

IN THE COURT OF APPEALS OF OHIO  
SIXTH APPELLATE DISTRICT  
LUCAS COUNTY

State of Ohio

Court of Appeals No. L-12-1276

Appellee

Trial Court No. CR0201201487

v.

Jordan Byrd

**DECISION AND JUDGMENT**

Appellant

Decided: September 13, 2013

\* \* \* \* \*

Julia R. Bates, Lucas County Prosecuting Attorney, and  
Evy M. Jarrett, Assistant Prosecuting Attorney, for appellee.

Deborah Kovac Rump, for appellant.

\* \* \* \* \*

**PIETRYKOWSKI, J.**

{¶ 1} This is an appeal of a trial court's pretrial ruling removing a criminal defendant's retained counsel of choice. The judgment is subject to immediate appeal. *State v. Chambliss*, 128 Ohio St.3d 507, 2011-Ohio-1785, 947 N.E.2d 651, syllabus.

{¶ 2} Jordan Byrd is the appellant. He appeals a September 17, 2012 judgment of the Lucas County Court of Common Pleas that disqualified his retained attorney, Lorin Zaner, from continuing to represent him in this case. The judgment granted a motion by the state to disqualify Mr. Zaner as counsel. Appellant's brother, James Byrd, and sister, Larrissa James, are co-defendants.

{¶ 3} The criminal charges against the defendants are under a March 29, 2012 indictment. The indictment charges appellant with four counts of rape and a single count of gross sexual imposition. It charges James Byrd with four counts of rape, one count of gross sexual imposition, and one count of disseminating matter harmful to juveniles and Larrissa James, with three counts of gross sexual imposition. The alleged victim is the defendants' niece.

{¶ 4} Mr. Zaner entered an appearance on behalf of all three defendants on April 17, 2012, and contemporaneously filed a motion on behalf of all defendants "to sever trials to permit each defendant to be tried separately." The trial court denied the motion to sever after a hearing on April 27, 2012.

{¶ 5} At the hearing on the motion to sever, the prosecutor stated that the charges include 14 separate criminal offenses occurring between September 2009 and November 2009, eight of which are rapes, five of which are gross sexual imposition, and one of which is disseminating matter harmful to juveniles. According to the state, the 14 offenses allegedly took place in separate areas of the same house, the respective

bedrooms of each defendant. The alleged victim's age during the period ranged from seven to nine years of age.

{¶ 6} The state disclosed that each defendant denied any knowledge of wrongdoing by the other defendants and the alleged victim denied telling the defendants what the others were doing. The prosecutor also stated that one defendant had denied all criminal wrongdoing and that the case may involve plea negotiations with that defendant.

{¶ 7} During the hearing, the trial court discussed with Mr. Zaner its concern over whether potential conflicts of interest were presented in the case and that Mr. Zaner could not represent all three defendants should the motion to sever be denied. After the court denied the motion to sever, Mr. Zaner advised the trial court that he would continue to represent only one of the defendants and that the other two would require appointed counsel.

{¶ 8} The case proceeded to a hearing on May 2, 2012, for appointment of counsel and arraignment. On that date Mr. Zaner advised the court that he would continue to represent Jordan Byrd. The court appointed attorney David Klucas to represent James Byrd and attorney Sarah Roller to represent Larrissa James. The court then proceeded with arraignments of the defendants.

{¶ 9} After the appointment of separate counsel for James Byrd, Mr. Zaner spoke directly by telephone to him on May 11, 2012. The communication was without the knowledge or authorization of James Byrd's attorney, David Klucas, and the subject matter included Mr. Zaner's dissatisfaction with Mr. Klucas, the need for James Byrd to

secure new counsel, and need for Mr. Byrd's attorney to work with Mr. Zaner in defense of the case.

{¶ 10} The state filed a motion to disqualify Mr. Zaner from further representation of appellant on June 21, 2012. The matter was fully briefed by the parties. The trial court conducted an evidentiary hearing on the motion on August 27, 2012. In an opinion and judgment filed on September 17, 2012, the court granted the motion to disqualify. Jordan Byrd appeals the judgment and asserts three assignments of error on appeal:

Assignment of Error I: This Court should undertake de novo review of the trial court's granting of the state's motion to disqualify Jordan Byrd's counsel because the trial court did not properly apply the law.

Alternatively, Byrd believes that the trial court abused its discretion by ordering the disqualification of his trial counsel (Lorin Zaner).

Assignment of Error II: The state filed the motion to disqualify. It was not filed by Jordan Byrd or either of his co-defendants. The state is using the motion as a tactical device to remove Zaner from the case. Because this ultimately involves a potential conflict of interest, the state has no standing. Even under the case relied upon by the trial court, the state would only have standing if the trial court entered a decision as to whether trial counsel could testify.

Assignment of Error III: Byrd has a constitutional right to counsel of his choice. Denying that right is a structural error, not subject to a

harmless error analysis. The state failed to meet its burden to establish why Byrd should not be permitted counsel of his choice, and the trial court failed to properly and completely address this in its decision. In doing so, his constitutional rights were violated.

### **May 11, 2012 Telephone Conference**

{¶ 11} At all times relevant, James Byrd has been incarcerated, pending trial, in the Lucas County Corrections Center. By stipulation of the parties, audio recordings and transcripts of four telephone calls made by James Byrd from the jail to his mother, Laura, on May 10 and 11, 2012, were placed in evidence for consideration by the trial court in its ruling on the motion to disqualify. The four recordings all begin with an announcement to participants that the telephone call was from an inmate at the Lucas County Corrections Center and that the call may be monitored and recorded.

{¶ 12} Working from a transcript and audio recording, the trial court found in its judgment that the following telephone conversation occurred on May 11, 2012 between James Byrd, his mother Laura and attorney Lorin Zaner:

Laura: Okay. Well, Lorin is right here. I – hold on minute, I’m going to go in the office with Lorin and put you on speaker phone, okay?

Hold on.

James: Okay.

Laura: Are you there?

James: Yeah.

Laura: Okay. Go ahead.

James: He just made a couple of statements that I didn't like and – when I was sitting up there at – where I was sitting. He just – in the beginning before you guys told me to even say anything, I want to, but he made a couple of statements that I did not, did not like.

Laura: Do you remember what he said?

James: Yeah, I know what he said. Basically the other two co-defendants whatever, whatever, he

Laura: Lorin said go ahead and tell him.

James: Okay. Basically what he told me was the – about the other two, what we discussed up there before, about the other two and that I'm – that he wants me to be alone by myself. I – don't even work underneath Lorin or anything.

Mr. Zaner: Well, you know we had already tried that and the Judge denied it, but I mean here's the game plan. Did you sign a paper when you were in front of the Judge?

James: Yes, I did.

Mr. Zaner: All right, all that was was waiving time until the next court date.

James: Right.

Mr. Zaner: All right, so that's not a big deal. Ronnie Wingate is going to come and talk to you either today or this week-end, okay? He's the guy that we want to have represent you. I can tell you this, I don't trust Klucas at all. He lied to me yesterday; I'm very upset about it. I've heard some other things about him also and, you know, you – I mean, I agree, it should be a separate trial by the Judge has already denied that, okay?

James: All right.

Mr. Zaner: And that means if we're going to be in trial together we need to work together, and I don't trust this guy and I won't work well with him.

James: Okay, that's fine.

Mr. Zaner: I talked to Ronnie yesterday and he's willing to jump on board so he's going to get over and talk to you. As long as you're comfortable, then we'll [switch] lawyers and have him represent you.

James: I definitely – you know I'm comfortable; I don't want to work with this guy. I want to fire him today.

Mr. Zaner: Well, it was better that you didn't.

James: Okay.

Mr. Zaner: And as I said, Ronnie will get to talk to you and he and I will – will work well together on it, okay?

James: Okay.

{¶ 13} At the hearing on the motion to disqualify, attorney Jonathan Cherry testified as an expert witness. He testified that Mr. Zaner’s conversation with James Byrd was not a clear violation of Rule 4.2 of the Rules of Professional Conduct. Mr. Zaner argued that no ethical violation occurred. Appellant argues that Mr. Zaner’s conduct was an unprofessional lapse but had no impact on the case.

#### **Rule 4.2 of the Ohio Rules of Professional Conduct**

{¶ 14} Rule 4.2 of the Ohio Rules of Professional Conduct was adopted effective February 1, 2007. Official comments to the rule note that it is identical to ABA Model Rule 4.2. The rule provides:

Rule 4.2. Communication with person represented by counsel

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

{¶ 15} An official comment to the rule states that the “rule applies even though the represented person initiates or consents to the communication.” Prof.Cond.R. 4.2, comment 3. An attorney “must immediately terminate communication with a person” upon learning a communication is not permitted by the rule. *Id.* According to comment 1 of the rule, its purpose is to protect defendants who are represented by counsel:



This rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship, and the uncounselled disclosure of information relating to the representation. Prof.Cond.R. 4.2, comment 1.

### **Trial Court Judgment**

{¶ 16} In its September 17, 2012 judgment, the trial court found that at the time of the May 11, 2012 telephone conversation James Byrd was represented by attorney Klucas and that Mr. Klucas had not given permission for Mr. Zaner to speak to his client. The court noted that in his testimony at the hearing that Mr. Zaner admitted that he realized during the course of the conversation with James Byrd that he should not be speaking with him, but “[t]he conversation proceeds and concludes without any acknowledgment by Mr. Zaner that he should not have been speaking with James Byrd.” (Emphasis in original.)

{¶ 17} Mr. Zaner testified that he became concerned when he learned that Mr. Klucas intended to pursue a different defense strategy than he and Mr. Klucas had previously discussed. Mr. Zaner testified: “I was concerned that the decisions could have a major negative impact in my abilities in handling Jordan Byrd, to try to achieve the best results for him, including a not guilty at trial.” The trial court found that this

testimony “demonstrates Mr. Zaner’s efforts to undermine another defendant’s representation for his client’s benefits.”

{¶ 18} The court concluded that statements by Mr. Zaner to James Byrd in the telephone conversation “can only be construed as undermining the attorney/client privilege between David Klucas and James Byrd. They also reflect the degree to which Mr. Zaner continued to attempt to direct the defense of James Byrd in this case.”

{¶ 19} The trial court concluded that the actions and statements by Mr. Zaner demonstrated “a disregard to maintaining the integrity of these court proceedings which this Court has the inherent power to protect.”

### **Standing**

{¶ 20} We consider the issue of standing first. Under Assignment of Error No. II, appellant argues that the state lacks standing to seek disqualification of Mr. Zaner as counsel for appellant. Appellant contends that Mr. Zaner was disqualified based upon a potential conflict of interest and that only persons who have a present or past attorney-client relationship with Mr. Zaner have standing to seek his disqualification on that ground. Appellant acknowledges that he failed to object to the motion to disqualify on the basis of standing in the trial court.

{¶ 21} The state argues that appellant waived the right to assert lack of standing on appeal because appellant failed to object to standing in the trial court. Alternatively, the state argues that standing exists on various legal grounds including the ground that the case presents potential breaches of ethical obligations by Mr. Zaner of which attorneys

have a duty to report and that the conduct compromised the integrity of trial court proceedings.

{¶ 22} Failure of appellant to object to lack of standing in the trial court constitutes a waiver of the defense on appeal. *State v. Morris*, 42 Ohio St.2d 307, 329 N.E.2d 85 (1975), paragraph one of the syllabus. No issue of plain error is presented as we conclude that the state in fact had standing to seek disqualification.

{¶ 23} Disqualification in this case was sought on the basis of an unauthorized ex parte communication by counsel with a defendant, represented by another attorney, in breach of Prof.Cond.R. 4.2, and not under traditional conflict of interest analysis under the three-part test of *Dana Corp. v. Blue Cross & Blue Shield Mut. of N. Ohio*, 900 F.2d 882, 889 (6th Cir.1990). See *Morgan v. N. Coast Cable Co.*, 63 Ohio St.3d 156, 159-160, 586 N.E.2d 88 (1992). The Ohio Supreme Court has recognized that a trial court's inherent power over its proceedings includes authority to disqualify attorneys on ethical grounds:

The most common basis for trial court disqualification of an attorney is the risk of a tainted trial due to an actual or potential conflict of interest.

*Glueck v. Jonathan Logan, Inc.* (C.A.2, 1981), 653 F.2d 746, at 748.

However, this is not the only ground for disqualification. The trial court's power to protect its pending proceedings includes the authority to dismiss an attorney who cannot, or will not, take part in them with a reasonable degree of propriety. *Laughlin v. Eicher* (D.D.C.1944), 145 F.2d 700.

Similarly, attorney disqualification can be warranted in cases of truly egregious misconduct which is likely to infect future proceedings. *Royal Indem. Co. v. J.C. Penney Co., Inc.*, 27 Ohio St.3d 31, 34, 501 N.E.2d 617 (1986).

{¶ 24} In *Mentor Lagoons, Inc. v. Rubin*, 31 Ohio St.3d 256, 259-260, 510 N.E.2d 379 (1987), the Ohio Supreme Court quoted *Royal Indemnity* with approval and clarified on the inherent authority of trial courts with respect to attorney disqualification:

This includes the inherent authority of dismissal or disqualification from a case if an attorney cannot, or will not, comply with the Code of Professional Responsibility when representing a client. \* \* \* This power is distinct from the exclusive authority of the Supreme Court of Ohio over attorney disciplinary proceedings, and does not conflict with such power. (Citations omitted.)

{¶ 25} Appellant has presented the court with no authority to support an argument that the state lacks standing in a criminal case to seek trial court disqualification of an attorney under its inherent authority recognized in *Royal Indemnity* and in *Mentor Lagoons*. Prosecutors and attorneys generally have a duty to report violations of the Ohio Rules of Professional Conduct. See Prof.Cond.R. 8.3(a). Such a duty has been recognized in decisions by United States Courts of Appeals for the First, Fourth, and Fifth Circuits to provide standing for third party motions to disqualify for breach of ethical rules of conduct. See *Kevlik v. Goldstein*, 724 F.2d 844, 847-48 (1st Cir.1984);

*United States v. Clarkson*, 567 F.2d 270, 271 fn. 1 (4th Cir.1977); *In re Gopman*, 531 F.2d 262, 265-266 (5th Cir. 1976).

{¶ 26} We conclude that the state has standing to move for disqualification of Mr. Zaner in aid of the inherent authority of trial courts over their proceedings as recognized in *Royal Indemnity* and *Mentor Lagoons*.

{¶ 27} We find Assignment of Error No. II not well-taken.

{¶ 28} Assignments of Error Nos. I and III concern the merits of the judgment disqualifying Mr. Zaner. We consider them together.

{¶ 29} Under Assignment of Error No. I, appellant argues that the trial court judgment disqualifying Mr. Zaner is contrary to law and that a de novo review of the motion to disqualify is required. Alternatively, appellant argues that the trial court abused its discretion in ordering disqualification of appellant's trial counsel. Under Assignment of Error No. III, appellant argues that the trial court judgment denies appellant his constitutional right to counsel of choice and constitutes structural error.

{¶ 30} The Sixth Amendment right to counsel is recognized to include a right to retain counsel of choice:

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence.” We have previously held that an element of this right is the right of a defendant who does not require appointed counsel to choose who will represent him. See *Wheat v. United States*, 486 U.S. 153, 159, 108

S.Ct. 1692, 100 L.Ed.2d 140 (1988). Cf. *Powell v. Alabama*, 287 U.S. 45, 53, 53 S.Ct. 55, 77 L.Ed. 158 (1932). *United States v. Gonzalez-Lopez*, 548 U.S. 140, 144, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006).

{¶ 31} The right to counsel of choice is not unqualified, but is “only a presumptive right to employ \* \* \* chosen counsel.” *State v. Keenan*, 81 Ohio St.3d 133, 137, 689 N.E.2d 929 (1998). The erroneous denial of counsel of choice constitutes structural error. *Gonzalez-Lopez* at 150; *State v. Chambliss*, 128 Ohio St.3d 507, 2011-Ohio-1785, 947 N.E.2d 651, ¶ 18. Such an error requires an automatic reversal of a conviction. *Chambliss* at ¶ 18.

{¶ 32} We consider the issue in a different context than the court in *Gonzalez-Lopez*. *Gonzalez-Lopez* considered the erroneous denial of choice of counsel on appeal, after trial. In this case we consider the issue on interlocutory appeal from the judgment removing trial counsel. See *State v. Ponce*, 2012-Ohio-4572, 977 N.E.2d 1062, ¶ 14. The interlocutory procedure is intended to avoid a potential retrial. *Chambliss* at ¶ 23.

{¶ 33} In its judgment, the trial court held that a violation of Prof.R.Cond. 4.2 alone was an insufficient basis to disqualify counsel. The trial court held that a two-step analysis was required and applied the analysis set forth in *Kitchen v. Aristech Chem.*, 769 F.Supp. 254 (S.D.Ohio 1991). The *Kitchen v. Aristech* case concerned a claimed violation of DR 7-104 of the Ohio Code of Professional Responsibility by counsel’s ex parte communications with a former employee. *Id.* at 258-259.

{¶ 34} The trial court concluded that under the analysis it must first determine that “there is a reasonable possibility that some specifically identifiable impropriety actually occurred.” Next, the court must determine whether the public interest in \* \* \* professional conduct by attorneys outweighs the competing interest of allowing a party to retain counsel of his choice.”

{¶ 35} The *Kitchen v. Aristech* court cited two decisions of the United States Fifth Circuit Court of Appeals as the source of the standard: *United States v. Kitchin*, 592 F.2d 900, 903 (5th Cir.1979) and *Woods v. Covington County Bank*, 537 F.2d 804 (5th Cir.1976). *Kitchen* at 257. Appellant has promoted the same line of inquiry in his brief. We conclude that appellant has presented no basis to conclude that the trial court’s judgment is erroneous as a matter of law.

{¶ 36} The standard of review to determine trial court error in granting pretrial motions to disqualify defense counsel in a criminal case is the abuse of discretion standard. *Keenan*, 81 Ohio St.3d 133, 137, 689 N.E.2d 929. As this court recognized in *State v. Henry*, 6th Dist. Lucas No. L-12-1209, 2013-Ohio-2247, ¶ 16:

Generally, a trial court has wide discretion in the consideration of a motion to disqualify counsel. *Spivey v. Bender*, 77 Ohio App.3d 17, 22, 601 N.E.2d 56 (6th Dist.1991). An abuse of discretion connotes more than a mere error of law or judgment, instead requiring a finding that the trial court’s decision was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 276 (1983).

In addition, a trial court has great latitude in supervising the practice and conduct of attorneys who appear before it. *Columbus Credit Co. v. Evans*, 82 Ohio App.3d 798, 803, 613 N.E.2d 671 (10th Dist.1992), citing *Royal Indemn. Co. v. J.C. Penney Co.*, 27 Ohio St.3d 31, 34-35, 501 N.E.2d 617 (1986).

{¶ 37} In *Spivey v. Bender*, 77 Ohio App.3d 17, 601 N.E.2d 56 (6th Dist.1991) this court considered disqualification of trial counsel in a civil case. We held that disqualification was a “drastic measure” and granted for violation of professional rules of conduct where the violation “poses significant risk of trial taint.” *Id.* at 22. We have recognized that disqualification of counsel is not to be imposed unless “absolutely necessary.” *Ott v. Ott*, 6th Dist. Huron No. H-10-007, 2011-Ohio-356, ¶ 9.

{¶ 38} Appellant argues that disqualification was not necessary and that counsel’s conduct did not pose a significant risk of trial taint. Appellant argues that he has executed a written waiver of his right to conflict-free counsel.

{¶ 39} The trial court did not base its judgment on a technical violation of ethical restrictions against unauthorized communications with a person known to be represented by an attorney. In the telephone conversation, Mr. Zaner encouraged replacement of James Byrd’s attorney in order to secure a unified defense strategy among the defendants. Mr. Zaner and Mr. Klucas disagreed on trial strategy. The trial court found that the conduct acted to undermine another defendant’s representation for the benefit of Mr. Zaner’s client, appellant.



{¶ 40} The court concluded that the conversation disclosed “the degree to which Mr. Zaner continued to attempt to direct the defense of James Byrd in this case.” Mr. Zaner had agreed to limit his representation to one defendant in the case after the court expressed its concern for potential conflicts of interest arising from potential plea negotiations with one defendant.

{¶ 41} We find competent credible evidence in the record supporting the trial court’s determination that counsel’s unauthorized communication with James Byrd (1) directly interfered with the co-defendant’s relationship with his attorney, (2) was undertaken to secure a change in defense strategy to one more favorable to appellant, and (3) that such conduct undermined the ability of the trial court to protect co-defendants against potential conflicts of interest. The record fully supports the trial court’s determination that the conduct undermined the integrity of trial court proceedings. Such conduct is not of the type that concerns appellant alone and is not fully addressed by a written waiver by appellant to conflict-free counsel.

{¶ 42} In our view, disqualification was necessary and appropriate to protect the integrity of trial court proceedings. We find no abuse of discretion by the trial court in granting the motion to disqualify and conclude that the trial court did not err in granting the motion.

{¶ 43} Accordingly, we find Assignments of Error Nos. I and III not well-taken.

{¶ 44} For the foregoing reasons, we affirm the judgment of the Lucas County Court of Common Pleas. We order appellant to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

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JUDGE

Thomas J. Osowik, J.

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JUDGE

Stephen A. Yarbrough, J.  
CONCUR.

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JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:  
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