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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)
Appellee,) Filed June 30, 1978
vs.)
NEAL EDWARD HIRSH,) 544/60770
Appellant.)

Appeal from Johnson District Court - Robert Osmundson, Judge.

Defendant appeals from his conviction on assault and robbery with aggravation charges claiming he was denied effective assistance of counsel when trial court denied his attorney's motion to withdraw from the case because of a conflict of interest implicating other clients not criminally charged. - Reversed and remanded for new trial.

Leon F. Spies, of Mellon & Spies, Iowa City, for Appellant.

Lona Hansen, Assistant Attorney General, Richard C. Turner, Attorney General of Iowa, and Jack W. Dooley, Johnson County Attorney, for Appellee.

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

PER CURIAM

This case presents a narrow question for our resolution: whether, when counsel appointed to represent a criminal defendant subsequently discovers this representation is in conflict with the interests of his ongoing representation of other clients, the trial court should allow the attorney to withdraw from the court appointment?

The trial court took the pragmatic view that there was no conflict of interest since the other clients had not been charged with criminal activity arising out of events or circumstances involving defendant Neal Edward Hirsh. The United States v. Glasser, 315 U.S. 60, 76 (1942) case in dealing with the appointment of effective assistance of counsel observed it was the court's duty:

> . . . to refrain from embarrasing counsel in the defense of an accused by insisting, or indeed even suggesting, that counsel undertake to concurrently represent interests which might diverge from those of his first client, when the possibility of the divergence is brought home to the Court.

Jackson v. Auger, 239 N.W.2d 180, 183 (Iowa 1976) relying upon Glasser held:

> . . . The burden is upon the defendant to demonstrate a substantial possibility that the situation of dual representation created a conflict between his interests and the interests of the other person or persons represented. Actual prejudice need not be shown.

State v. Gatewood, 179 N.W.2d 520, 523 (Iowa 1970), earlier relying upon Glasser, held:

> . . . that one who claims denial of effective assistance of counsel. . . must show a conflict of interest; but having done so, he need not point out in what manner or to what extent he has been prejudiced.

These decisions focus upon the impairment of assistance of counsel when the spectre of serving two masters arises. We think it is too narrow a view for the trial court to insist that until the other clients are indicted and charged there can be no conflict. The attorney and the defendant concurred in their strenuous urging that the conflict was real, material, and of such proportions as to prevent the attorney from in good conscience calling his other clients as witnesses to testify. The attorney anticipated his clients' testimony would quite possibly incriminate themselves while extricating or exonerating the defendant.

Further, we cannot escape the force of this Glasser language:

> . . . In conspiracy cases, where the liberal rules of evidence and the wide latitude accorded the prosecution may, and sometimes do, operate unfairly against an individual defendant, it is especially important that he be given the benefit of the undivided assistance of his counsel without the court's becoming a party to encumbering that assistance.

315 U.S. at 76. Hirsh was convicted in large part by out-of-court statements urged by the State to be admissible under the co-conspirator exception to the hearsay rule. These statements placed Hirsh at the scene of the crime and purported to establish Hirsh in possession of the sawed-off shotgun when it "went off." We are persuaded Hirsh and his attorney sufficiently apprised the trial court of the pivotal conflict of interest which was operating to prevent the attorney from pursuing and presenting evidence:

> . . . there are things which may well be valid defense which I cannot in good conscience present. . . . I'm talking about conspiracy, I'm talking about entrapment. . . . I'm talking about things of that nature which if I understand the nature of the possible testimony are severe. . . .

Recently in Holloway v. Arkansas, __U.S.__, 55 L.Ed.2d 426 (1978) the Supreme Court dealt again with the Glasser problem, observing:

> It is arguable, perhaps, that defense counsel might have presented the requests for appointment of separate counsel more vigorously and in greater detail. As to the former, however, the trial court's responses hardly encouraged pursuit of the separate counsel claim; and as to presenting the basis for that claim in more detail, defense counsel was confronted with a risk of violating, by more disclosure, his duty of confidentiality to his clients. (emphasis added). __U.S.__, 55 L.Ed.2d at 435.

Holloway ruled the lawyer claiming a conflict of interest acts in bringing the problem to the court's attention as an officer of the court. It is the attorney who is in the best position professionally and ethically to determine when a conflict of interest exists or probably will develop at trial.

In the instant case, reluctantly and under order from the court, the attorney proceeded to trial. We can find no solace in the State's insistance that the attorney vigorously and effectively cross-examined its witnesses. Hirsh's point is that his attorney conscientiously perceived he could not present Hirsh's claimed defense. We hold such a showing is sufficient to establish a conflict of interest requiring the trial court to allow, upon application, the attorney to withdraw. Accordingly, we reverse the judgment below and remand for new trial.

The question of the admissibility of the testimony of Greg Pickard concerning the out-of-court declarations of Scott Houston will undoubtedly come up again in the new trial. Hirsh objected to this testimony on hearsay grounds. The State argued that Houston's report to Pickard about the robbery ". . . was a report about the success of the robbery plans to Pickard who had been aware of and involved in the robbery plans." Houston's account placed Hirsh and himself at the Green Pepper Restaurant as the actual perpetrators of the burglary and assault. It also identified Hirsh as the instigator and actor and Houston as the bystander-observer who made no move to actually further the criminal activity. State v. Kidd, 239 N.W.2d 860, 865 (Iowa 1976) reiterated the State v. Gilmore, 151 Iowa 618, 624, 132 N.W. 53, 54 (1911) rule that statements uttered during the active life of the conspiracy under circumstances indicating reliability are deemed to have been said by the body of conspirators as a whole and are not excluded by the hearsay rule. However, a merely narrative declaration of acts or measures already taken is barred since such utterances are likely to be unreliable and self-serving because they result from premeditation and design. In Pickard's testimony Houston's statements are just such utterances and should have been excluded upon Hirsh's hearsay objection.

Reversed and remanded for new trial.

All judges concur, except CARTER, J., who concurs specially, and DONIELSON, J., who concurs in part and dissents in part.

CARTER, J. (specially concurring)

I concur in the reversal of defendant's conviction upon the basis of Holloway v. Arkansas, ___ U.S. ___, 98 S. Ct. 1173 (1978). As I interpret that decision, a trial court may explore "the adequacy of the basis of defense counsel's representations regarding a conflict of interests" as long as this requires no disclosure of confidential communications. But, unless such exploration completely negates the basis of the representation, the professional statement of counsel must be accepted by the court. On the present record I cannot find that counsel's response to the trial court's inquiries sufficiently negated the claim of conflict of interest to permit rejection of the professional statement.

I also concur with the majority's holding that the statement of the alleged co-conspirator was inadmissible.

DONIELSON, J. (concurring in part and dissenting in part)

Although I concur in the reversal of defendant's conviction on the basis of the attorney conflict of interests question, I am unable to agree with the majority's conclusion that Pickard's testimony was inadmissible under State v. Kidd, 239 N.W.2d 860, 865 (Iowa 1976).

I agree with the State's argument that Pickard's testimony about Houston's statements is admissible against defendant as a statement made by a co-conspirator of a party during the course and in furtherance of the conspiracy. When there is substantial evidence of a conspiracy, whether the offense charged is conspiracy or not, everything said by any conspirator in furtherance of the common purpose is deemed to have been said in behalf of all parties to the conspiracy. **Id.** at 864.

The record in this case is replete with evidence that the statements in question were made during the pendency of the conspiracy. However, the majority concludes that the difficulty lies with the second condition for admissibility--the requirement that the statements be made in furtherance of the conspiracy. They take the position that Houston's statements constitute inadmissible hearsay because they are merely a declaration of acts or measures already taken.

A narrative declaration is in furtherance of the conspiracy if it has some connection with what is being done in promotion of the common design. **Id.** at 865. The record in the instant case reflects that in January of 1977, defendant borrowed some shotgun shells from Pickard and a sawed-off shotgun from another dormitory resident, Carl Keister. At about 1:00 a.m. on February 6, 1977, Houston telephoned Pickard and asked to use his car so that he (Houston) could go out and rob The Green Pepper Restaurant. At about 3:30 a.m., defendant, Houston, and Craig Burkhard returned to Pickard's apartment. Pickard asked, "You guys didn't really do that, did you?" He testified that his question was in reference to the robbery of the restaurant. Houston replied "Yeah." Defendant then told Pickard not to say anything about it. After Hirsh and Burkhard left the apartment, Houston related the details of the robbery and the shooting of the victims to Pickard. One of the things Houston mentioned to Pickard was that Hirsh used Keister's sawed-off shotgun to commit the robbery.

I believe that Kidd is authority for the admissibility of Pickard's testimony. There, the court viewed the conversation, which took place within an hour of the robbery, as a report to Gibson by the conspirators which was made to advance the aims of the ongoing conspiracy in circumstances indicating its reliability. The court concluded that the statements were circumstantial and spontaneous rather than merely narrative. Id. at 865; Mares v. United States, 383 F.2d 805, 810 (10 Cir. 1967), cert. denied, 394 U.S. 963, 89 S.Ct. 1314, 22 L.Ed.2d 564 (1969).

In holding the challenged evidence admissible, the Kidd court cited United States v. Cox, 449 F.2d 679, 688 (10 Cir. 1971), where an incriminating tape-recorded telephone conversation between two alleged conspirators which occurred during the evening after a daytime robbery was held admissible. In so holding, the court reasoned that the conversation was so closely related to the day's events and the crime as to be an inseparable part of the conspiracy.

After reviewing the record, I am of the opinion that Houston's statements to Pickard had a similar connection with the alleged conspiracy involved here, and that, consequently, they were made in furtherance of the conspiracy. I would hold Pickard's testimony admissible on this basis.