

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

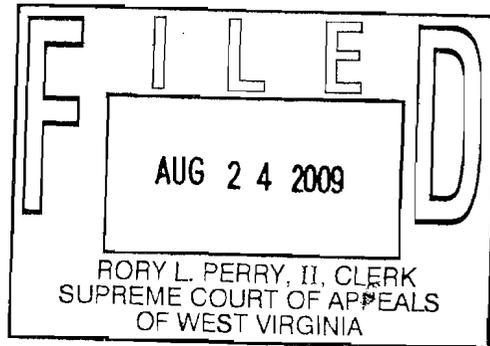
STATE OF WEST VIRGINIA,
Appellee,

v.

DEAARON FIELDS,
Appellant.

Supreme Court No. 34746

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



REPLY BRIEF

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REPLY ARGUMENT

I. Whether Attorney Perry Was Appointed or Retained Is Not Legally Relevant.

Although the state's brief confuses the issue somewhat, this is not a case where an indigent defendant seeks the right to initially select counsel of his choice. This case is about a defendant's right to particular counsel once an attorney client relationship is formed. As to the latter issue, once that relationship forms the right to that counsel is "no less invaluable than if counsel had been retained." Maxwell v. Superior Court of Los Angeles County, 639 P.2d 248, 252 (Cal. 1982). See also Appellant's Brief at n.2.

II. The State's Brief Both Fails To Address The Issue Of Lesser Sanctions For Attorney Misconduct And Mischaracterizes The Facts.

In arguing the trial court was justified in dismissing counsel, the state cites much general caselaw regarding the power of the court to regulate proceedings before it, but ignores the prevailing view that dismissal is rarely justified as an initial sanction. Cases on point use strong language in making it clear that dismissal is an extreme sanction. (See Appellants Brief at 12-13).

The state cites People v. Avila, 208 P.3d 634 (Ca. 2009), without discussing the facts of the case. The facts in Avila are completely different than those at bar, and are a good example of the type of extreme circumstance where removal of counsel is justified.

In Avila, defense counsel moved for a continuance, citing his heavy caseload, and asking the trial date be set back at least twelve months. Avila, 208 P.3d at 652. The trial court, noting that a key prosecution witness was battling cancer, dismissed defense counsel, holding counsel blameless, in order to appoint counsel that could try the case in a reasonable time. Id.

The present case is far different. Here, it was the state moving to continue and the defense objecting, saying “We are ready. I have investigated everything.” (1/21/05 hearing transcript at 40). Rather than a terminally ill witness, the state appeared to have some trouble gathering witnesses, so a continuance would benefit the state. (Id. at 41.) There was no finding by the Court that removal of counsel would expedite trial.

The State offers much bombast as to the nature of the controversy here, going so far as labeling Perry’s conduct as “egregious dilatory actions” despite the fact that Perry was the one objecting to a continuance. This is not a case of a defense counsel trying to unduly delay a trial. This is an issue of technical discovery infractions. Perry did not provide addresses on his witness list, he was tardy in disclosing alibi witnesses, and filed a late motion to dismiss. Past that, the Court was noting infractions of rules that “I had forgotten about or didn’t even know,” such as the requirement for a “discovery conference.”¹

As noted on page 12 of Appellant’s Brief, Courts require extreme circumstances not curable by contempt proceedings when dismissing counsel. Avila dealt with extreme circumstances, assigned counsel who would not be available for at least one year, and a dying prosecution witness. There is no finding of such extreme circumstances here, only ordinary and easily remedied discovery issues.

Respectfully submitted,

DeAaron Fields
By Counsel

¹ That the trial court was not completely familiar with the formal discovery rules is not surprising or unusual, in practice discovery in our criminal courts is usually informal. Undersigned counsel has handled over one hundred felony indictments and more than twenty felony trials, and has participated in exactly one discovery conference.

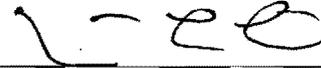


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CERTIFICATE OF SERVICE

I, Robert C. Catlett, hereby certify that on the 29th day of May, 2009, I mailed a copy of the foregoing Reply Brief to Benjamin F. Yancey, III, Assistant Attorney General, State Capitol Complex, Building 1, Room W-435, Charleston, WV 25305.



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