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Commonwealth v. Shives

COMMONWEALTH OF PENNSYLVANIA
v. MICHAEL F. SHIVES SR., Defendant
Court of Common Pleas of the 39th Judicial District of Pennsylvania,
Fulton County Branch
Criminal Action, No. 139-2008

Motion to disqualify the District Attorney

1. Pennsylvania Rule of Professional Conduct 1.9 precludes a District Attorney from representing anyone in the same or substantially related matter who may have a material adverse interest to the interest of a former client.
2. Even where an actual conflict of interest exists, a District Attorney need not be automatically disqualified if remedial measures can be taken to ensure that the defendant is not prejudiced by the District Attorney's former representation of the defendant.
3. An appropriate remedial measure includes allowing the District Attorney to proceed with the prosecution while requiring him to disclose to the court that he has exculpatory information and to reveal that information to the defense pursuant to Order of Court and pursuant to his continuing duty to disclose confidential information under Pennsylvania Rule of Criminal Procedure 573(D).
4. In deciding whether two or more legal transactions are substantially related under Rule 1.9, the court may also consider whether the information that was the subject of those transactions has become generally known, stale or obsolete.
5. Any information made known to the District Attorney during his previous representation of the defendant had become attenuated in light of the approximately two years that had since elapsed and the fact that the defendant and his ex-girlfriend, who is now the alleged victim in the current case, had reconciled after the defendant consulted with his former counsel, the current District Attorney.
6. The court denied the defendant's motion to disqualify the District Attorney based solely on the allegation that selecting an impartial jury would be impossible because the District Attorney's position in a small county would amount to a personal vouching for the victim. Such an allegation is insufficient grounds in itself for disqualification where the defendant will have ample opportunity at *voir dire* to discover if any potential jurors harbor such a prejudice.

Appearances:

Fulton County District Attorney

Christopher Sheffield, Esq., *Counsel for Defendant*

OPINION

Herman, J., April 6, 2009

I. Introduction

Before the Court is the defendant's motion to disqualify the Fulton County District Attorney from further prosecuting this case. The Court has statutory authority pursuant to the Commonwealth Attorney's Act to request the Attorney General to represent the Commonwealth in a prosecution where the Court has reason to believe the County District Attorney has a conflict of interest [71 P.S. §732-205]. The Act is not specific as to under what circumstances a local District Attorney should be disqualified. Defendant claims that the Fulton County District Attorney has a conflict of interest pursuant to Rule 1.9 of the Pennsylvania Rules of Professional Conduct [Pa.Rule of Prof.Conduct, Rule 1.9].

A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent.

We believe this Rule is applicable in determining whether the District Attorney should be disqualified in this case. More specifically, the defendant claims that the District Attorney should be removed from the case because he may be in possession of evidence that could be favorable or exculpatory at the time of trial and he could potentially be a witness for the defendant. Defendant argues the District Attorney's continued prosecution of the case would prevent the defendant from obtaining such evidence.

Additionally the defendant claims that it is not possible for him to receive a fair trial because a jury would be unfairly biased against the defendant by the District Attorney's prosecution of a case in which the defendant was a former client.

The Court held a hearing on the defendant's motion on February 17, 2009, at which time the defendant testified on his own behalf. We find the discussion of the testimony of the defendant contained in the Commonwealth's Brief adequate to describe the evidence presented by the defendant. We summarize that discussion as follows:

"Defendant and Barbara Smith lived together since about 1994. In February 2006, during a period of estrangement in their relationship, Defendant sought the legal services of the undersigned regarding disposition of Barbara Smith's personal property located on real estate owned either by the Defendant or his father, and also for the purpose of directing Barbara Smith to cease having contact with the Defendant and his family

At the pre-trial hearing on February 17, 2009, the Defendant testified that the office conference with the undersigned lasted about one hour. He did not recall discussing anything at the office conference other than the matters set forth in the letter from the undersigned dated February 10, 2006. Defendant described Barbara Smith's actions at that period of time as "coming around" from time to time and "bothering" him.

Defendant also testified that by about April or May of 2006 he and Barbara Smith had patched things up and were again living together."

In this prosecution the defendant is accused of discharging a firearm into the vehicle of his former girlfriend, Barbara Smith, who was traveling on Route 522 in Fulton County on September 17, 2008. He is accused of waiting for the victim's vehicle on Route 522 at a time when the victim was traveling to work. The Commonwealth alleges that the victim passed the defendant's location in her vehicle and the defendant followed the victim, pulled alongside her vehicle in the opposing lane of traffic and fired at least two rounds from a .357 magnum revolver into the victim's vehicle.

Defendant claims that due to the nature of the charges, his state of mind at the time of the shooting would be relevant at the time of trial. He claims he will be frustrated in obtaining evidence of his state of mind due to the current District Attorney's prosecution of the case.

II. Discussion of the Issues

A. Rule 1.9

The relevant conflict of interest rule clearly applies to the District Attorney in this case. It precludes the District Attorney's representing anyone in the same or substantially related matter who may have a material adverse interest to the interest of a former client.

Certainly the subject matter of the prosecution in this case is, in some degree, related to the domestic relationship of the defendant and the victim during the District Attorney's former representation of the defendant in those previous matters. However, as the Rule states, the relationship must be substantial in that it must be the exact same transaction or legal

dispute. If it is not the exact same transaction, then there must be a substantial risk that confidential factual information obtained through the prior representation would somehow prejudice the former client's position in the present prosecution. Pennsylvania Rules of Professional Conduct, Rule 1.9, Explanatory Comment, paragraph 3.

This prosecution is not the exact transaction or legal dispute in which the District Attorney represented the defendant. Therefore, in order to be substantially related the defendant must show that he will somehow be prejudiced or that the Commonwealth would gain an advantage by way of confidential information given during the time of the District Attorney's former representation of the defendant. Upon review of the evidence presented at the hearing in this matter, the Court concludes that there is no such confidential information because the subject of the dispute between the defendant and his former girlfriend was completely and totally communicated in the letter the District Attorney wrote to the defendant's former girlfriend at the time he represented the defendant. The defendant acknowledged upon cross-examination by the District Attorney at the hearing that he had fully disclosed all the information that he wanted his then-attorney to know about the relationship between him and his former girlfriend. He stated he was fully aware of that information and there was nothing else disclosed.

1. Access to Evidence and/or a Witness – Prejudice to Defendant

Assuming for purposes of argument that an actual conflict of interest exists under Rule 1.9, a District Attorney is not automatically disqualified if remedial measures can be taken to ensure that the defendant is not prejudiced by the prosecution's former representation of the defendant.

Where an actual conflict of interest exists, the defendant is entitled to have the conflict removed without any further showing or prejudice. *Commonwealth v. Eskridge*, 529 Pa.387, 604 A.2d 700, 702 (1992); *Commonwealth v. Balenger*, 704 A.2d 1385, 1390 (Pa. Super. 1997), appeal denied, 556 Pa. 670, 727 A.2d 126 (1998). On the other hand, a mere allegation or appearance of impropriety is insufficient to establish an actual conflict of interest. *Commonwealth v. Karenbauer*, 552 Pa. 420, 715 A.2d 1086, 1094 (1998).

. . . courts will look closely at the specific facts of the case and any remedial measures to determine whether any actual conflict of interest exists. *Commonwealth v. Faulkner*, 528 Pa. 57, 595 A.2d 28, 38 (1991).

Commonwealth v. Sims, 799 A.2d 853 (Pa. Super. 2002)

We look to a recent decision of the Supreme Court of Colorado in *The People of the State of Colorado v. Samuel Lincoln*, 161 P.3d 1274, for authority for the proposition that appropriate remedial measures can be put in place which do not require disqualification of a prosecutor. On this issue the Colorado Supreme Court states the following:

A prosecutor's duty to disclose exculpatory information may involve information received from a prior client that normally would be protected by attorney-client confidentiality. See Colo. RPC 1.6 (governing attorney-client confidentiality and its exceptions). In relevant part, Rule 1.6(a) states that "[a] lawyer shall not reveal information relating to representation of a client unless the client consents after consultation." However, the comment to this rule states that an attorney may not disclose confidential information, unless authorized or required by other Rules of Professional Conduct or other law. Colo.RPC 1.6 cmt. (emphasis added).

The accused's due process right to a fair trial and the constitutional, statutory, and ethical rules require a prosecuting attorney, if she or he wishes to remain on the case, to disclose exculpatory information even if it was obtained from a prior representation. In this situation, a prosecuting attorney has several options. She or he may obtain consent from the prior client waiving attorney-client confidentiality and authorizing disclosure of the exculpatory information.

If consent is not obtained, she or he may (1) disqualify from prosecuting the accused and be screened from the office's prosecution of the case or (2) proceed with the prosecution, disclose to the court that she or he has exculpatory information, and reveal the information to the defense upon order of the court. Colo.RPC 1.6 cmt.

A trial court can ask for and accept a prosecuting attorney's assurance that he or she has diligently reviewed the facts and circumstances of the prior representation and there is no exculpatory information required to be revealed by the constitution, statutes, and case law. This is so because, like all attorneys, the prosecuting attorney

as an officer of the court must not lie or misrepresent facts to the court. Colo. RPC 3.3(a)(1)&(4); Colo. RPC 8.4; In the Matter of Pautler, 47 P.3d 1175,1178-79 (Colo. 2002). In addition, as a duty of office, a prosecutor, who wishes to continue prosecuting the case, must disclose to the court that he or she has exculpatory information and reveal that information if ordered to do so by the court.

The District Attorney is under a continuing duty to disclose confidential information. Pa.R.Crim. 573(D). This is particularly true in circumstances where the District Attorney may discover exculpatory evidence or evidence favorable to the accused.

At this point the defendant has obtained full discovery as to any information the District Attorney would have with regard to his former representation of the defendant. The Court and the defendant are entitled to rely on the District Attorney's probity and good faith in his continuing duty to comply with Rule 573(D). Therefore we feel there is no prejudice or threat to a fair trial under Rule 1.9 because the defendant has not shown that there is confidential information he needs at trial which he has not obtained or cannot obtain. As pointed out by the Commonwealth, the District Attorney is not the only witness to the former relationship of the victim and the defendant.

2. Substantially Related Matters

The Court may also consider in determining whether two or more legal transactions are substantially related whether the information which was the subject of those transactions has become generally known or has become stale or obsolete. Such information or facts will not suffice to bar former counsel from representing a new client whose interest may be adverse to counsel's former client. See Rule 1.9 Pennsylvania Rules of Professional Conduct, Explanatory Comment, paragraph 3. While there are no guidelines or examples provided by the Rules to determine if information provided by a client to his counsel has become obsolete for purposes of this Rule, we believe, in this case, that given the time that has elapsed – approximately two years – and the nature of the information in light of the fact that the defendant and his former girlfriend, who is now the victim in this case, had reconciled their relationship subsequent to the defendant's meeting with his former attorney, any information passed to the District Attorney has become attenuated and obsolete for purposes of the Rule.

For these reasons, we find that the District Attorney's former representation of the defendant does not qualify as a substantially related matter pursuant to Rule 1.9 even though the subjects of that former representation appear as a victim and a defendant in this case.

B. Jury Pool Bias

In this claim the defendant makes a vague and somewhat general argument that due to the District Attorney's respected status as the local prosecutor in a small county that somehow any jury selected from the community would not be able to render a fair and impartial verdict. Defendant appears to argue that somehow the District Attorney's position personally vouches for the victim and conveys the District Attorney's personal disapproval in some way of the defendant. However as the defendant points out in his written argument, the District Attorney does not represent the victim and his only client is the people of the Commonwealth of Pennsylvania. Commonwealth v. Lutes, 793 A.2d 949 (Pa. Super. 2002). Without something more than the District Attorney's former representation of the defendant, we cannot find that under these circumstances alone the defendant would not receive a fair and impartial jury trial. Certainly the defendant has available to him at the time of jury selection the ability to appropriately voir dire the jury on any possible prejudice that may exist along these lines.

In accordance with this Opinion, the Court hereby declines to refer the matter to the Office of the Attorney General and we are entering an Order dismissing the defendant's motion to disqualify the District Attorney of Fulton County.

ORDER OF COURT

Now this 6th day of April 2009, for the reasons stated in the attached Opinion, the defendant's Motion to Disqualify the District Attorney of Fulton County from further prosecuting this case is hereby denied.

