WR-94,237-01
Court of Criminal Appeals of Texas

Ex parte Lewis

688 S.W.3d 351 (Tex. Crim. App. 2024)
Decided May 8, 2024

NO. WR-94 237-01

05-08-2024

EX PARTE Michael David LEWIS, Applicant

Angela Moore, for Applicant.

Per curiam.

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ON APPLICATION FOR A WRIT OF HABEAS CORPUS, IN CAUSE NO. CR30418-A IN THE 238TH DISTRICT COURT, MIDLAND COUNTY

Angela Moore, for Applicant.

OPINION

Per curiam.

[1] Applicant was convicted of capital murder and sentenced to life imprisonment without parole. The Eleventh Court of Appeals affirmed his conviction. *Lewis v. State,* No. 11-05-00301-CR, 2007 WL 866636 (Tex. App. – Eastland, March 22, 2007, pet. ref'd) (not designated for publication). Applicant filed this application for a writ of habeas corpus in the county of conviction, and the district clerk forwarded it to this Court. *See* Tex. Code Crim. Proc. Ann. art. 11.07. Applicant contends, among other things, that one of the prosecutors representing the State in Applicant's capital murder case was also employed as a paid "judicial clerk" for the trial judge presiding over Applicant's capital murder trial. The State and the trial court confirm this factual assertion. We filed and set the case to determine whether the fact that the prosecutor was the trial judge's law clerk when he prosecuted the case entitles Applicant to relief. Both parties agree that Applicant is entitled to relief.

[2] Applicant was denied his due process rights to a fair trial and impartial judge. "A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison,* 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942 (1955).
352 "[O]ur system of law *352 has always endeavored to prevent even the probability of unfairness." *Id.* Almost a century ago, the Supreme Court explained that "[e]very procedure which would offer a possible temptation to the average man as a judge … not to hold the balance nice, clear, and true between the state and the accused denies the latter due process of law." *Tumey v. Ohio,* 273 U.S. 510, 532, 47 S.Ct. 437, 71 L.Ed. 749 (1927).

[3] Regardless of any actual bias, a judge may be disqualified due to an appearance of impropriety. *Metts v. State,* 510 S.W.3d 1, 7-8 (Tex. Crim. App. 2016) (holding that judge who had appeared at a status hearing and signed defendant's jury-trial waiver as a prosecutor was disqualified from subsequently presiding over defendant's probation revocation hearing regardless of any actual bias harbored by judge because "the appearance of impropriety [was] palpable"); *see also Murchison,* 349 U.S. at 136, 75 S.Ct. 623 ("But to perform its high function in the best way 'justice must satisfy the appearance of justice.' ") (quoting *Offutt v. United States,* 348 U.S. 11, 14, 75 S.Ct. 11, 99 L.Ed. 11 (1954)). The undisputed facts establish that the trial court allowed his paid judicial law clerk to represent one of the parties appearing before him in a contested legal matter. This undisclosed employment relationship between the trial judge and the prosecutor appearing before him tainted Applicant's trial.

Relief is granted. The judgment in cause number CR30418-A in the 238th District Court of Midland County is set aside, and Applicant is remanded to the custody of the Sheriff of Midland County to answer the charges as set out in the indictment. The trial court shall issue any necessary bench warrant within ten days from the date of this Court's mandate. Copies of this opinion shall be sent to the Texas Department of Criminal Justice – Correctional Institutions Division and the Board of Pardons and Paroles.

Richardson, J., filed a concurring opinion in which Walker, J., joined.

Keller, P.J., filed a dissenting opinion in which Yeary and Keel, JJ., joined.

Hervey, J., did not participate.

CONCURRING OPINION

Richardson, J., filed a concurring opinion in which Walker, J., joined.

I join the Court's opinion and write separately to further describe how "utterly bonkers" this case is.[1] [1] In this case and a number of other cases, the prosecutor was simultaneously dual-employed as a prosecutor for the district attorney and law clerk for the judge presiding over the case. Adding to the impropriety, this relationship remained undisclosed to Applicant and his trial counsel. Our adversarial system of law before an impartial judge malfunctioned. The barrier to prevent ex parte communications between the prosecutor and the neutral
353 judge vanished (unknown to the defense). This situation leaves "last- *353 ing stains on a system of justice" that will take years to restore.[2] [2]

1 Fifth Circuit Judge Don Willett aptly described the Ralph Petty dual-employment situation in another case in the context of a federal § 1983 suit: "What allegedly happened here (and in hundreds of other criminal cases in Midland County) is utterly bonkers: the presiding Judge employed a member of the prosecution team as a right-hand advisor." *Wilson v. Midland County, Texas,* 89 F.4th 446, 459 (5th Cir. 2023) (pending rehearing en banc. 92 F.4th 1150 (5th Cir. 2024)). Because of the palpable impropriety, I previously joined Judge Newell in dissent against filing and setting this case, arguing that it was unnecessary to do so and that the Court should grant relief. *Ex parte Lewis,* No. WR-94,237-01, 2023 WL 4094772 (Tex. Crim. App. June 21, 2023) (Newell, J., dissenting).

1 *See, e.g.,* District Courts: Activity by County Summary, September 1, 2016 to August 31, 2017, p. 5, "criminal cases" column for Midland County (showing 2,765 disposed cases), on internet at https://www.txcourts.gov/media/1440656/3-district activity-summary-by-county.pdf.

2 One looks to Robert H. Jackson—a person who served as Unites States Attorney General, Chief Prosecutor of the Nuremberg trials, and Justice of the Supreme Court—for guidance on procedural due process: Only the untaught layman or the charlatan lawyer can answer that procedures matter not. Procedural fairness and regularity are of the

> indispensable essence of liberty…. Let it not be overlooked that due process of law is not for the sole benefit of an accused. It is the best insurance for the Government itself against those blunders which leave lasting stains on a system of justice but which are bound to occur on ex parte consideration. *Shaughnessy v. United States, ex rel. Mezei,* 345 U.S. 206, 224–25, 73 S.Ct. 625, 97 L.Ed. 956 (1953) (Jackson, J., dissenting).

2 Besides being a district judge, she is also the Regional Presiding Judge for the Ninth Administrative Judicial Region.

The State agrees that Applicant is entitled to a new, untainted trial. And the Court correctly grants one. As we have previously found, Weldon Ralph Petty Jr., a former Midland County prosecutor, was concurrently working as a law clerk for several judges out of Midland County.[3] [3] Petty worked for the Midland District Attorney's Office from 2002-2019.[4] [4] From 2002-2018, while Petty was employed as an assistant district attorney, the judges collectively paid Petty at least $132,900. Judge John Hyde of the 238th District Court authorized Petty to be paid at least $64,100 for legal work.[5] [5]

3 *Ex parte Young,* No. WR-65,137-05, 2021 WL 4302528 (Tex. Crim. App. Sept. 22, 2021) (not designated for publication).

3 Emphasis added.

4 The Supreme Court of Texas accepted Petty's resignation from the bar in lieu of discipline on April 13, 2021.

4 *Williams v. Pennsylvania,* 579 U.S. 1, 8, 136 S.Ct. 1899, 195 L.Ed.2d 132 (2016) (internal quotation marks omitted).

5 *Ex parte Young,* 2021 WL 4302528, at *3 n.2.

5 *Id.*

Petty served as a prosecutor on Applicant's capital murder case. He did not serve as the trial prosecutor in the actual trial. Nor did he do any post-conviction work for Judge Hyde on the case. But, as demonstrated below, the interwoven dual employment of Petty during the course of Applicant's prosecution violated due process of law:

354 Timeline of Petty's prosecution activities *354

• March 14, 2005	**Applicant is indicted.**
• April 22, 2005	***Petty solely represents the State in a pre-trial conference.***
• May 4, 2005	***Petty files the State's response to Applicant's motion in limine.***
• May 20-23, 2005	***Petty solely examines witnesses and solely presents argument against Applicant's motion to suppress. (Judge Hyde denied the motion to suppress).***
• May 23, 2005	***Petty moves for leave to file an amended indictment. Judge Hyde also hears Applicant 's motion to quash. Petty presents argument. (Judge Hyde granted in part and denied in part Applicant's motion).***
• August 4, 2005	***Petty appears and speaks for the State at the final pre-trial conference.***

• August 22-26, 2005 **Applicant's jury selection and trial take place.**

• September 2, 2005 **Applicant is sentenced.**

Petty's paid legal work for Judge Hyde during Applicant's prosecution

Applicant's "Motion for the Court of Criminal Appeals to take judicial notice of records from Midland County pay records for RE: Weldon Ralph Petty" filed in our Court on November 1, 2023, reveal numerous invoices filed by Petty. During Applicant's prosecution from March 14 (indictment)–September 2, 2005 (sentencing), Petty was issued eight separate times for work done in the 238th District Court under Judge Hyde. *355

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Date Legal Work Performed	*Amount Invoiced*	*Post Conviction Case Worked*	*PDF Page Number of Motion*
• March 23, 2005	**$600**	**Mark Adam LovellCR 26,609-A238th District Court**	**p. 127**
• April 28, 2005	**$400**	**Orlando TempleCR 27,722-A238th District Court**	**p. 126**
• May 2, 2005	**$400**	**Curtis Joe ReynoldsCR 29,765-A238th District Court**	**p. 125**
• June 22, 2005	**$400**	**Alejandro MartinezCR 29,312-B238th District Court**	**p. 124**
• June 29, 2005	**$400**	**Derrick Andrea PriceCR 20,335-A238th District Court**	**p. 122**
• July 5, 2005	**$400**	**Norman YoungCR 26,746-C238th District Court**	**p. 121**
• August 9, 2005	**$400**	**Cedric WilliamsCR 28,656-A238th District Court**	**p. 119**
• August 31, 2005	**$400**	**Orlando WilliamsCR 27,722-B, A238th District Court**	**p. 118**

These eight invoices approved by Judge Hyde for work performed by Petty during Applicant's prosecution timeline totaled $3,400.[6] [6] These payments reveal a routine work stream between Petty for Judge Hyde on post-conviction writs that occurred during Applicant's prosecution. This created numerous ex parte contacts which occurred in stealth.

6 These invoices are documented as part of the record These are also corroborated by the Midland County Auditor's Office in their accounts payable report. *See* pp. 14, 21, 27–30 of the motion.

6 *United States v. Martinez,* 446 F.3d 878, (8th Cir. 2006) (prosecutor who had presented the defendant's case to the grand jury, signed the indictment, represented the United States in the early pretrial phase of the prosecution, and cross-examined the defendant at a suppression hearing became a law clerk for the trial judge but assigned to work exclusively on the civil docket and immediately screened from the criminal docket); *United States v. DeTemple,* 162 F.3d 279, 286 n.2 (4th Cir. 1998) (law clerk married to prosecutor but judge took pains to see that law clerk did not work on the defendant's case); *Mathis v. Huff & Puff Trucking,* 787 F.3d 1297, 1313 (10th Cir. 2015) ("as soon as the law clerk became aware of her husband's situation, she informed the judge, who screened her from substantive work on the case") (citing *DeTemple*);

The consistent payments from the judges to Petty during Petty's tenure as a prosecutor, disclose that Petty was a trusted law clerk. Neither Petty nor Judge Hyde should have been involved in this case, because Petty was "of counsel" for the State on *this case* and was "of counsel" for the judge while the judge was presiding over *this*
356 *case.* [7] [7] Petty's direct access to Judge Hyde in his role as the judge's legal *356 advisor while maintaining an active conflict of interest raises suspicions of inappropriate influence behind closed doors.

7 *Cf.* Tex Code Crim Proc art. 2.08(a) ("District and county attorneys shall not be of counsel adversely to the State in any case, in any court, nor shall they, after they cease to be such officers, be of counsel adversely to the State in any case in which they have been of counsel for the State."); Tex. R. Civ Proc 18b(b)(1) & (5) ("A judge must recuse in any proceeding in which: (1) the judge's impartiality might reasonably be questioned; … (5)the judge participated as counsel, adviser, or material witness in the matter in controversy, or expressed an opinion concerning the merits of it, while acting as an attorney in government service.").

7 510 S.W.3d 1 (Tex. Crim. App. 2016).

Even if we assume no inappropriate communications occurred about the instant case (we will likely never know),[8] [8] "the appearance of impropriety" remains "palpable."[9] [9] Recusal should have been required because the relationship between Petty and Judge Hyde.[10] [10] The "touchstone of due process" is "fundamental fairness." *Gagnon v. Scarpelli,* 411 U.S. 778, 790, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973). "As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice,"[11] [11] *Lisenba v. California,* 314 U.S. 219, 236, 62 S.Ct. 280, 86 L.Ed. 166 (1941). "[J]ustice must satisfy the appearance of justice." *Offutt v. United States,* 348 U.S. 11, 14, 75 S.Ct. 11, 99 L.Ed. 11 (1954). Here, it did not do that.

8 The Honorable John Hyde passed away in 2012. And Ralph Petty has signaled that he will assert his 5th Amendment right to not incriminate himself. *See Ex parte Young,* 2021 WL 4302528, at *3-4.

8 *Id.* at 4.

9 *Metts v. Slate,* 510 S.W.3d 1, 8 (Tex. Crim. App. 2016).

9 *Id.* at 2.

10 *Caperton v. A.T. Massey Coal Co., Inc.,* 556 U.S. 868, 872, 129 S.Ct. 2252, 173 L.Ed.2d 1208 (2009) ("[T]here are objective standards that require recusal when 'the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.' ") (quoting *Withrow v. Larkin,* 421 U.S. 35, 47, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975)).

10 *Id.* at 3.

11 As the Supreme Court has clarified: For all its consequence, "due process" has never been, and perhaps can never be precisely defined. "Unlike some legal rules," this Court has said, *due process "is not a technical conception* with a fixed concept unrelated to time, place and circumstances." Rather, the phrase expresses the requirement of "fundamental fairness," a requirement whose meaning can be as opaque as its importance is lofty. *Lassiter v. Dept. of Soc. Serv. of Durham Cty.,* 452 U.S. 18, 25, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981) (internal citation removed; emphasis added).

11 *Id.*

It is immaterial whether Petty worked for Judge Hyde during Applicant's post-conviction proceedings, because the issue is that Petty worked as a judicial clerk for the trial judge *while* prosecuting Applicant. The dual-natured employment irredeemably tainted Applicant's right to a fair trial.[12] [12]

12 This significantly differs from scenarios where a prosecutor actively involved in a case is subsequently hired as a law clerk to a judge who then takes concrete steps to wall off the now-former-prosecutor from that same case. *See e.g., United States v. Martinez,* 446 F.3d 878 (8th Cir. 2006) (finding recusal not required where a judicial law clerk was assigned to work exclusively on the civil docket and screened from the criminal docket after previously serving as a prosecutor on a case before her employing judge).

12 *See id.* (describing the constitutional and statutory provisions respectively as stating that a judge is disqualified if he has "been counsel in the case" or "has been of counsel for the State or the accused").

The Court does not discount the gravity of the depraved acts Applicant was tried for. Nevertheless, the Court is obliged to uphold the law. The legally correct course of action in this situation has already been demonstrated by our Court in another Ralph Petty case—grant relief: "Judicial and prosecutorial misconduct—in the form of an undisclosed employment relationship between the trial judge and the prosecutor appearing before him—tainted Applicant's entire proceedings from the outset. As a result, little confidence can be placed in the fairness of the proceedings or the outcome of Applicant's trial …. Applicant was deprived of his due process
357 rights to a fair trial and an impartial judge."[13] [13] *357 **DISSENTING OPINION**

13 *Ex parte Young,* 2021 WL 4302528, at *5.

13 349 U.S. 133, 134, 75 S.Ct. 623, 99 L.Ed. 942 (1955).

Keller, P.J,, filed a dissenting opinion in which Yeary and Keel, JJ., joined.

The Court commits an unforced error in this case, and in doing so unnecessarily jeopardizes thousands of convictions out of Midland County that were obtained over a period of around nineteen years.[1a] Regrettably, the Court hazes over crucial facts, cites to cases that are factually and legally distinct from this case, and fails to cite a single pertinent due process case to support its decision. The concurring opinion, though justified in its disapproval of what happened here, cites as fact allegations in a motion upon which this Court has not acted and cites to an unpublished opinion of this Court. To be sure, the situation in this case is unfortunate. And admittedly, there are no on-point cases for the Court to cite. But under the law and cases that I can find, Applicant has not established a denial of due process.

I. BACKGROUND

Applicant was convicted of the capital murder of a nine-month old child and sentenced to life in prison without parole. In this, his first and only post-conviction habeas application, he alleges, among other things, that he was denied a fair and impartial judge at trial. The habeas court recommended that relief be denied.

Ralph Petty worked for the Midland County District Attorney's Office as a prosecutor between 2002 and 2019. During Applicant's capital murder case in 2005, Petty represented the State in at least two contested hearings. Judge John Hyde presided over Applicant's trial.

Petty was also paid by Judge Hyde and other Midland County district court judges for legal work he performed on the side for them on post-conviction habeas cases from 2001 through 2014, as well as in 2017 and 2018.

Applicant filed this habeas application, alleging that at his trial he was denied a fair and impartial judge. Judge Ana Estevez was appointed to preside over the habeas proceeding.[2a] Judge Estevez request ed responses from the parties on the question of whether Petty had worked for Judge Hyde on a habeas application from Applicant. The judge sent the following request to the parties:

> Thank you for your supplemental response. I did not see a record reference to Petty being paid for legal work in connection with Applicant's post-conviction application for writ of habeas corpus. If there is no evidence that Petty actually drafted the order denying Applicant's 11.07 writ application, I would like the state to include a harm analysis in its response. If there is evidence of Petty actually working for the court on drafting the order recommending denial of a writ application, please include the record reference in your proposed findings. Thank you.

After receiving responses, Judge Estevez recommended denying relief because Petty never worked for the
358 judge on a habeas application for Applicant. In fact, Applicant had never even filed a habeas application *358
so there was no occasion for Petty to have worked on one.

Judge Estevez found that "The Midland County District Attorney knew of Petty's work for Midland County judges in *unrelated* cases and failed to disclose it."[3a] But she also explicitly found that, "Petty never worked nor billed on a post-conviction writ of habeas corpus on Applicant's case." No one has suggested that Petty worked for the trial judge on any stage of Applicant's case, either at trial or on habeas.

II. A nalysis

Applicant's sole claim regarding the Petty issue is a conflict of interest claim alleging that he was denied "a fair and impartial judge." Whether a judge is deemed biased for due-process purposes based on a conflict of interest depends on whether "as an objective matter, the average judge in his position is likely to be neutral, or whether there is an unconstitutional potential for bias."[4a] "[A]n unconstitutional potential for bias exists when the same person serves as both accuser and adjudicator in a case."[5a] Here, though, the judge did not serve dual roles as prosecutor and judge. Rather, a person who worked as a prosecutor also worked for the judge.

Several cases involving law clerks hold that a judge need not recuse himself because of a law clerk's participation in the case as a prosecutor, or relationship to a prosecutor in the case, as long as the law clerk is screened off from working on the case for the judge.[6a] Petty did not work for the judge on Applicant's case, and Applicant has not shown that Petty's work for the judge on other cases created a risk of bias on the part of the judge in violation of due process.

The Court cites *Metts v. State* [7a] for the proposition that a judge can be "disqualified" due to an "appearance of impropriety." But *Metts* is inapt for two reasons. First, the legal basis of the claim there differs from the claim here. *Metts* concerned the judicial "disqualification" provisions in the Texas Constitution and the Code of Criminal Procedure.[8a] No one has alleged that Judge Hyde was constitutionally or statutorily disqualified. Second, the facts are different in *Metts.* There, a prosecutor signed the State's consent to waive a jury.[9a] Metts

was later placed on deferred adjudication, and he was eventually adjudicated.[10a] After the fact, it was
359 discovered that the judge at the adjudication hearing was the former prosecutor who had signed *359 the jury waiver.[11a] But Judge Hyde was never himself counsel for the State in this case, so *Metts* is not on point.[12a]

For the same reason, the Supreme Court cases cited by the Court are not on point. *In re Murchison* involved a judge who acted as a "one-man grand jury" in accordance with Michigan law and subsequently presided over a contempt proceeding arising out of conduct occurring in the prior one-man-grand-jury proceeding.[13a] In *Tumey v. Ohio,* a mayor who acted as judge was paid from court fees if the defendant was convicted.[14a] *Offutt v. United States* involved a judge who found an attorney in criminal contempt for proceedings had before that judge.[15a] None of these cases involved dual roles by a judge's law clerk.

14a 273 U.S. 510, 531-32, 47 S.Ct. 437, 71 L.Ed. 749 (1927).

15a 348 U.S. 11, 12, 75 S.Ct. 11, 99 L.Ed. 11 (1954).

And while the Court characterizes Petty as the judge's "paid judicial law clerk," the habeas court's findings indicate that Petty never worked for the judge at all on any aspect of Appellant's case, and they further suggest that Petty only ever worked for the judges on post-conviction habeas cases, effectively screening him from any pending prosecutions.

Because Applicant has failed to establish a due process violation, I respectfully dissent.