represented by counsel at his trial, emphasized that our nation's legal resources are sufficient to provide counsel for any indigent who is entitled to counsel.

After arguing that this Court and the Sixth Circuit "have both rejected a per se rule of conflict of interest under the same circumstances presented by the case at bar," appellee contends that no conflict of interest is apparent from the facts and circumstances of the instant case (Appellee's Brief, pp. 3-5). Appellee has misconceived the issue at bar. Appellee cites the fact that "the record...does not disclose that appellant ever objected to the substitution or was dissatisfied with his trial counsel...or that there was ever any question or hint of impropriety in the appointment of Mr. Hopkins as trial counsel for appellant" as support for his contention that there was no conflict of interest (Appellee's Brief, pp. 3-4). What is significant is that the record does not contain any indication that appellant was advised by the trial judge that Mr. Hopkins, the second attorney appointed as his defense counsel, was the City Attorney of Carlisle--the county seat of Nicholas County, the situs of appellant's trial.

Appellee's argument implies that since neither appellant nor his trial attorney raised this issue in the trial court, there was no actual conflict of interest. Such a contention cannot withstand the scrutiny of law and logic.

First, such an argument places the burden on either appellant or his counsel to recognize the conflict of interest and bring it to the trial judge's attention by a timely objection. Of course, such a rule would be not only impractical, but unrealistic. If a city attorney accepts the task of representing an indigent criminal defendant, it is most probable that he does not see the conflict of interest inherent in the case. If he were aware of such an ethical dilemma, he surely would have declined to accept the appointment. Consequently, the counsel must be presumed to be unaware of the conflict that results from his position as city attorney. It

would be ludicrous to require an attorney who does not perceive the ethical quandry in which he is floundering to object to its existence. (If, however, the city attorney is hypothesized to be an unethical practitioner who accepted the defense of an individual charged in the indictment with full knowledge of the conflict of interests, then it would be patently unrealistic to suggest that such an attorney would place awareness of the conflict before the trial judge. Here it should be noted that appellant does not impute an unethical attitude or improper conduct to his trial defense counsel, but raises this example for the sole purpose of demonstrating the fallacy of such an argument.) In any event, it would be quite unreasonable to require that a city attorney challenge in the court below the propriety of his representation of an indigent accused before the conflict of interest could be regarded as real or substantial.

Equally as unrealistic is the suggestion that appellant was required to object at trial to the conflict of interest resulting from his attorney's position as city attorney. It is a judicially accepted fact that an individual accused "is rarely sophisticated enough to evaluate the potential conflicts." Campbell v. United States, 352 F.2d 359, 360, (D.C. Cir. 1965). Usually, a layman selects an attorney with the belief that the attorney will evaluate the legal issues involved in all aspects of the case. It would certainly be an inversion of reality to suggest that a laymen defendant must evaluate and analyze the legality and propriety of his counsel's conflicting roles of prosecutor and defense counsel. Such an approach would place an enormous burden on the untrained defendant who lacks adequate familiarity with the law to undertake the herculean task of evaluating his attorney's conflicting duties and responsibilities. It must be remembered that the

ordinary criminal defendant is unversed in the law. As the Supreme Court has observed, "[e]ven the intelligent and educated layman has small and sometimes no skill in the science of law." Johnson v. Zerbst, 304 U.S. 458, 463, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938).

In the case at bar there is simply no evidence in the record that appellant had any knowledge of his appointed counsel's status as a city attorney. The waiver of a fundamental constitutional right is not ordinarily presumed, but must be shown through a development of the facts and circumstances surrounding each case. Johnson v. Zerbst, supra. Since the present record provides no basis for finding that appellant relinquished a known right, it must be presumed that appellant did not knowingly, intelligently, and voluntarily accede to the appointment of a city prosecutor to serve as his defense counsel. Presuming waiver from a silent record is impermissible. Carnley v. Cochran, 369 U.S. 506, 82 S.Ct. 884, 8 L.Ed.2d 70 (1962).

Appellee has labelled as "senseless" appellant's assertion that it was significant that appellant's counsel did not make a motion to suppress identification evidence relating to appellant while appellant's counsel and his co-defendant's counsel made such a motion on behalf of the co-defendant (Appellee's Brief, p. 4). Appellee states: "After admitting that his trial counsel did make the pretrial motion, he then argues that it is significant because he did not" (Appellee's Brief, p. 4). Appellee has patently misstated appellant's argument. Appellant "admitted" that his trial counsel made a written pretrial motion on behalf of his co-defendant and then argued that it was significant that his counsel made no such written motion on his behalf; this certainly is not a senseless argument. Appellant's counsel assuredly did argue the motion to suppress both before and during trial;

however, it must be noted that he argued on behalf of appellant's co-defendant for whom the motion was made.

Appellee implies that the failure of appellant's counsel to call any witnesses or present any evidence on behalf of appellant was not indicative of any conflict of interest experienced by Mr. Hopkins because nothing in the record indicates that appellant had any witnesses he wanted to call or that appellant's counsel refused to call such witnesses (Appellee's Brief, pp. 4-5). Of course, it is the responsibility of defense counsel to investigate and prepare his client's case with his client's aid. As indicated by Mr. Hopkins' closing argument, the core of his defense was that any identification of appellant was highly suspect and probably the result of "coaching" by law enforcement agents. The key witnesses for such a defense would be the state troopers who investigated the alleged crime; since appellant's counsel was the city attorney for Carlisle, he may have been reluctant to issue subpoenas for these law enforcement agents and to challenge their investigating techniques.

Appellee argues that Mr. Hopkins substantiated his defense of appellant by vigorous cross-examination of witnesses about their identification of appellant. Even effective cross-examination, however, is not a substitute for the introduction of positive evidence on direct examination.

Appellant asserts that he was denied his right to full and effective assistance of counsel in violation of the Sixth and Fourteenth Amendments because Mr. Hopkins' prosecutorial position as a city attorney constituted conflict of interest.

II.

THE TRIAL COURT'S APPOINTMENT OF A CITY PROSECUTOR TO REPRESENT APPELLANT AT HIS FELONY TRIAL WAS CONTRARY TO PUBLIC POLICY NECESSITATING REVERSAL OF APPELLANT'S CONVICTION.

Appellee's sole response to appellant's assertion that the appointment of a city prosecutor to represent appellant was contrary to public policy and necessitates reversal of appellant's conviction is that the Sixth Circuit rejected such a per se rule in Dawson v. Cowan, 531 F.2d 1374 (6th Cir. 1976). Appellant has already discussed appellee's misconstruction of the ruling in Dawson in Argument I, supra. Since appellee completely failed to respond to appellant's extensive argument about the public policy considerations involved in an attorney serving as both prosecutor and defense counsel, appellant will rest on his initial argument.

CONCLUSION

For the foregoing reasons, we respectfully request that the judgment of the lower court be reversed.

Respectfully submitted,

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