

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

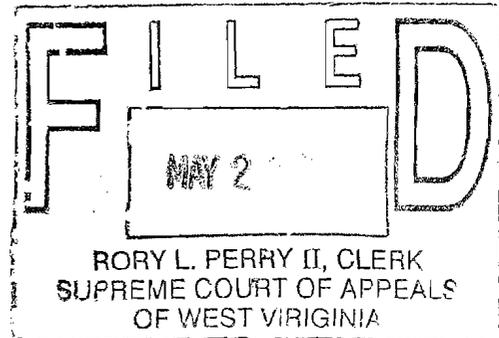
STATE OF WEST VIRGINIA,

v.

Supreme Court No. 34746

Circuit Court No. 04-F-311
(Cabell County)

DEAARON FIELDS,
Petitioner.



APPELLANT'S BRIEF

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INTRODUCTION

The Cabell County Circuit Court denied fifteen year old DeAaron Fields counsel of his and his parents choice. Attorney David Perry was hired to represent DeAaron Fields, but was improperly removed. This forced DeAaron Fields to face a murder charge and possible life sentence while represented by an attorney about whom his parents stated “we have dealt with him before and were unimpressed with his ability as a lawyer or concern for our son as a person.” (Supreme Court Record “SCR” Vol. 1 at 24).

This denial was based merely on discovery issues. There was no conflict of interest issues, no findings of contempt or other remedial measures prior to Attorney Perry’s dismissal. The trial court, believing Perry, and the assistant Prosecutor, to be somewhat tardy with discovery, punished DeAaron Fields by removing Perry, and thus denying him counsel of choice. Such an act is not only a gross violation of DeAaron Fields’ right to counsel under the United States and West Virginia Constitutions, it also serves to cripple the ability of the defense bar to present a vigorous defense when a court can simply dismiss counsel based on a minor issue and the vague premise that it is in the defendant’s best interest to do so. This important right to counsel of choice has not been previously addressed by this Court.

PROCEEDINGS AND RULINGS BELOW

On April 22, 2004, a juvenile delinquency petition was filed against fourteen year old DeAaron Fields, accusing him of first degree murder. (SCR Vol. 1 at 0-1.) On May 13 the State of West Virginia filed a motion to transfer the case to the criminal jurisdiction of the Cabell County Circuit Court. On July 23, 2004, this motion was granted and the case transferred to adult status. (Vol. 1 p 12)

On October 8, 2004, the Cabell County Grand Jury indicted DeAaron Fields for a single count of murder. David Perry had been privately retained to represent DeAaron Fields for the sum of one dollar. (1/31/05 Hearing Transcript (“Trans.”) at 52.) On December 8, 2004, the trial court agreed to, for financial reasons, appoint David Perry retroactive to his initial June 2, 2004 appearance. At a January 31, 2005, hearing, David Perry was removed as defense counsel because of the trial court’s dissatisfaction with the pace of discovery. (1/31/05 Trans. at 65.) John Laishley was appointed as Perry’s replacement.

The next day, David Perry was again retained to represent DeAaron Fields and entered a notice to this effect. (SCR Vol. 1 at 229.). Attached to this notice was a letter from DeAaron’s parents, Mary and Charles Fields, expressing their desire to have Perry represent their son. (SCR Vol. 1 at 24.) The letter stated that Mr. And Mrs. Fields were “unimpressed with [John Laishley’s] ability as a lawyer or concern for [DeAaron] as a person.” (Id.)

Despite this clear statement, the trial court rejected privately appointed counsel and left Mr. Laishley as DeAaron’s appointed attorney. (SCR Vol. 1 at 24)).¹ DeAaron

¹ Although it doesn’t appear on the face of the record in this case, Attorney Perry filed a Petition for a Writ of Prohibition with this Court on February 18, 2005. State ex rel Myers-Field v. Ferguson, Case no. 050394 (2005). On February 18, 2005, this Court rejected the petition without a hearing on the merits. Id.

Fields was forced to go to trial with Mr. Laishley, and was convicted of first-degree murder. (SCR Vol. 1 at 375.) The State declined to pursue a finding of “No Mercy,” so DeAaron was sentenced to “Life with Mercy” and remanded to Juvenile custody until his eighteenth birthday, and then to Division of Corrections custody. (SCR Vol. 1 at 368.) DeAaron was transferred to Division of Corrections custody by Order entered August 27, 2007. (SCR Vol. 1 at 442.)

A notice of intent to appeal was filed on April 26, 2005. (SCR Vol. 1 at 389.) On May 26, 2005, A. Courtney Craig was appointed as counsel for purposes of appeal. (Id.) On September 21, 2007, Craig withdrew and Carl J. Dascoli, Jr. was appointed as appellate counsel. (SCR Vol. 1 at 415.) On May 14, 2008, Mr. Dascoli was forced to close his law office due to illness and the Kanawha County Public Defender was appointed. (SCR Vol. 1 at 448.) On August 13, 2008, DeAaron Fields was resentenced to allow for an appeal. (SCR Vol. 1 at 450.) This appeal followed.

STATEMENT OF FACTS

Fifteen-year-old DeAaron Fields was denied his chosen counsel and forced to face a first degree murder charge with an attorney about whom his parents said “we have dealt with him before and were unimpressed with his ability as a lawyer or concern for our son as a person.” (Vol. 1p 233.)

David Perry was originally retained by Fields’ family to represent DeAaron against a first degree murder charge. (SCR Vol. 1 at 19) The trial court later agreed, because of financial issues, to appoint Perry as counsel. (SCR Vol. 1 at 155.) On January 31, 2005, a hearing was held to consider the State’s motion, to continue the trial that was scheduled to begin the following day. (SCR Vol. 1 at 182.) Defense counsel objected to this motion. (SCR Vol. 1 at 189.) The trial court first criticized defense counsel’s alerting the media as to the time and topic of hearings and otherwise talking to the press. (1/31/08 Trans. at 442-47) No specific allegations of misconduct were made nor were remedial steps taken by the trial court on that issue.

However, the trial court then launched into a review of the timing and history of the case, leading to an examination of the rules of criminal discovery. (1/31/05 Trans. at 54-56.) The trial court noted that “[a]s I went over each and every rule over the weekend, I found some things in there that I had forgotten about or didn’t even know.” (1/31/05 Trans. at 59.) Nevertheless, the trial court stated its belief these rules were not followed, and without a chance for counsel to remedy the situation, without consideration of lesser sanctions, without asking the defendant for his preference, and without a thorough weighing of defendant’s right to counsel of choice, the court stripped DeAaron Fields of his chosen counsel. (1/31/05 Trans. at 65.) The only reference

to DeAaron's rights was the conclusory statement that removing his counsel was in his best interests. (Id.) John Laishley was appointed to replace Perry. (Id.)

Another point of contention between the trial court and defense counsel Perry was Perry's vigorous opposition to any attempt by the trial court or opposing counsel to sanctify the victim by reminding the court that the victim in this case was shot while buying crack cocaine from Juveniles, and according to the state's theory of the case was doing so in a less than honest manner. (1/31/05 trans at 645.) While the trial court did not mention this, or Perry's insistence on informing the press about hearings when removing Perry, it does give some background as to the trial court's suddenly militant enforcement of discovery rules.

The very next day, February 1, 2005, Fields' parents re-retained David Perry, and Perry entered a notice of appearance. (SCR Vol. 1 at 229.) The trial court rejected this notice in a February 10, 2005 order, again stating that it was not in the defendant's best interests to have David Perry as counsel. (SCR Vol. 1 at 240.)

The trial centered on an April 21, 2004, incident where Karen L. Stultz was shot while trying to buy crack cocaine. The State alleged the defendant was the shooter. The trial was a case of disputed identity, as the shooting occurred at a location where drug deals involving motorists and young men were common. The State presented eyewitnesses and statements allegedly made by the accused to other witnesses. The defense centered on both the weakness of the identifications and the credibility and motive to lie of those reporting DeAaron's alleged statements.

DeAaron was convicted of first-degree murder in a bifurcated proceeding. After consulting with the victim's family, the State declined to pursue a finding of no mercy, allowing DeAaron eligibility for parole.

DeAaron Fields appeals his conviction because he was unjustly stripped of his right to counsel of choice.

ASSIGNMENT OF ERROR

- I. DeAaron Fields Was Denied Counsel Of His Choice When The Trial Court On Its Own Motion Dismissed And Disqualified Counsel For Insufficient Cause.

DISCUSSION OF LAW

I. **DeAaron Fields Was Denied Counsel Of His Choice When The Trial Court On Its Own Motion Dismissed And Disqualified Counsel For Insufficient Cause.**

Standard of Review

This issue presents mixed questions of law and fact. The ultimate disposition is subject to an abuse of discretion standard, the factual findings are subject to a clearly erroneous standard, and questions of law are reviewed *de novo*. See, Syl. Pt. 2, Walker v. West Virginia Ethics Comn, 201 W.Va. 108, 492 S.E.2d 167 (1997). When the selection of counsel in a criminal case is at issue, there is a presumption in favor of defendant's chosen counsel. Youngblood v. Sanders, 212 W.Va. 885, 893; 575 S.E.2d 864, 872 (2002).

Defendant alleges the trial court erred as a matter of law in that the court failed to apply not only the proper standard for removing counsel of choice, but failed to put on the record specific findings of fact and law to support removal. Defendant also alleges the trial court abused its discretion as the facts clearly do not satisfy the legal standard for removal of chosen counsel.

Argument

It is well-settled that an element of the Sixth Amendment right to counsel "is the right of a defendant who does not require appointed counsel to choose who will represent him." United States v. Gonzalez-Lopez, 548 U.S. 140, 144 (2006) (citing Wheat v. United States, 486 U.S. 153, 159 (1988)). The erroneous deprivation of the right to counsel of choice is structural error, therefore no harmless error analysis applies. Gonzalez-Lopez, 548 U.S. at 149-50 (citing Sullivan v. Louisiana, 508 U.S. 275 (1983)). A structural error is one that "'affect[s] the framework within which the trial proceeds' and is not 'simply an error in the trial process

itself.” Gonzalez-Lopez, 458 U.S. at 148 (quoting Arizona v. Fulminante, 499 U.S. 279, 307-8 (1991). Denial of counsel of choice has “consequences that are necessarily unquantifiable and indeterminate.” Gonzalez-Lopez, 499 U.S. at 150 (quoting Sullivan, 508 U.S. at 282). Therefore, “[h]armless-error analysis . . . would be a speculative inquiry into what might have occurred in an alternate universe.” Gonzalez-Lopez, 499 U.S. at 150.

The right to choice of counsel is not absolute, but removal of counsel requires extraordinary circumstances. See United States v. Nolen, 472 F.3d 362, 375 (5th Cir. 2006) (holding ethical breach does not “confer upon the trial court unfettered discretion to disqualify the attorney selected by the party”); see also Maxwell v. Superior Court of Los Angeles County, 639 P.2d 248, 253, (Cal. 1982) (holding removal of attorney justified “only in the most flagrant circumstances of attorney misconduct or incompetence when all other judicial controls have failed.”) (quoting Cannon v. Commission on Judicial Qualifications, 537 P.2d 898 Cal. (1975)).

DeAaron Fields was denied his choice of counsel when the trial court dismissed his retained counsel, David D. Perry, and assigned him another attorney. Fields’ family had originally retained Perry for the nominal fee of one dollar. Leading up to trial, the trial court, upon request of Perry, appointed Perry as Fields’ counsel. On January 31, 2005, the trial court, without reference to the wishes of Mr. Fields, simply removed Perry and appointed John L. Lashley as lead counsel. Fields’ family again retained Perry, and Perry attempted to enter an appearance on Fields’ behalf. The trial court refused to reinstate Perry and John Lashley remained Fields’ counsel throughout trial.

That Perry was at one time technically “appointed” as Fields’ attorney does not disturb Fields’ right to choose his own counsel. Perry was originally retained, his appointment was

strictly financial, and once Perry was dismissed by the trial court he was again retained. It is clear Mr. Perry was retained as Fields' counsel of choice.²

This Court's opinions discussing this issue are cases in which defendant's counsel of choice has a conflict of interest. See generally State ex rel Blake v. Hatcher, 218 W.Va. 407, 624 S.E.2d 844 (2005) Youngblood v. Sanders, 212 W.Va. 885, 575 S.E.2d 864 (2002). This Court noted that there is, when defendant's selection of counsel is at issue, a presumption in favor of defendant's counsel of choice that can be overcome not by speculation, but only by a showing of an actual conflict or serious potential for conflict. Youngblood, 212 W.Va. at 893, 575 S.E.2d at 872.

There is no mention of conflict of interest in the present cases and as the trial court failed to make explicit findings of fact, its reasons for dismissing Mr. Perry are not absolutely clear. At a January 31, 2005 hearing, the court addressed a motion for a continuance made by the State. Mr. Perry objected to the motion, alleging the motion was merely for the convenience of the prosecutor. (1/31/05 Trans at 40.) The trial court then listed the developments in the case to that date, concluding that neither side had completely followed the rules of discovery. (1/31/05 Trans. at 55-56.) The trial court listed several discovery rules, remarking that "as I went over each and every rule over the weekend, **I found some things in there that I had forgotten about or didn't even know.**" (1/31/05 Trans. at 59) (emphasis added.) The court then dismissed both the lead prosecutor trying the case (but not the entire office) and lead defense counsel, Mr. Perry.

² Once an accused establishes an attorney-client relationship with appointed counsel, the same standards apply to an accused's right to that counsel. See Hercules v. Harman, 864 S.W.2d 752, 754 (Tx. Ct. App. 1993); See also Maxwell v. Superior Court of Las Angeles County, 639 P.2d 248, 252 (Cal. 1982) ("[o]nce counsel is appointed . . . the parties enter into an attorney client privilege which is no less inviolable than if counsel had been retained"); See generally People v. Espinal, 781, N.Y.S.2d 99 (N.Y. App. Div. 2004) (discussing wrongful removal of assigned counsel); see generally Brown v. State, 982 S.W.3d 427 (Tex. Ct. App. 2005) (Holding substitution of appointed counsel for sentencing over objection of defendant improper).

The only finding the trial court made was that “it’s the best interest at this time that [Mr. Perry] be removed as counsel.” (1/31/05 Trans. at 65.) The order entered on February 2, 2005, as a result of this hearing simply states that Mr. Perry was removed as appointed counsel. The trial court then entered an “Amended Order” on February 7, 2005, stating that Mr. Perry “had failed to comply with Rules 12.1 and 10 of the West Virginia Rules of Criminal Procedure and Rule 32.03 of the trial court rules,” rules that deal with alibi disclosure and discovery. (SCR Vol. 1 at 240.)

On February 1, 2005, Mr. Perry was again retained by defendant’s family, and Perry entered a notice of appearance to this effect. The trial court, in a February 10, 2005, order, alleged that Mr. Perry was “attempting to circumvent the former Order of this Court,” and found that ‘it is not in the best interest of the defendant that [Mr. Perry] should be permitted to represent said defendant.’ (SCR Vol. 1 at 247.) There was no hearing, argument, or even elaboration as to the interests and wishes of DeAaron Fields, just a finding.

This disqualification was structural error for two reasons. First, the initial finding of a discovery problem is not an example of flagrant misconduct or incompetence sufficient to require the disqualification of chosen counsel. Second, the trial court failed to weigh DeAaron’s right to chosen counsel against the reasons for disqualification, putting on the record findings of fact and law to support disqualification. There is nothing on the record to show that the trial court asked DeAaron Fields as to his desire to be represented by Perry.

The trial court lacked sufficient cause to remove defendant’s chosen counsel. While this court has yet to address this issue, the weight of current caselaw requires compelling reasons and limits such an involuntary substitution to extreme cases of flagrant misconduct that cannot be addressed by other means.

The Supreme Court of California visited this issue in the case of a municipal court judge with a record of frequently removing appointed counsel. Cannon v. Commission On Judicial Qualifications, 537 P.2d 898 (Cal. 1975). In Cannon the judge in question had a somewhat farcical habit of not only removing appointed counsel at the drop of a hat, but also jailing said counsel. Id. at fn. 4. In affirming the removal of this judge, the court noted that a court “has many tools available short of discharging counsel including contempt powers,” id. at 910, holding that “the involuntary removal of any attorney is a severe limitation on a defendant’s right to counsel and may be justified, if at all, only in the most flagrant circumstances of attorney misconduct or incompetence when all other judicial controls have failed.” Id. at 911.

In McKinnon v. State, 526 P.2d 18 (Alaska 1974), the Supreme Court of Alaska addressed a case where trial counsel was removed because of allegations that a motion was not filed promptly. In reversing the conviction, the Court noted that “the threat of summary dismissal for provoking the trial judge’s displeasure could intimidate the trial bar and discourage tenacious trial representation.” Id. at 23. Similar to Cannon, the court noted there are other ways to deal with dilatory conduct, including censure, a referral to the bar association, or contempt sanctions, and that removal penalizes the defendant rather than counsel. Id. at 23-4. Furthermore, the court discussed the illogic “of relieving counsel on the eve of trial for delaying the proceedings, when the appointment of another attorney necessarily results in a still more protracted trial delay while newly appointed counsel acquaints himself with the case.” Id. at 24.

McKinnon is extremely similar to the present case. Both appear to involve disqualifications based on alleged dilatory conduct where the trial court failed to consider other sanctions and appointed new counsel to remedy a delay which actually created a greater delay.

Other courts have imposed similar restrictions on the removal of counsel. People v. Coones, 550 N.W.2d 600, 603 (Mich. App. 1996) (“A trial court may remove appointed counsel for gross incompetence, physical incapacity, or contumacious conduct”); Brown v. State, 128 S.W.3d 427, 429 (Tex. Ct. App. 2005) (holding “extraordinarily good cause” necessary to remove counsel); Finkelstein v. State, 574 So.2d 1164, 1168 (Fla. App. 1991) (“Gross incompetence, physical incapacity, or *conduct which cannot be cured by contempt proceedings* . . .”)(emphasis in original).

Given this high standard, the dismissal of attorney Perry because of alleged delays in discovery clearly fails. No other sanctions were applied, and the record shows this was the first time the trial court addressed this issue. The trial court noted that prior to the hearing the trial court did not have total command of the relevant discovery rules. Clearly, any problems could have been initially addressed by sanctioning the attorney rather than punishing DeAaron Fields by denying him his counsel of choice.

The other fatal problem with the trial court’s removal of Mr. Perry is the trial court’s failure to fully address defendant’s wishes and weigh his right to counsel of choice against the need for removal.

In United States v. Gonzalez-Lopez, 399 F.3d 924, 932 (8th Cir. 2005), *affirmed*, 548 U.S. 140 (2006), the Eighth Circuit voiced concern that “in the two district orders discussing [the denial of counsel] there is no mention of the effect of the denial on [defendant’s] Sixth Amendment right to representation by counsel of his choice.” This Court has briefly discussed the issue in the context of a possible conflict of interest on the part of defense counsel, holding that defendant’s right to counsel of choice must be balanced against reasons for removal. See

Syl. Pt. 4, State ex rel Blake v. Hatcher, 218 W.Va. 407, 624 S.E.2d 844 (2005); Syl. Pt. 5 State ex. rel Youngblood v. Sanders, 212 W.Va. 885, 575 S.E.2d 864 (2002).

In United States v. Nolen, 472 F.3d 363, 376, (5th Cir. 2006), the Fifth Circuit held that the failure of the record to reflect a balancing test involving a defendant's Sixth Amendment rights required an assumption that the trial court abused its discretion.

The Supreme Court of Georgia approved a trial court's removal of counsel for repeated episodes of incompetence in part because the defendant was given a chance to be heard on the record. Davenport v. State, 656 S.E.2d 514, 516 (Ga. 2008); Cf. People v. Coones, 550 N.W.3d 600 (Mich App. 1996) (Failure to hold "careful inquiry" cited as reason for reversal).

In the present case, DeAaron Fields was never asked about his preference of counsel , nor was his right to counsel of choice ever mentioned on the record. All that exists is a dispute over discovery, and a finding that removing Mr. Perry would be in DeAaron Fields' best interests. This finding was declaratory and included no specific findings as to how removing Mr. Perry was in DeAaron Fields' best interests. It is clear that the trial court failed to give any weight to DeAaron Fields' right to his counsel of choice as the trial court at no time asked DeAaron his preference or wishes..

The trial court committed structural error by denying DeAaron Fields the right to counsel of his choice. The trial court lacked a sufficient basis for removing Fields' trial counsel, and failed to properly weigh Fields' rights to counsel under the Sixth Amendment to the Constitution of the United States, and Article III, section fourteen of the West Virginia Constitution in doing so. This conviction must be vacated.

RELIEF REQUESTED

DeAaron Fields requests this Court vacate his conviction and remand this case for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Robert C. Catlett, hereby certify that on the 29th day of May, 2009, I mailed a copy of the foregoing Appellant's Brief to Christopher Chiles, Cabell County Prosecuting Attorney, 750 5th Avenue, Suite 300, Huntington, West Virginia 25701.



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