IN THE COURT OF APPEALS OF IOWA

No. 8-1032 / 08-0318
Filed February 4, 2009

STATE OF IOWA,
Plaintiff-Appellant,

vs.

ROBIN RENEE CASEY,
Defendant-Appellee.

Appeal from the Iowa District Court for Wayne County, Sherman W. Phipps, Judge.

The State appeals from the district court's order granting the defendant a new trial. **AFFIRMED.**

Thomas J. Miller, Attorney General, Kyle Hanson, Assistant Attorney General, and Alan M. Wilson, County Attorney, for appellant.

Carol A. Clark, Lamoni, for appellee.

Considered by Sackett, C.J., and Eisenhauer and Doyle, JJ.

SACKETT, C.J.

The State appeals from the district court's order granting the defendant, Robin Casey, a new trial on the ground that the part-time Wayne county attorney had a conflict of interest that should have been disclosed to the court prior to trial. We affirm.

I. SCOPE OF REVIEW.

The parties agree we review for an abuse of discretion. *See State v. Nitcher*, 720 N.W.2d 547, 559 (Iowa 2006). We will reverse only if the State shows the ruling was clearly unreasonable or based on untenable grounds. *State v. Reeves*, 670 N.W.2d 199, 202 (Iowa 2003); *State v. Schatz*, 414 N.W.2d 840, 841 (Iowa Ct. App. 1987). We are "slower to interfere with the grant of a new trial than with its denial." Iowa R. App. P. 6.14(6)(*d*); *Reeves*, 670 N.W.2d at 202-03.

II. BACKGROUND.

On July 13, 2006, the Wayne County Sheriff filed charges against Robin Casey alleging she committed six counts of forgery in violation of Iowa Code sections 715A.2(1)(c), (d), and 715A.2(2)(a)(3) (2005). Alan Wilson, acting as county attorney for Wayne County, filed the trial information and minutes of evidence on the charges on September 19, 2006. The minutes of evidence alleged that in May and June of 2006, six checks went missing from Earl McCullough's checkbook. Robin Casey worked for Earl McCullough and purportedly had access to his checkbook. Upon investigation, it was discovered

that each missing check was made out to Robin Casey and cashed by her. Casey entered a plea of not guilty on October 3, 2006.

On August 3, 2006, a small claims action was filed by Corydon State Bank alleging Casey and her husband failed to make payments on a loan. A default judgment was entered against the Caseys in this action on October 20, 2006. Wilson, acting as attorney for the Corydon State Bank, filed an application on October 27, 2006, in the small claims action for an order to require the Caseys to appear for a debtors' examination. The court subsequently entered an order requiring the Caseys to appear for that purpose on November 21, 2006. The Caseys were served with the order on November 7, 2006. Also on November 7, 2006, Wilson, acting as county attorney, Robin Casey, and her attorney appeared for a pretrial conference on the criminal charges. Casey failed to appear for the November 21, 2006 debtor's examination.

A jury trial on the forgery charges commenced on November 14, 2007. Wilson, acting as county attorney, represented the State. Casey claimed McCullough gave her the money as a loan and that he did not remember doing so. The State alleged McCullough did not make a loan to Casey and that she forged his name on the checks. Casey was found guilty on all counts. Her attorney filed a motion for a new trial on various grounds of error, including that Wilson's representation of Corydon State Bank in the civil action while the criminal case was pending was a conflict of interest. The motion alleged Wilson's failure to disclose this to the court prior to trial was prejudicial error. After a hearing on the issue, the court granted Casey a new trial. It determined

that even though the court was convinced Wilson did not allow the civil action to influence his prosecution of the criminal charges, the appearance of a conflict of interest was concerning. To avoid conveying any possible conflict of interest to the public, it found granting a new trial was appropriate.

III. GRANTING A NEW TRIAL DUE TO A CONFLICT OF INTEREST.

The State contends the district court abused its discretion by granting a new trial solely on the possibility of a conflict of interest. A court may grant a new trial for any of the reasons set forth in Iowa Rule of Criminal Procedure 2.24(2)(*b*). In its ruling, the court is to specify the grounds for granting a new trial. Iowa R. Crim. P. 2.24(2)(*a*). The court did not specifically recite which ground it was relying on; however, two appear applicable to the situation.

> The court may grant a new trial for any or all of the following causes:
> . . .
> (5) . . . when the prosecuting attorney has been guilty of prejudicial misconduct during the trial thereof before a jury.
> . . .
> (9) [w]hen from any other cause the defendant has not received a fair and impartial trial.

Iowa R. Crim. P. 2.24(2)(*b*)(5),(9). A new trial is not warranted due to prosecutorial misconduct unless that misconduct caused prejudice by depriving the defendant of a fair trial. *State v. Wright*, 309 N.W.2d 891, 893 (Iowa 1981); *State v. Slauson*, 249 Iowa 755, 759, 88 N.W.2d 806, 808-09 (1958). The court has considerable discretion in determining whether the prosecutor's conduct prejudiced the defendant. *State v. Williams*, 217 N.W.2d 573, 575 (Iowa 1974). However, in *State v. Larmond*, 244 N.W.2d 233, 235-36 (Iowa 1976) the court granted a defendant a new trial without proof of actual prejudice when the trial

judge's bias showed the judge should have been disqualified from trying the case.

"[G]enerally it is axiomatic a prosecutor should never try a defendant with whom he is embroiled in civil litigation." *Blanton v. Barrick*, 258 N.W.2d 306, 311 (Iowa 1977). Our rules of professional conduct are instructive on the situation.

> (c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person, acquired when the lawyer was a public officer or employee, *may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person.*
> . . . .
> (d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:
> . . . .
> (2) shall not:
> (i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing . . . .

Iowa Code of Prof'l Responsibility 32.DR 1-11(*c*), (*d*)(2)(i) (emphasis supplied). The comments to the rule explain how it is designed to protect the right to a fair trial.

> This rule represents a balancing of interests. On the one hand, where the successive clients are a government agency and another client, public or private, the risk exists that power or discretion vested in that agency might be used for the special benefit of the other client. A lawyer should not be in a position where benefit to the other client might affect performance of the lawyer's professional functions on behalf of the government. Also, unfair advantage could accrue to the other client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service.

Iowa Code of Prof'l Responsibility 32.DR 1-11, cmt. 4. In attorney disciplinary proceedings, engaging in conflicts of interest by simultaneously representing public and private interests has been determined to be "prejudicial to the administration of justice." *See Iowa Supreme Court Attorney Disciplinary Bd. v. Zenor*, 707 N.W.2d 176, 182 (Iowa 2005). In addressing the prejudice caused by dual representation, the supreme court has stated,

> [a]lthough "there is no typical form of conduct that prejudices the administration of justice," actions that have commonly been held to violate this disciplinary rule have hampered "the efficient and proper operation of the courts or of ancillary systems upon which the courts rely . . . ." [S]ome conflict-of-interest rules protect not only the rights of clients, but also "the integrity of the legal system." . . . "[T]he tribunal has an interest in basing its decisionmaking on a full and vigorous presentation of the competing positions." Similarly, "society as a whole has a right to expect that the system not be tainted by resort to hidden and conflicting agendas."

Zenor, 707 N.W.2d at 182.

The Iowa Code also prohibits county attorneys from pursuing a matter in both civil and criminal actions.

> A county attorney shall not:
> . . . .
> 2. Engage directly or indirectly as an attorney or an agent for a party other than the state or the county in an action or proceeding arising in the county *which is based upon substantially the same facts* as a prosecution or proceeding which has been commenced or prosecuted by the county attorney in the name of the state or the county. This prohibition also applies to the members of a law firm with which the county attorney is associated.

Iowa Code § 331.755(2) (emphasis supplied). A precursor to this section was construed in *State v. Jensen*, 178 Iowa 1098, 1099, 160 N.W. 832, 832-33 (1917), where the court considered whether an attorney who served as special prosecutor in indicting a defendant for seduction, could also be retained by a

plaintiff in a civil suit against the defendant for the seduction. The court found the situation problematic even if the attorney turned the civil case over to another attorney in his firm. *Jensen*, 178 Iowa at 1104, 160 N.W. at 834. It noted the conflict

> involves a public policy which must apply to all cases, and which is not so much concerned with whether a violation of that policy has worked an abuse in some particular trial as in repressing the possibilities of such mischief. It cares less for what has in fact been done than with what may be done in many other cases, if the policy be not adhered to.

Id. at 1104-05, 160 N.W. at 834. It determined that the general policy must be followed even though the attorney was a respected member of the bar and had no dishonorable intentions in handling the criminal and civil suits. *Id.* at 1105, 160 N.W. at 834-35. The court stated,

> enforcing the rules does not assume there is anything dishonorable in such employment, but does assume that it is not proper to [e]ntrust the administration of criminal justice to any who will be tempted to use it for private ends, and it is assumed that a retainer from private parties tends to this.

Id. It concluded that the attorney's conflict of interest required the defendant's conviction be reversed "as a matter of sound public policy and in obedience to the command of the statute[]." *Id.* at 1108, 160 N.W. at 835-36.

Iowa Code section 331.755 was also addressed in *Blanton v. Barrick*, 258 N.W.2d 306 (Iowa 1977). In *Blanton*, a part-time prosecutor filed a criminal action against Blanton for child stealing at the time the attorney was also representing Blanton's wife in a divorce action. *Blanton*, 258 N.W.2d at 307-08. The attorney was aware of the conflict of interest at the time but felt he was responsible to file the preliminary information on the criminal charges since no

one else was available to do so. *Id.* at 308. After filing the initial information, the attorney withdrew and a special prosecutor was appointed[1] to handle the criminal matter. *Id.* The court noted that even if the statute is violated, "if prior to commencement of the trial the conflict of interest is resolved, then there is no need to reverse a subsequent conviction." *Id.* at 312 (citing *State v. Weiland*, 202 N.W.2d 67, 69 (Iowa 1972)).

IV. ANALYSIS.

The State contends a new trial is not warranted because the civil and criminal actions were not "based upon substantially the same facts" and there was no showing of prejudice. We agree that the two cases cited above, *Jensen* and *Blanton*, are not based on identical facts and we do not and need not make a determination as to whether the county attorney acted in violation of Iowa Code section 331.755. The only question is whether the district court abused its discretion. The district court, in granting the motion, while indicating it did not imply the county attorney allowed something that happened a year before trial to motivate his prosecuting the case, noted his concern about the appearance of the county attorney's prosecution of Casey at a time when he also was representing a client in a small claims action against her. The court reasoned that the situation presented the possibility of a conflict and that there may be something tainted about the case and granted the new trial.

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[1] When a conflict of interest arises, the code permits a special prosecutor to be appointed. *See* Iowa Code § 331.754(1); *Polk County Conference Bd. v. Sarcone*, 516 N.W.2d 817, 821 (Iowa 1994) (stating that a conflict of interest constitutes a "disability" under section 331.754(1)).

Conflict-of-interest rules protect not only the rights of clients but also the integrity of the legal system. *Zenor*, 707 N.W.2d at 182. Society has a right to expect the system will not be tainted by a resort to hidden and conflicting agendas. *Id.* There was simultaneous representation by Wilson of both the State and the bank in matters against Casey. It is axiomatic a prosecutor should never try a defendant with whom he or she is embroiled in civil litigation. *Blanton*, 258 N.W.2d at 311. There is no evidence that the prosecutor advised Casey's attorney or the court of the dual representation fact. It is unclear as to whether Casey was aware of this fact.

Both the civil and criminal cases pertained to Casey's finances over the same time period. The checks went missing in the summer of 2006 and Corydon State Bank filed the small claims action to collect on an unpaid loan in August of that year. There was testimony that McCullough had previously advanced Casey funds to make payments on a car loan. Casey's attorney argued that the civil action was based on that unpaid car loan. The district court did not abuse its discretion in ordering a new trial.

AFFIRMED.