IN THE COURT OF APPEALS OF IOWA

HORTENSE LONG,)

Petitioner,)

vs.)

THE HONORABLE DALE S. MISSILDINE, JUDGE, POLK COUNTY DISTRICT COURT, in his official capacity only,)

Respondent.)

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Certiorari to Polk District Court - Dale S. Missildine, Judge.

Petitioner challenges by writ of certiorari trial court's refusal to permit her privately retained counsel to withdraw and its denial of her application for appointment of counsel at public expense asserting that trial court abused its discretion by denying her and her counsel's applications because she is indigent and unable to provide her counsel with the financial resources with which to ensure an adequate defense. WRIT ANNULLED IN PART; WRIT SUSTAINED AND ORDER ANNULLED IN PART.

Alfredo G. Parrish of Parrish & Del Gallo, Des Moines, Iowa, for petitioner.

Thomas J. Miller, Attorney General, and Richard L. Cleland, Assistant Attorney General, for respondent.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

Petitioner, Hortense Long, challenges by writ of certiorari trial court's refusal to permit her privately retained counsel to withdraw and its denial of her application for appointment of counsel at public expense. She asserts that trial court abused its discretion by denying her and her counsel's applications because she is indigent and unable to provide her counsel with the financial resources with which to ensure an adequate defense. We find trial court properly refused to permit withdrawal of counsel, but sustain the writ with regard to trial court's denial of petitioner's application for appointment of counsel and remand for further proceedings consistent with this opinion.

A trial information was filed on August 2, 1979, charging petitioner with the crime of robbery in the first degree in violation of section 711.2, The Code 1979. Petitioner applied for and was appointed counsel at public expense on August 3, 1979. She subsequently retained private counsel who appeared as attorney of record on November 9, 1979. Trial was held and upon petitioner's conviction of robbery in the second degree, her counsel filed a motion for new trial which was granted on March 27, 1980.

On May 16, 1980, defense counsel filed an application to withdraw due to petitioner's indigency and her failure to communicate with him. Hearing was held on May 23, 1980, at which time defense counsel, in support of his application to withdraw, made a professional statement and called petitioner to testify. According to counsel's statement, petitioner had indicated to him that she was unable to pay the remaining $1,800 of accrued attorney fees and could not afford to retain an attorney at present. Counsel stated that he could not proceed with petitioner's defense because he did not have the resources to continue. He further stated that the petitioner had failed to appear for appointments. Petitioner testified that she had not paid defense counsel's fees for the first trial, was presently employed at $3.55 per hour, owned no property or automobile, had no money in the bank, and could not afford the services of an attorney.

Trial court denied the application to withdraw, whereupon defense counsel made an oral application on behalf of petitioner for appointment of counsel at public expense, and offered to prepare a financial affidavit for the court's consideration. Trial court denied petitioner's oral application. Petitioner then filed a written application for appointment of counsel and an affidavit of financial condition. The record contains no ruling on the written application. Petitioner thereafter filed her petition. The supreme court granted certiorari on June 18, 1980.

I. Scope of Review. Our review of trial court proceedings upon a petition for writ of certiorari is to determine only whether trial court " 'exceeded its jurisdiction or otherwise acted illegally'." State v. Iowa District Court of Sioux County, 286 N.W.2d 22, 23 (Iowa 1979) (quoting Furey v. Crawford County, 208 N.W.2d 15, 19 (Iowa 1973)). Our review is very limited, Parish v. Denato, 262 N.W.2d 281, 284 (Iowa 1978), and we grant relief only if the trial court abused its discretion. Soldat v. Iowa District Court for Emmet County, 283 N.W.2d 497, 498 (Iowa 1979).

II. Withdrawal of Defense Counsel. Petitioner contends that trial court abused its discretion in refusing to allow her privately retained counsel to withdraw prior to her retrial on the robbery charge. We disagree.

It is within the trial court's discretion to decide whether to allow counsel to withdraw. State v. Taylor, 211 N.W.2d 264, 267 (Iowa 1973). Guidelines for testing claims of abuse of discretion were outlined in State v. Noonan, 246 N.W.2d 236 (Iowa 1976), wherein the court stated:

> The term discretion itself involves the idea of choice, of an exercise of the will, of a determination made between competing considerations. In order to have an "abuse" in reaching such determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias. . . . [citing authority].

Id. at 237 (quoting Wendel v. Swanberg, 384 Mich. 468, [475-76], 185 N.W.2d 348, 351 (1971)), (quoted in State v. Warner, 229 N.W.2d 776, 783 (Iowa 1975)).

Petitioner's claim that, in the event she is unable to provide adequate financial resources for her defense, her attorney should be allowed to withdraw is firmly supported by Iowa case law and general principles of attorney conduct. The ethical considerations and disciplinary rules of the Iowa Code of Professional Responsibility for Lawyers illustrate the soundness of her assertion: "The legal profession cannot remain a viable force in fulfilling its role in our society unless its members receive adequate compensation for services . . .", EC 2-16; ". . . adequate compensation is necessary to enable the lawyer to serve his client effectively and to preserve the integrity and independence of the profession," EC 2-17. A lawyer may request permission to withdraw when the client "[d]eliberately disregards an agreement or obligation to the lawyer as to expenses or fees." DR 2-110(c)(1)(f).

In addition the Iowa Supreme Court has specifically stated that an attorney should not be expected to serve gratuitously as defense counsel in a criminal case, Schmidt v.

Uhlenhopp, 258 Iowa 771, 775, 140 N.W.2d 118, 122 (1966), and that counsel cannot offer a defendant only token representation as a result of inadequate compensation. State v. Nelson, 279 N.W.2d 1, 3 (Iowa 1979). The remedy is to withdraw from the case. Id.

Trial court's refusal to allow defense counsel to withdraw in this case, however, cannot be categorized as violative of fact and logic, a perversity of will, a defiance of judgment, or the exercise of passion or bias. The record discloses trial court reasoned that since Mr. Parrish had conducted this matter through the initial trial and knew more about the case than any other attorney would, it would have been an injustice to his client for another attorney to have taken over at that stage. The Iowa Supreme Court concluded in Schmidt, that it would be an abuse of discretion for trial court to appoint counsel for an indigent defendant other than the lawyer who had begun preparation of the defense, because to do so "would result in unnecessary duplication of effort and at least partial loss of benefit of his [preparation]." 258 Iowa at 778, 140 N.W.2d at 123. Similarly, we are compelled in this case to conclude that allowing counsel to withdraw would result in unnecessary duplication of effort and loss of the invaluable benefit of preparing for and conducting the previous trial.

III. Appointment of Counsel at Public Expense. Petitioner also asserts that trial court abused its discretion by denying her application for appointed counsel because she was indigent and thereby entitled to such. The State contends that once counsel undertakes representation of a defendant for a fee, counsel is obliged to continue representation through retrial and that an indigent defendant, consequently, is not denied effective assistance of counsel by trial court's refusal to appoint counsel at public expense.

First, we note that the fact counsel has agreed to represent a client for a fee and has collected part of it is not a valid reason for denying withdrawal when the client has not paid the remainder of the fee as agreed. Where an attorney's compensation is inadequate, the remedy ordinarily is to withdraw from the case. Nelson, 279 N.W.2d at 3. We have already concluded, however, that trial court correctly refused to allow counsel to withdraw, not because counsel was contractually obligated to represent petitioner, but because counsel's withdrawal would have prejudiced petitioner's defense.

Second, there can be no doubt that a criminal defendant is entitled to have counsel appointed at public expense if the defendant cannot afford to employ counsel. U.S. CONST. amend. VI; Gideon v. Wainwright, 272 U.S. 335, 342-43, 83 S. Ct. 792, 795-96, 9 L. Ed. 2d 799, 804 (1963); Iowa R. Crim. P. 26.

The remaining question is whether petitioner was indigent. When a defendant has employed a private attorney and thereafter seeks appointed counsel, it is proper for trial court to require a showing that defendant is unable to employ counsel even if defendant originally was determined indigent. Schmidt, 258 Iowa at 775, 140 N.W.2d at 121. In this case, despite petitioner's employment of private counsel, we believe there is sufficient evidence that she was genuinely indigent. Petitioner's financial statement shows that she had weekly earnings of $190 from a job she had held for less than one month, had one minor dependent, and debts totalling $4,000. The record indicates that the petitioner was able to afford an attorney only with the financial assistance of her family but, as the court in Schmidt ruled, such outside sources are not to be considered by the trial court when determining a defendant's indigency. Schmidt, 258 Iowa at 777, 140 N.W.2d at 122.

From this record, we conclude that petitioner was entitled to appointed counsel and thus remand this case to trial court with directions to appoint Mr. Parrish as attorney for the petitioner. Trial court shall make a determination at the appropriate time of the proper award of attorney fees taking into account all the facts and circumstances.

In summary, we conclude that trial court properly refused to permit counsel to withdraw but abused its discretion by refusing to appoint counsel for petitioner. The writ of certiorari is sustained and trial court's order denying petitioner's application for appointment of counsel is annulled.

WRIT ANNULLED IN PART; WRIT SUSTAINED AND ORDER ANNULLED IN PART.