No. 31315 - State of West Virginia v. Kirk N.

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Davis, J., dissenting:

In this juvenile delinquency proceeding, the juvenile was appointed counsel by the circuit court.[1] However, during the adjudicatory phase of the proceeding, the circuit court permitted counsel for the juvenile's parents to participate fully in the proceeding, along with appointed counsel. The majority opinion has determined that counsel for the juvenile's parents should not have been allowed to participate in conducting the defense. However, the majority opinion concluded that there was no prejudice shown from such participation. For the reasons set out below, I dissent.

The Error in this Case Did Not Require Showing Prejudice

The United States Supreme Court has observed that "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error[.]" *Chapman v. California*, 386 U.S. 18, 23, 87 S. Ct. 824, 827-28, 17 L. Ed. 2d 705, 710 (1967) (footnote omitted). Thus, it has been held that "[a]ctual or constructive denial of the assistance of counsel . . . is legally presumed to result in prejudice."

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[1]"A juvenile's constitutional right to counsel was recognized by the United States Supreme Court in 1967 in *In re Gault*, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967)." *State ex rel. J. M. v. Taylor*, 166 W. Va. 511, 514, 276 S.E.2d 199, 201 (1981).

Strickland v. Washington, 466 U.S. 668, 692, 104 S. Ct. 2052, 2067, 80 L. Ed. 2d 674, 696 (1984). The United States Supreme Court "has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding." *United States v. Cronic*, 466 U.S. 648, 659 n.25, 104 S. Ct. 2039, 2047 n.25, 80 L. Ed. 2d 657, 668 n.25 (1984).

> Thus, when a defendant is completely denied assistance of counsel during a critical stage of judicial proceedings, when the state interferes in various ways with counsel's assistance, or when certain types of conflicts of interest are present, prejudice is presumed simply upon a showing that the actual or constructive deprivation occurred.

People v. Robles, 74 P.3d 437, 439 (Colo. Ct. App. 2003). Moreover, "constructive denial will be found when counsel fails 'to subject the prosecution's case to meaningful adversarial testing. . . .'" *Childress v. Johnson*, 103 F.3d 1221, 1228 (5th Cir. 1997) (quoting *Cronic*, 466 U.S. at 659, 104 S. Ct. at 2047, 80 L. Ed.2d at 668). This is to say that, although counsel is present, "the performance of counsel may be so inadequate that, in effect, no assistance of counsel is provided." *Cronic*, 466 U.S. at 654 n.11, 104 S. Ct. at 2044 n.11, 80 L. Ed. 2d at 665 n.11. *See also Holloway v. Arkansas*, 435 U.S. 475, 489-90, 98 S. Ct. 1173, 1181, 55 L. Ed. 2d 426, 438 (1978) (noting that the mere physical presence of an attorney does not fulfill the Sixth Amendment guarantee when the advocate is silent on crucial matters); *Belcher v. State*, 93 S.W.3d 593, 598 (Tex. Ct. App. 2003) ("[T]he physical presence of counsel does not prevent his 'absence' . . . . To the contrary, 'absence' means simply the defendant was without counsel, either literally or figuratively." (Citation omitted)).

The presumption of prejudice when there is an actual or constructive denial of counsel is necessary because, "'[o]f all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have.'" *Cronic*, 466 U.S. at 654, 104 S. Ct. at 2044, 80 L. Ed. 2d at 664 (footnote omitted).[2] *See also Judith P. v. Superior Court*, 102 Cal. App. 4th 535, 555, 126 Cal. Rptr. 2d 14, 30 (2002) ("[E]rrors that result in automatic reversal . . . include . . . deprivation of the right to counsel[.]"); *Wofford v. State*, 819 So. 2d 891, 892 (Fla. Dist. Ct. App. 2002) ("[D]enial of the Sixth Amendment right to counsel is per se reversible error."); *Propes v. State*, 550 N.E.2d 755, 758 (Ind. 1990) ("[V]iolation of the right to counsel is fundamental error, reversible *per se* despite other, independent evidence sufficient to support a conviction."); *State v. Thompson*, 355 S.C. 255, 261, 584 S.E.2d 131, 134 (Ct. App. 2003) ("The erroneous deprivation of a defendant's fundamental right to the assistance of counsel is *per se* reversible error."); *D.L.J. v. State*, 981 S.W.2d 815, 816 (Tex. Ct. App. 1998) ("Denial of the right to counsel at the certification hearing was structural error that is per se reversible; no harmless error analysis is required.").

In the instant case, a constructive denial of counsel occurred. This is true because the juvenile's counsel shared the duty to represent him with an attorney that was

[2]The right to counsel is guaranteed under both "Section 14 of Article III of the West Virginia Constitution and the Sixth Amendment to the United States Constitution[.]" Syl. pt. 6, in part, *State ex rel. Daniel v. Legursky*, 195 W. Va. 314, 465 S.E.2d 416 (1995).

under no legal obligation to represent the juvenile.[3] Two cases will help illustrate my position.

In the first case, *People v. McGraw*, 119 Cal. App. 3d 582, 174 Cal. Rptr. 711 (1981), the defendant was charged separately for committing burglary and possession of stolen property. The defendant was represented by retained counsel for the burglary charge, and was appointed a public defender for the possession of stolen property charge. The two charges were consolidated for a single trial. With the trial court's permission and the defendant's consent, retained counsel did not assist with or participate in the selection of the jury. The defendant was ultimately convicted by a jury on both charges. In the appeal, the defendant argued that the failure of appointed counsel to participate in jury selection denied him the constitutional right to assistance of counsel on the possession of stolen property charge. The appellate court agreed with the defendant as follows:

> What retained counsel characterized as "minimal" representation, this court holds to be a denial of appellant's constitutional right to assistance of counsel, reversible error per se. Unless waived, a criminal defendant is entitled to the assistance of a competent, active and diligent attorney during jury impanelment.
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> The People contend that the record demonstrates that [the

[3]This situation would be different if the trial court had appointed the parents' counsel to act as co-counsel for the juvenile. If that had occurred, then the parents' attorney would be legally and ethically obligated to protect the rights of the juvenile. The record in this case is clear in showing that at all times during the proceeding, the parents' counsel was under no legal or ethical obligation to represent the juvenile.

> retained counsel] "in fact substituted" for [the appointed counsel] during jury selection. The People's contention is without merit. Further, appellant's asserted consent to and apparent approval of [the appointed counsel's] "minimal" representation . . . did not meet even the minimal constitutional requisites for a valid waiver of the right to counsel.

McGraw, 119 Cal. App. 3d at 587, 174 Cal. Rptr. at 712 (internal citations omitted).

The second case I wish to consider is *Penson v. Ohio*, 488 U.S. 75, 109 S. Ct. 346, 102 L. Ed.2d 300 (1988). In *Penson*, the defendant and two co-defendants were found guilty by an Ohio jury of several crimes. The defendant was sentenced to a term of imprisonment of eighteen to twenty-eight years. The defendant was subsequently appointed counsel to perfect an appeal. However, his counsel filed a "Certification of Meritless Appeal and Motion," wherein it was said that there were no grounds for reversing the conviction. The defendant's counsel also asked to withdraw as appellate counsel. The Ohio appellate court permitted counsel to withdraw. The appellate court eventually reviewed the defendant's appeal based upon the record in the case. The appellate court also considered the briefs and arguments by counsel for the co-defendants:

> In reviewing the record and the briefs filed by counsel on behalf of [defendant's] codefendants, the court found "several arguable claims." Indeed, the court concluded that plain error had been committed in the jury instructions concerning one count. The court therefore reversed [defendant's] conviction and sentence on that count but affirmed the convictions and sentences on the remaining counts. It concluded that [defendant] "suffered no prejudice" as a result of "counsel's failure to give a more conscientious examination of the record" because the court had thoroughly examined the record and had

> received the benefit of arguments advanced by counsel for [defendant's] two codefendants.

Penson, 488 U.S. at 79, 109 S. Ct. at 349, 102 L. Ed. 2d at 308 (internal citations omitted).

The Ohio supreme court affirmed the appellate court decision. The United States Supreme Court granted certiorari and reversed the decision on the following grounds:

> No one disputes that the Ohio Court of Appeals concluded that the record below supported a number of arguable claims. Thus, in finding that petitioner suffered no prejudice, the court was simply asserting that, based on its review of the case, it was ultimately unconvinced that petitioner's conviction--with the exception of one count--should be reversed. Finding harmless error or a lack of *Strickland [v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)] prejudice in cases such as this, however, would leave indigent criminal appellants without any of the protections afforded by *Anders [v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967)]. . . .
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> Nor are we persuaded that the Court of Appeals' consideration of the appellate briefs filed on behalf of petitioner's codefendants alters this conclusion. One party's right to representation on appeal is not satisfied by simply relying on representation provided to another party. To the contrary, "[t]he right to counsel guaranteed by the Constitution contemplates the services of an attorney devoted solely to the interests of his client. *Glasser v. United States*, 315 U.S. 60, 70, 62 S. Ct. 457, 465, 86 L. Ed. 680 [(1942)]." *Von Moltke v. Gillies*, 332 U.S. 708, 725, 68 S. Ct. 316, 324, 92 L. Ed. 309 (1948) (plurality opinion). A criminal appellant is entitled to a single-minded advocacy for which the mere possibility of a coincidence of interest with a represented codefendant is an inadequate proxy.

Penson, 488 U.S. at 86-87, 109 S. Ct. at 353 (internal citation to record and footnote omitted).

The decisions in *Penson* and *McGraw* stand for the proposition that, absent a valid waiver by a defendant, only the counsel of record for a defendant on a charge may represent the defendant during critical stages of a prosecution. Under *Penson* and *McGraw*, prejudice is presumed when a defendant's counsel relinquishes any part of the representation of the defendant to an attorney who is not on record as counsel for the defendant.

Penson and *McGraw* should have controlled the outcome of the instant case. The record is devoid of any evidence of a valid waiver by the juvenile of his right to have appointed counsel conduct his defense. *See State v. Sugg*, 193 W. Va. 388, 397, 456 S.E.2d 469, 478 (1995) ("Thus, when a constitutional right is at stake, its waiver must be knowing, intelligent, and voluntary."). Absent such a waiver, the juvenile's counsel *could not* agree to let counsel for the juvenile's parents have an active role in the defense. *See Evitts v. Lucey*, 469 U.S. 387, 394, 105 S. Ct. 830, 835, 83 L. Ed. 2d 821, 828 (1985) ("[An effective attorney] must play the role of an active advocate, rather than a mere friend of the court."). By doing so, the juvenile's constitutional right to counsel during every critical stage of the prosecution was constructively denied.[4] Consequently, the issue of prejudice was irrelevant. *See Perry v. Leeke*, 488 U.S. 272, 280, 109 S. Ct. 594, 600, 102 L. Ed. 2d 624, 633 (1989) (actual or constructive denial of the assistance of counsel is not subject to prejudice analysis);

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[4]The Supreme Court has interpreted "critical stage" to mean "any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial." *United States v. Wade*, 388 U.S. 218, 226, 87 S. Ct. 1926, 1932, 18 L. Ed. 2d 1149, 1157 (1967) (footnote omitted).

Herring v. New York, 422 U.S. 853, 864, 95 S. Ct. 2550, 2556, 45 L. Ed. 2d 593, 601-02 (1975) (presumption of prejudice where defense counsel denied right to give closing argument); *Mitchell v. State*, 989 S.W.2d 747, 748 (Tex. Crim. App. 1999) (En banc) ("In these circumstances no affirmative proof of prejudice is required because prejudice is irrefutably presumed.").

In view of the foregoing, I dissent.