No. 30785 - State of West Virginia ex rel. Denver A. Youngblood, Jr. v. Honorable David H. Sanders, Judge of the Circuit Court of Morgan County

FILED
December 5, 2002
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

RELEASED
December 6, 2002
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Davis, C.J., concurring:

In this proceeding, the majority opinion has issued a writ of prohibition precluding the circuit court from disqualifying the petitioner's defense counsel. I concur in this judgment. I write separately to clarify issues the majority opinion failed to address, but which I believe may pose potential problems in future cases for future litigants.

A. The State Did Not Have Standing to Disqualify Defense Counsel

The majority opinion *assumed* that the State had standing to seek to disqualify defense counsel. Consequently, the majority opinion addressed the merits of the issue presented without ever addressing the standing issue. However, the issue of standing should have been considered by the majority opinion, even though the issue was apparently not raised by the petitioner below nor before this Court.

We have previously noted that "[g]enerally speaking, '[s]tanding is an element of jurisdiction over the subject matter.'" *State ex rel. Paul B. v. Hill*, 201 W. Va. 248, 256, 496 S.E.2d 198, 206 (1997) (quoting 21A Michie's Jurisprudence *Words & Phrases* 380 (1987) (citing *Chesapeake Bay Found. v. Gwaltney of Smithfield, Ltd.*, 611 F. Supp. 1542

(E.D. Va.1985), *vacated on other grounds*, 484 U.S. 49, 108 S. Ct. 376, 98 L. Ed. 2d 306 (1987))). *See also Taff v. Bettcher*, 646 A.2d 875, 877 (Conn. App. 1994) ("The issue of standing implicates the court's subject matter jurisdiction."). We have also recognized that "[w]here neither party . . . raises, briefs, or argues a jurisdictional question presented, this Court has the inherent power and duty to determine [the issue] unilaterally[.]" Syl. pt. 2, in part, *James M.B. v. Carolyn M.*, 193 W. Va. 289, 456 S.E.2d 16 (1995). *See Expedited Transp. Sys., Inc. v. Vieweg*, 207 W. Va. 90, 96, 529 S.E.2d 110, 116 (2000) ("[B]efore reaching the substantive issues raised, we must first contemplate whether the circuit court had jurisdiction[.]"). Therefore, this Court had the authority and the duty to address the issue of standing in this case *sua sponte.*

In my review of this Court's prior decisions, I have failed to uncover any case specifically ruling upon the question of who has standing to raise the issue of a conflict of interest by an attorney, in relation to his/her representation of a former client. Other courts, however, have addressed the matter. Those courts have held that "[a]s a general rule, a stranger to an attorney-client relationship lacks standing to complain of a conflict of interest in that relationship." Syllabus, *Morgan v. North Coast Cable Co.*, 586 N.E.2d 88 (Ohio 1992). That is, "as a general rule, courts do not disqualify an attorney on the grounds of conflict of interest unless the former client moves for disqualification." *United States v. Rogers*, 9 F.3d 1025,

1031 (2d Cir. 1993).[1] *Accord Dana Corp. v. Blue Cross & Blue Shield Mut. of Northern Ohio*, 900 F.2d 882 (6th Cir. 1990); *In re Yarn Processing Patent Validity, Celanese Corp. v. Leesona Corp.*, 530 F.2d 83 (5th Cir. 1976); *Fisher Studio v. Loew's, Inc.*, 232 F.2d 199 (2d Cir. 1956); *Richardson v. Hamilton Int'l Corp.*, 333 F. Supp. 1049 (E.D.Pa. 1971); *E. F. Hutton & Co. v. Brown*, 305 F. Supp. 371 (S.D. Tex. 1969); *Murchison v. Kirby*, 201 F. Supp. 122 (S.D.N.Y. 1961); *Johnson v. Prime Bank*, 464 S.E.2d 24 (Ga. Ct. App. 1996); *Ferguson v. Alexander*, 122 S.W.2d 1079 (Tex. Civ. App. 1938). The underlying rationale for this rule is that "a lawyer owes no general duty of confidentiality to nonclients." *DCH Health Servs. Corp. v. Waite*, 115 Cal. Rptr. 2d 847, 849 (Ct. App. 2002). Courts have also noted that "[t]he refusal to disqualify in the absence of a motion by the former client is all the more appropriate in the context of a criminal prosecution with its implication of constitutional rights." *United States v. Rogers*, 9 F.3d 1025, 1031 (2d Cir. 1993).

In the instant proceeding, defense counsel's "implied" client was a co-defendant who entered a guilty plea. Assuming that the co-defendant, as a nonparty, could seek to disqualify defense counsel, the co-defendant in these proceedings chose not to seek disqualification. Instead, the State sought to disqualify defense counsel based upon defense counsel's implied attorney-client relationship with the co-defendant. Under the general rule addressing this issue, the State did not have standing to seek disqualification of defense

[1]The narrow exceptions to the general rule are not applicable in this case. *See generally In re Appeal of Infotechnology, Inc.*, 582 A.2d 215 (Del. 1990).

counsel. Consequently, the majority opinion should have issued the writ based upon the State's lack of standing to raise the conflict of interest issue.

The fact that the majority opinion did not address the standing issue should not be interpreted to mean that the opinion imposes standing on the State or any party seeking to disqualify an opposing counsel, on the grounds of a conflict of interest by counsel due to his/her prior representation of a third party. *See, e.g.*, *Lewis v. Casey*, 518 U. S. 343, 352 n.2, 116 S. Ct. 2174, 2180 n.2, 135 L. Ed. 2d 606, 618 n.2 (1996) ("[W]e have repeatedly held that the existence of unaddressed jurisdictional defects has no precedential effect."); *Hagans v. Lavine*, 415 U.S. 528, 535 n.9, 94 S. Ct. 1372, 1377 n.5, 39 L. Ed. 2d 577, 586 n.5 (1974) ("[W]hen questions of jurisdiction have been passed on in prior decisions *sub silentio*, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us."). To be clear, as a general rule, only a party to an attorney-client relationship may seek to have his/her former attorney disqualified from a case on the grounds of conflict of interest arising from the former representation.

B. Practical Application of the Majority Opinion

The majority opinion has set out six new syllabus points that were aimed at assisting the lower courts in resolving attorney disqualification issues. In my reading of the

new syllabus points, I do not believe they provide practical guidance for lower courts.[2]

To begin, I believe trial courts should understand the legal conceptual framework, which is not expressly stated in the majority opinion, that governs the creation of an attorney-client relationship with a prospective client. The legal concept is that "[a]n implied attorney-client relationship may result when a prospective client divulges confidential information during a consultation with an attorney for the purpose of retaining the attorney, even if actual employment does not result." *Pro-Hand Servs. Trust v. Monthei*, 49 P.3d 56, 59 (Mont. 2002). In other words, the holding of the majority opinion recognizes an "implied" attorney-client relationship with respect to information given by a prospective client. The significance of the implied attorney-client relationship is that "[t]he attorney-client privilege applies to all confidential communications made to an attorney during preliminary discussions of the prospective professional employment[.]" *Hooser v. Superior Court*, 101 Cal. Rptr. 2d 341, 345-46 (Ct. App. 2000).

[2]In the body of its opinion, the majority relies heavily upon principles discussed in *State ex rel. Ogden Newspapers, Inc. v. Wilkes*, 211 W. Va. 423, 566 S.E.2d 560 (2002) (per curiam). While I do not disapprove of the principles the majority opinion borrowed from *Ogden*, I must point out that I dissented in part to the application of those principles to the facts presented in that case. *See Ogden*, 211 W. Va. at ___, 566 S.E.2d at 567 (Davis, C.J., concurring, in part, and dissenting, in part).

Courts have justified the imposition of an implied attorney-client relationship onto communication by a prospective client on the grounds that "[a]t the inception of the contacts between the layman and the lawyer it is essential that the layman feel free of danger in stating the facts of the case to the lawyer whom he consults." *King v. King*, 367 N.E.2d 1358, 1360 (Ill. App. Ct. 1977). To deny an implied attorney-client relationship in this situation would mean that no prospective client "could ever safely consult an attorney for the first time . . . if the [attorney-client] privilege depended on the chance of whether the attorney after hearing the statement of facts decided to accept employment or decline it." *In re Auclair*, 961 F.2d 65, 69 (5th Cir. 1992). *See generally Hiskett v. Wal-Mart Stores, Inc.*, 180 F.R.D. 403, 405 (D. Kan. 1998); *Perkins v. Gregg County*, 891 F. Supp. 361, 364 (E.D. Tex. 1995); *Nuccio v. Chicago Commodities, Inc.*, 628 N.E.2d 1134, 1137 (Ill. App. 1993). Consequently, as this Court has previously recognized, "[i]t is a nigh universal rule that '[t]he disqualification of an attorney by reason of conflict of interest will not be denied solely because there is no actual attorney-client relationship between the parties.'" *State ex rel. Taylor Assocs. v. Nuzum*, 175 W. Va. 19, 23, 330 S.E.2d 677, 681 (1985) (quoting *Nichols v. Village Voice, Inc.*, 99 Misc. 2d 822, 824, 417 N.Y.S.2d 415, 418 (1979)).

In determining whether an attorney should be disqualified, the majority opinion states in Syllabus point 3 that the trial "court must satisfy itself from a review of the available evidence, including affidavits and testimony of affected individuals, that confidential information was in fact discussed." While I do not disagree with this ruling, I believe the

majority opinion should have gone further in crystalizing the trial court's role. The court in *Pro-Hand Services Trust v. Monthei*, 49 P.3d 56 (Mont. 2002), provided some practical guidance for trial courts when making a determination as to whether confidential information was conveyed to an attorney by a prospective client:

> [A]n alleged client should not be required, at a disqualification hearing, to reveal actual confidences that he or she maintains were disclosed to establish an attorney-client relationship. Such a procedure would violate the very disclosure the [attorney-client privilege] is designed to protect. However, simply making a representation to the court that confidential information was disclosed offers nothing to assist the court in making a reasoned judgment. The alleged client must at least inform the court of the nature of the confidential information disclosed. For example, the alleged client can testify that she informed the prospective counsel of the nature of the transaction, her position regarding the claim or defense, witnesses who support or oppose her claim [or defense], . . . and other relevant personal information. This type of testimony, without getting specific, would alert the court of the possibility that confidential information had been previously disclosed.

Monthei, 49 P.3d at 59. *See Trone v. Smith*, 621 F.2d 994, 999 (9th Cir. 1980) ("The test does not require the former client to show that actual confidences were disclosed. That inquiry would be improper as requiring the very disclosure the rule is intended to protect.").

In view of the foregoing, I concur in the judgment reached in this case.