

NOTICE

The text of this order may be changed or corrected prior to the time for filing of a Petition for Rehearing or the disposition of the same

SIXTH DIVISION
March 21, 2008

No. 1-06-3575

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County
)	
v.)	86 CR 15796
)	
JASON GRAY,)	Honorable
)	Nicholas R. Ford,
Defendant-Appellant.)	Judge Presiding

ORDER

A jury found defendant, Jason Gray, guilty of three murders. We affirmed the convictions on direct appeal. People v. Gray, 247 Ill. App. 3d 133 (1993). The trial court later granted defendant a new trial. Prosecutors moved to disqualify the attorney who helped defendant get a new trial. The trial court granted the motion. Defendant now appeals. We find that the prosecution did not present grounds that warrant denial of defendant's right to choose his counsel. Accordingly, we reverse the decision disqualifying counsel.

BACKGROUND

On November 7, 1986, Joanne McGuire, then 12 years old, attended a party in the basement of her neighbor's home. About 40 teens remained crowded into the basement a little after midnight, when a knock sounded on the back door. Jessie

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Villagomez opened the door. Someone in the doorway fired several shots from a .380 automatic gun and fled. The gunshots killed three of the teenagers attending the party.

Police took about 20 of the teens from the party, including McGuire, to the police station in a paddy wagon. Police did not permit McGuire's mother to come with her to the station. When officers first spoke with McGuire she said she had been in the front half of the basement, away from the door, at the time of the shooting. She could not identify the shooters. However, she told police "Little Hawk" might have participated in the murders.

McGuire returned to a room with other teens from the party. They discussed the shooting. Police showed McGuire an array of photographs that included defendant's picture. McGuire identified defendant as the shooter. Prosecutors charged defendant and Manuel Bobe, known as "Little Hulk," with the three murders.

Detective Michael Kill interviewed defendant, and an assistant State's Attorney later took a statement from defendant. Defendant admitted that he had driven past the party on the evening of November 7. He gave an alibi for the time of the shooting.

At trial McGuire explained that she initially told police that she did not see the shooter because she feared defendant, whom she knew from the neighborhood. She had known him for about two years before the trial. She told police about "Little Hawk"

because other partygoers said he participated in the shooting.

Three other witnesses supported the prosecution. Sam Rehder (whose name we spelt "Rahder" in our prior opinion) testified that he picked up some friends, members of the Two-Two gang, to take them to the party on November 7, 1986. On the way they encountered defendant and another member of the Two-Six. Defendant threw a bottle at Rehder's car and displayed hostile gang signals. Later, in a separate encounter, defendant and his friend got out of their car to confront Rehder, but when Rehder and the other Two-Two members got out of Rehder's car, defendant retreated and left the scene.

Kill testified that in the interview at the police station defendant admitted that he had a .380 automatic gun on the evening of November 7, 1986. The admission did not appear in any police report of the interview with defendant, and the statement the assistant State's Attorney took from defendant made no mention of a gun.

Villagomez, the person who opened the door right before the shooting started, swore that he did not see defendant at the door. However, he said that he saw defendant near the party shortly before the shooting. Apart from McGuire and Villagomez, no other witness saw defendant near the area around the time of the shooting.

Defendant presented one witness who testified that defendant spent the evening with her. The testimony largely corroborated

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the alibi defense in the statement defendant gave to the assistant State's Attorney.

Separate juries in the trials of defendant and Bobe found both guilty of the three murders. The trial court sentenced defendant and Bobe to natural life in prison.

Defendant supported his motion for new trial with affidavits from two of McGuire's friends, who swore that McGuire told them she did not see who shot the victims, but she intended to testify against defendant anyway. The trial court found the evidence insufficient to warrant a new trial.

A private attorney filed on defendant's behalf a motion for posttrial relief under section 2-1401 of the Code of Civil Procedure (Ill. Rev. Stat. 1989, ch. 110, par. 2-1401). Evidence that Villagomez committed perjury formed the basis for the 2-1401 motion. Although the trial judge found Villagomez completely untrustworthy, the judge held that the prosecution's case did not depend on Villagomez's testimony, and therefore the new evidence did not warrant a new trial.

The private attorney did not represent defendant on the appeal from the denial of the 2-1401 motion. In January 2001 the State Appellate Defender assigned the appeal to Jennifer Bonjean. We affirmed the denial of the 2-1401 motion. People v. Gray, No. 1-98-4310 (2001) (unpublished order under Supreme Court Rule 23).

Bonjean, acting pro bono, assisted defendant with his subsequent petition brought under the Postconviction Hearing Act

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(725 ILCS 5/122-1 et seq. (West 1996)). She investigated defendant's claim that he did not participate in the murders. She left her business card with McGuire's brother and asked him to ask McGuire to contact her. McGuire called Bonjean and agreed to meet her. McGuire suggested they meet at a bar, Frankie and Johnny's, where McGuire knew the staff. McGuire asked Bonjean to come alone. After that discussion McGuire invited Bonjean to come to McGuire's apartment for further discussions. For this second interview, in January 2002, McGuire permitted Bonjean to bring along another attorney, and Bonjean brought along an attorney who did not work for the same law firm as Bonjean. Bonjean next met McGuire in May 2003. Again McGuire permitted Bonjean to bring along another attorney for the discussion, and again Bonjean brought an attorney with whom she had no law firm affiliation.

Bonjean also interviewed several persons who attended the party, including Rehder and a boy who rode with Rehder to the party. Rehder admitted that he lied at defendant's trial. He had not encountered defendant at all on the day of the party. Rehder's passenger corroborated the recantation. Witnesses from the party said they saw three Hispanic males approaching the party, and one had a gun in his hand. Minutes later the shooting occurred. Defendant, who is not Hispanic, is tall and blond. Bobe, convicted of the murders, swore that he did not see defendant near the party and defendant did not participate in the

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shootings.

The amended postconviction petition included affidavits from these witnesses and several alibi witnesses. But defendant relied primarily on the affidavits of the attorneys who listened to Bonjean's discussions with McGuire. Kathleen Flynn swore that McGuire "expressed reservations about her identification of Jason Gray stating 'maybe I just got Jason in my head.'" Heidi Lambros swore that McGuire said "she never saw the gunman's face." She testified against defendant because police told her that other witnesses identified defendant as the shooter, and police recovered a gun that implicated defendant.

Bonjean also appended to the petition a report of an investigation into allegations that police officers working with Commander Jon Burge physically abused persons in their custody. Kill worked with Burge at the time of the alleged physical abuse. The investigator reported:

"In the matter of alleged physical abuse, the preponderance of the evidence is that abuse did occur and that it was systematic. *** The type of abuse described was not limited to the usual beating, but went into such esoteric areas as *** planned torture."

The report suggested that Kill may have perjured himself in many cases in which he swore that he obtained confessions or other statements from defendants without any physical force.

In 2004 the judge who presided at defendant's trial heard

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evidence on the postconviction petition. McGuire testified that she had last seen defendant five or six years before the shooting. She did not remember whether she saw defendant's face in the doorway at the party at the time of the shooting. She admitted that she told an attorney that she "didn't think [she] saw the shooter's face." At the police station she heard others from the party say they had seen defendant near the party. Defense counsel asked, "why do you think it was that you came to believe it was [defendant] that did the shooting?" McGuire answered: "A lot of people were saying his name."

On cross-examination she said she was not recanting her trial testimony. The judge sought clarification:

"THE COURT: *** [I]n speaking to *** [the attorney who signed the affidavit supporting the petition] you have indicated that you are not sure who the shooter was?

THE WITNESS: Correct.

THE COURT: Is that your basic statement today?

THE WITNESS: Yes.

THE COURT: Is anybody forcing you[,] coercing you to say that?

THE WITNESS: No."

McGuire explained that she suffered from lupus, a terminal illness. Stress raises her blood pressure and accelerates the progress of the disease. McGuire felt great stress every time

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she testified. She clarified that she had the disease when she testified at the original trial. The testimony on the postconviction petition left her "an emotional wreck." In response to the prosecutor's questions, she said she had not "ever told anyone that [she was] not sure that [defendant] was the shooter." She also said she last saw defendant two or three years before the shooting, and she had known him for many years before that. She did not explain why she testified at the original trial that she had known defendant for about two years before the shooting.

The trial judge found Villagomez's trial testimony "totally untrustworthy." In light of the investigator's report into police misconduct, the judge did not consider Kill's testimony. The judge also noted the corroborated recantation of Rehder's testimony and the exonerating testimony of alibi witnesses and witnesses who saw Hispanic males, and not defendant, involved in the shooting. That evidence, along with the stark inconsistencies in McGuire's testimony in court, and the inconsistencies in the many out-of-court statements she made over the years about the shooting, led the court to grant defendant a new trial.

Bonjean found an attorney with more trial experience to help her pro bono with defendant's new trial. The judge who presided at the trial retired before the new trial could begin. Prosecutors asked the new judge to disqualify Bonjean from

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representing defendant at the new trial. In the motion the prosecutor alleged:

"Ms. Bonjean *** is prone to inject her own recollection of the meetings with McGuire, as well as to argue her own personal feelings ***.

*** [A] number of interactions took place between Ms. Bonjean and [McGuire] wherein they were the only two persons privy to what was said. *** Those interactions provide the essential background for what Ms. Bonjean has often argued amounts to a recantation of [McGuire's] trial testimony. The first face-to-face meeting between the two did not involve any third party witnesses and took place at a bar where the two consumed several bottles of beer while Ms. Bonjean attempted to elicit statements from [McGuire].

* * *

*** [D]efense counsel in the instant case acted as an 'investigator' on behalf of the defendant. ***

*** [I]n the re-trial of this case the defense will seek to impeach [McGuire] by the introduction of what the defense considers prior inconsistent statements. *** What has been said by Ms. Bonjean to [McGuire] and vice versa is an issue that will be unavoidable at trial. *** Ms. Bonjean acted as an 'investigator' on behalf of defendant when she

interviewed [McGuire] without anyone else present, and would presumably wish to elicit this testimony on behalf of defendant."

Defendant argued that Bonjean met with McGuire only once with no third person to testify to the discussion, and defendant had no intention of eliciting any testimony regarding that conversation. The judge said:

"Ms. Bonjean has consistently hearkened back to conversations she has had with witnesses in this matter. *** And about individuals contradicting what they said previously. And, of course, it's a matter of public record. And the great deal of flip-flopping that has occurred in particular with reference to the testimony of Ms. McGuire *** who is the preeminent witness in the case.

It's my opinion that it's very likely that [Bonjean] would be a witness in this case, not unlikely. ***

*** [I]t is my view, my duty to *** remove Ms. Bonjean from representing Mr. Gray in this matter and that will be the order of the Court today.

* * *

*** Do you understand how intimately and personally you have become involved in this case? How

many times you have come before me articulating sometimes really great ideas but doing so in a mood and temperance which to me indicated very profoundly and clearly that you crossed the line between a litigator and a person with a personal interest or as a witness in this case?"

The judge denied the motion to reconsider and defendant appealed pursuant to Supreme Court Rule 306(a)(7). 166 Ill. 2d R. 306(a)(7). Prosecutors returned to court to add to the record a letter Bonjean sent to Rehder, who is in prison on unrelated charges. Bonjean wrote:

"Even though no evidence exists to suggest that Mr. Gray is guilty, the State is still intent on re-prosecuting Mr. Gray ***. You also might know that one of the cops, Detective Kill, who was involved in Jason's case (I believe he may have harassed you some also) is currently under investigation by a Special Prosecutor for torturing criminal suspects ***. My partner and I *** would like to talk to you more about it. If possible, I would like to arrange a visit with you."

Rehder submitted a grievance in which he alleged that an officer "shook down [Rehder's] cell *** and confiscated a legal letter." Rehder subsequently signed a statement that reaffirmed that he lied at defendant's original trial because prosecutors

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intimidated him. No one "threatened, coerced, pressured, harassed, paid or otherwise improperly influenced" him to recant his trial testimony. He recanted because he wanted to tell the truth.

The court allowed the motion to add Bonjean's letter to the record on appeal.

ANALYSIS

Defendant now argues that the removal of Bonjean from the case violated his right to counsel. In all criminal prosecutions, a defendant who does not require appointed counsel has a constitutional right to choose the attorney who will represent him. United States v. Gonzalez-Lopez, 548 U.S. 140, 126 S. Ct. 2557, 2561 (2006).

"The right to select counsel of one's choice *** has never been derived from the Sixth Amendment's purpose of ensuring a fair trial. It has been regarded as the root meaning of the constitutional guarantee. [Citations.] Where the right to be assisted by counsel of one's choice is wrongly denied, therefore, it is unnecessary to conduct an ineffectiveness or prejudice inquiry to establish a Sixth Amendment violation. Deprivation of the right is 'complete' when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of the representation he received." Gonzalez-

Lopez, 548 U.S. at ____, 126 S. Ct. at 2563.

Courts have established some constraints on the constitutional right to one's choice of counsel. To decide whether circumstances override the presumption in favor of the defendant's choice of counsel, the court may consider various factors, including:

"(1) the defendant's interest in having the undivided loyalty of counsel; (2) the State's right to a fair trial in which defense counsel acts ethically and does not use confidential information to attack a State's witness; (3) the appearance of impropriety should the jury learn of the conflict; (4) the probability that continued representation by counsel of choice will provide grounds for overturning a conviction." People v. Ortega, 209 Ill. 2d 354, 361-62 (2004).

We will not set aside a decision on a motion to disqualify an attorney unless the trial court has abused its discretion. Ortega, 209 Ill. 2d at 359.

The prosecution here asserts that Bonjean's continued representation of defendant would violate Rule 3.7 of the Rules of Professional Conduct. That rule provides:

"(a) A lawyer shall not accept or continue employment in contemplated or pending litigation if the lawyer knows or reasonably should know that the lawyer may be called as a witness on behalf of the client,

except that the lawyer may undertake the employment and may testify *** if refusal to accept or continue the employment would work a substantial hardship on the client.

(b) If a lawyer knows or reasonably should know that the lawyer may be called as a witness other than on behalf of the client, the lawyer may accept or continue the representation until the lawyer knows or reasonably should know that the lawyer's testimony is or may be prejudicial to the client."

Subpart (a) of the rule provides generally that if the client seeks to use the attorney as a witness, the attorney should not continue representing the client. See Park-N-Shop, Ltd. v. City of Highwood, 864 F. Supp. 82, 83 (N.D. Ill. 1994). Defendant told the trial court he did not seek to call Bonjean as a witness. However, some courts have disallowed the client's choice of a lawyer if "it is obvious that he *** ought to be called as a witness on behalf of his client." Ames v. Cohen, 156 Ohio App. 492, 495, 806 N.E.2d 1014, 1016 (2004).

Here, McGuire herself testified that she met with Bonjean alone only once. For the other three meetings over the course of more than two years, other attorneys observed and supplied affidavits about the discussions. The prosecution has not shown any insufficiency in the available testimony concerning those meetings.

Prior to the meeting with Bonjean, McGuire told police (when she first arrived at the police station following the shootings) that she did not see who fired the shots, as she stood at the far end of the basement, unable to see the door through the crowded room. Several witnesses from the party corroborated this initial account, swearing that they saw McGuire shortly before the shooting, and she stood far from the basement door. According to two further witnesses, a few days after her initial encounter with police, McGuire told two of her friends that she did not see who shot the victims, but she intended to testify against defendant anyway.

At the hearing on the postconviction petition, in court and under oath, McGuire said she "didn't think [she] saw the shooter's face," she was "not sure who the shooter was," and that she had not "ever told anyone that [she was] not sure that [defendant] was the shooter." She further contradicted many particulars of her testimony about how long she knew defendant and when she had seen him. The prosecution does not assert that any different or more persuasive evidence impeaching McGuire arose during the one conversation McGuire had in person with Bonjean alone. Because the prosecution has not shown that defendant ought to call Bonjean as a witness on his behalf, the prosecution has not shown that her continued representation of defendant would violate Rule 3.7(a).

Although the prosecution raised no such suggestion in the

motion to disqualify Bonjean, at argument in the trial court the prosecution hinted that it might wish to call Bonjean to testify about the one private conversation she had in person with McGuire. On this basis the prosecution argues that Bonjean's representation of defendant would violate Rule 3.7(b), which applies when a client's opponent intends to call the client's attorney as a witness. See Weeks v. Samsung Heavy Industry Co., 909 F. Supp. 582 (N.D. Ill. 1996).

The rule permits the attorney to continue representing the client "until the lawyer knows or reasonably should know that the lawyer's testimony is or may be prejudicial to the client." RPC 3.7(b). The record includes Bonjean's affidavit concerning her discussions with McGuire and McGuire's testimony concerning those same discussions. We find no indication that the prosecution could elicit from Bonjean any testimony prejudicial to defendant. The prosecution emphasizes that in the private meeting Bonjean and McGuire drank beer. We do not see any prejudicial effect from testimony that in 2001 Bonjean and McGuire drank beer during a discussion about the case, nor do we see any connection between that beer and the self-contradictory testimony McGuire gave in 2004 at the hearing on the postconviction petition. The prosecution has not shown that Bonjean's continued representation of defendant will violate the Rules of Professional Conduct.

Consideration of the factors listed in Ortega also shows no grounds for disqualifying Bonjean. No one has questioned her

loyalty to her client. Indeed, the judge disqualified her in part because he found that she had too much personal interest in achieving the best result for her client. The prosecution has not suggested that Bonjean obtained any confidential information about McGuire in their interviews. McGuire swore that she always understood that Bonjean represented defendant, and she never thought of Bonjean as her attorney.

The prosecution argues that we will likely reverse any conviction of defendant, if he goes to trial with Bonjean as his attorney. But the case on which the prosecution relies, People v. Burrows, 148 Ill. 2d 196 (1992), shows the improbability of that result. In that case defense counsel and a second attorney from the same law firm interviewed the prosecution's principal witness. According to that witness, counsel promised that he would get the witness out of jail if he recanted his testimony against the defendant, counsel's client. The attorney admitted that either he or the other attorney from his firm needed to testify about the circumstances surrounding the witness's recantation of his trial testimony. Burrows, 148 Ill. 2d at 244. The court pointed out that if the client sought testimony from either attorney, the law firm should not continue representing the client. Burrows, 148 Ill. 2d at 244. A jury found the client guilty of murder. Although our supreme court found that counsel should have refused to continue representing the client, the court affirmed the conviction. The court found no indication

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that the attorney's testimony would have changed the result on retrial.

If the severe conflict in Burrows, and the need for the attorney's testimony, did not warrant reversing the convictions there, the slight possibility of some utility for Bonjean's testimony here will not likely warrant reversal of any conviction the prosecution might obtain. See also People v. Attaway, 41 Ill. App. 3d 837, 853-54 (1976) (conviction affirmed although defense counsel should have withdrawn to testify on defendant's behalf).

Our supreme court in Ortega also considered "the appearance of impropriety" if the jury should learn of the conflict between the attorney's interests and those of her client. In the brief the prosecution contends:

"where Bonjean has repeatedly met with, called, interviewed and drank alcohol with Ms. McGuire, the 'appearance of impropriety' to the jury is utterly manifest. ***

*** [A]ny rational jury would view Bonjean with tremendous skepticism upon learning of her 'investigative' activities involving this witness."

Prosecutors have shown that Bonjean diligently investigated her client's claims. After some investigation she came to believe that her client did not commit the murders for which prosecutors charged him. Even the cold transcript displays the

depth of her emotional commitment to the case.

The court should not disqualify Bonjean because of her work and her commitment to the case. She had a duty to investigate her client's claims. See Baker v. Daniel S. Berger, Ltd., 323 Ill. App. 3d 956, 965 (2001). If she had not investigated defendant's claims, this court might need to reverse any decision adverse to defendant. See People v. Tillman, 226 Ill. App. 3d 1, 15-16 (1991). The decision to replace Bonjean with new counsel shortly before trial, when counsel will certainly not have the time to prepare as well as Bonjean has prepared, runs the risk of reversal for ineffective assistance of counsel. Just as the prosecutor's faith in Kill and certain very carefully selected portions of McGuire's testimony should not disqualify the prosecutor from working on the case, Bonjean's belief in her client's innocence and her diligent investigation should not disqualify her.

Federal courts have stressed that the Sixth Amendment does not permit courts to overcome lightly a defendant's right to his choice of private counsel, when he can afford such counsel. See United States v. Perez, 325 F.3d 115, 125-27 (2d Cir. 2003). To overcome the defendant's choice the prosecution must show a conflict between the interests of the attorney and the client. People v. Holmes, 141 Ill. 2d 204, 218-28 (1990). Where counsel should testify for the client, the conflict between the roles as attorney and witness may provide grounds for disqualifying the

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attorney. See Model Rules of Professional Conduct, R. 3.7, comments 1, 2 (2002). According to several federal courts interpreting the Sixth Amendment, the prosecution must show a conflict of such severity that no rational defendant would continue to allow the attorney to represent him. See United States v. Schwarz, 283 F.3d 76, 95 (2d Cir. 2002).

In light of the available evidence impeaching McGuire, and in light of Bonjean's familiarity with and commitment to the case, we cannot describe as irrational defendant's stated preference for Bonjean to continue to act as his attorney, even if this precludes her from testifying on his behalf. The trial court abused its discretion by granting the prosecution's motion to disqualify Bonjean. Accordingly, we reverse the trial court's decision disqualifying counsel and remand for further proceedings.

Reversed and remanded.

McNULTY, J., with JOSEPH GORDON and O'MALLEY, JJ.,
concurring.