

FILED-CT. OF APPEALS

IN THE COURT OF APPEALS OF OHIO  
FOURTH APPELLATE DISTRICT  
PICKAWAY COUNTY

2021 JUN -2 AM11:11

JAMES A. DEAN  
CLERK OF COURTS  
DISTRICT OF COLUMBIA

State of Ohio, Case No. 99CA33

Plaintiff-Appellee,

**DECISION & JUDGMENT**  
**ENTRY**

v.

David K. Horsley,

Defendant-Appellant.

Appellant, David K. Horsley, filed a "Motion for Reconsideration of his Appeal," which we treat as an application for reopening pursuant to App.R. 26(B). In support of his motion, Mr. Horsley alleges his attorney failed to properly file his appeal. Mr. Horsley requests that he be permitted to appeal the October 14, 1999 decision of the trial court denying his motion to withdraw his guilty plea. The state has not responded to Mr. Horsley's motion. Because Mr. Horsley failed to establish any genuine issue as to whether he was deprived of the effective assistance of counsel on appeal we dismiss his application for reopening.

A review of the online docket indicates Mr. Horsley pled guilty on May 3, 1999 in Pickaway County Common Pleas Court Case No. 1998CR184. On October 6, 1999, Mr. Horsley filed a notice of appeal, which he later withdrew on November 24, 1999. As a result, this Court filed an entry dismissing his appeal on December 8, 1999.

"A defendant in a criminal case may apply for reopening of the appeal

**APPENDIX A**

Consequently, because Mr. Horsley's appellate counsel *did* properly file a notice of appeal and appellant failed to establish any genuine issue as to whether he was deprived of the effective assistance of counsel on appeal, we dismiss Mr. Horsley's application for reopening. **APPLICATION DISMISSED.**

The clerk is **ORDERED** to serve a copy of this order on all counsel of record and unrepresented parties at their last known addresses by ordinary mail.

**IT IS SO ORDERED.**

Abele, J., and Wilkin, J.: Concur.

**FOR THE COURT**



\_\_\_\_\_  
Jason P. Smith  
Presiding Judge

## **APPENDIX A**

IN THE FOURTH DISTRICT COURT OF APPEALS, PICKAWAY COUNTY, OHIO

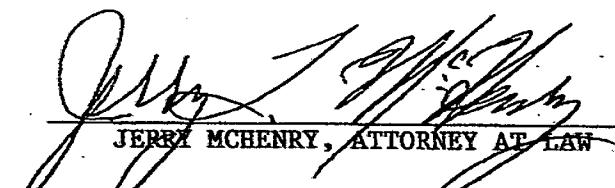
State of Ohio,

Plaintiff, : No. 99-CA-000033  
vs. :  
David K. Horsley, : AGREED ENTRY  
Defendant. :  
:

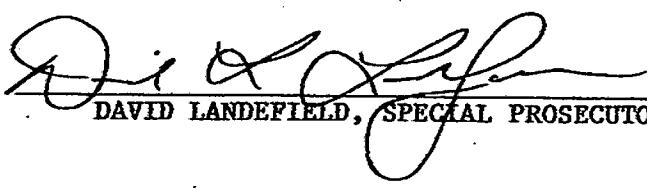
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SHARON K. CLINE  
CLERK OF COURTS  
PICKAWAY COUNTY

FILED - CT OF APPEALS

By agreement of the parties the Notice of Appeal filed in the above-mentioned case is hereby voluntarily WITHDRAWN without prejudice.

  
JERRY McHENRY, ATTORNEY AT LAW

  
DAVID K. HORSLEY, DEFENDANT

  
DAVID LANDEFIELD, SPECIAL PROSECUTOR

APPENDIX C

IN THE COURT OF COMMON PLEAS  
PICKAWAY COUNTY, OHIO

STATE OF OHIO,

Plaintiff,

vs.

Case No. 98-CR-184

DAVID K. HORSLEY,

Defendant.

SHARON K. CLINE  
CLERK OF COURTS  
PICKAWAY COUNTY

99 SEP -7 AM 8:04

FILED-COMM, PLEAS

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DEFENDANT'S MOTION TO DISQUALIFY THE  
PICKAWAY COUNTY PROSECUTOR'S OFFICE

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Now comes David K. Horsley, by and through counsel, and moves this Court to remove the Pickaway County Prosecutor and his entire staff from any further involvement in this case whatsoever. Mr. Horsley requests that a special, independent prosecutor, free from any conflict of interest, be appointed to represent the interests of the State of Ohio and Pickaway County.

The reasons for this request are more fully set forth in the attached Memorandum in Support.

Respectfully submitted,

*David H. Bodiker*

DAVID H. BODIKER - 0016590  
Ohio Public Defender

*Tracey Leonard*

TRACEY LEONARD  
Assistant State Public Defender  
Atty. Reg. No. 0064013

APPENDIX H

Office of the Ohio Public Defender  
8 East Long Street - 11th Floor  
Columbus, Ohio 43215-2998  
(614) 466-5394

COUNSEL FOR DEFENDANT

**MEMORANDUM IN SUPPORT**

David K. Horsley was indicted on November 6, 1998 for causing or attempting to cause harm to a peace officer in violation of Ohio Rev. Code § 2903.13(A). Mr. Horsley was represented in this matter by William Archer. Mr. Archer was involved in the change of plea and the sentencing of Mr. Horsley on June 11, 1999. Mr. Alan Sedlack prosecuted this case for the State. This matter is now before this Court upon Mr. Horsley's motion to withdraw his plea. In his motion, Mr. Horsley alleges that Mr. Archer's representations during the plea process, rendered the plea involuntary and unknowing. The prosecuting attorney opposes the motion to withdraw the plea. The Court has scheduled this matter for a hearing on September 8, 1999, where evidence of Mr. Archer's actions will be examined by the Court to determine whether the plea may be withdrawn to correct manifest injustice.

Mr. Archer began working for the Pickaway County Prosecutor's Office on August 2, 1999. It is clear from the hearing held on August 25, 1999, that in opposing the plea withdrawal, the prosecuting attorney is in the position of arguing that Mr. Archer's actions were appropriate with respect to his representation of Mr. Horsley. This situation, where the Assistant Prosecuting Attorney Alan Sedlack is now defending

Mr. Archer's actions as Mr. Horsley's attorney, and Mr. Archer is now employed by the same prosecutor's office, presents a conflict of interest.

Various ethical considerations are implicated by the conflict of interest before the Court. DR 5-105 provides:

- (A) A lawyer shall decline proffered employment if the exercise of his independent judgment on behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, except to the extent permitted by DR 5-105(C).
- (B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment on behalf of a client will be or is likely to be adversely affected by his representation of another client, except to the extent permitted by DR 5-105(C).
- (C) In the situations covered by DR 5-105(A) & (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.
- (D) If a lawyer is required to decline employment or to withdraw from employment under DR 5-105, no other partner or associate of his or his firm may accept or continue such employment.

DR 4-101 provides in material part:

- (B) Except when permitted under DR 4-104(C), a lawyer shall not knowingly:
  - (1) Reveal a confidence or secret of his client.
  - (2) Use a confidence or secret of his client to the disadvantage of the client.
  - (3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.

(D) A lawyer shall exercise reasonable care to prevent his employees, associates, and others whose services are utilized by him from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by DR4-101(C) through an employee.

Ethical Consideration 5-1 provides:

The professional judgment of a lawyer should be exercised within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to this client.

Ethical Consideration 5-14 provides:

Maintaining the independence of professional judgment required of a lawyer precludes his acceptance of continuation of employment that will adversely affect his judgment on behalf of or dilute his loyalty to a client. This problem arises whenever a lawyer is asked to represent two or more clients who may have differing interests, whether such interest be conflicting, inconsistent, diverse or otherwise discordant.

Finally, the American Bar Association's Standards with regard to the Prosecution Function provide, in material part:

**Standard 3-1.3 Conflicts of Interest**

(a) A prosecutor should avoid the appearance or reality of a conflict of interest with regard to official duties.

(b) A prosecutor should not represent a defendant in criminal proceedings in a jurisdiction where he or she is also employed as a prosecutor.

(d) A prosecutor who has formerly represented a client in a matter in private practice should not thereafter use information obtained from that representation to the disadvantage of the former client unless the rules of attorney-client confidentiality do not apply or the information has become generally known.

Each of the above cited provisions are offended or compromised by allowing the Pickaway County Prosecuting Attorney's Office to remain on this case.

This Court, in the exercise of its judicial discretion, has the authority to order disqualification where such action is necessary to enforce the Code of Professional Responsibility. **State ex. rel. Keenan v. Calabrese** (1994), 69 Ohio St. 3d 176. The fact that Mr. Archer now works for the prosecutor's office, may give the prosecutor's office an unfair advantage in defending Mr. Archer's representation of Mr. Horsley. As Justice Stratton wrote:

When an attorney leaves his or her former employment and becomes employed by a firm representing an opposing party, a presumption arises that the attorney takes with him or her any confidences gained in the former relationship and shares those confidences with the new law firm.

**Kala v. Aluminum Smelting & Refining Co., Inc.** (1998), 81 Ohio St. 3d 1, 5.

Whether or not Mr. Archer actually divulges confidential information is immaterial. The situation to be avoided by disqualification is the appearance of impropriety. Where confidential information has not been improperly transmitted, the courts have recognized that the mere appearance of any impropriety acts as a detriment to the integrity of the justice system, and therefore mandates disqualification. In **State v. Boyd** (Mo. Ct. App. 1977), 560 S.W. 2d 296, the defendant was represented at trial by the public defender's office. During the course of the preliminary proceedings in the case, attorney Mark Bryant was a member of the public defender's office, although not personally assigned to Mr. Boyd's case. Mr. Bryant left the public defender's office, began working as an assistant prosecuting attorney, and prosecuted Mr. Bryant's case.

The Court held that "Mr. Bryant's employment as an assistant in the Public Defender's Office during part of the time that such office acted as counsel for the defendant followed by his prosecution of the defendant in the same case as Assistant Prosecuting Attorney creates an apparent conflict of interest and appearance of impropriety inimical to the proper administration of criminal justice." *Id.* at 298.

It is the access to confidential information which raises the question of a conflict. "It is unnecessary that the prosecuting attorney be guilty of an attempt to betray confidence; it is enough if it places him in a position which leaves him open to such charge." *Id.* (quoting **People v. Gerold** (Ill. 1914), 107 N.E. 165, 177. The **Boyd** court also relied on **State v. Burns** (Mo. 1959), 322 S.W.2d 736. In that case, the prosecuting attorney formerly represented defendant. The attorney assigned the case to an assistant, betrayed no confidences, and in no way participated in the prosecution. However, the conviction was still reversed: "We shall not attempt to weigh or measure the actual prejudice in a case of this kind, and we do not consider a more specific showing of prejudice to be necessary." *Id.* at 742.

A "prosecutor should avoid the appearance or reality of a conflict of interest with respect to official duties." ABA Standards for Criminal Justice, Section 3-1.2 (1980 2d ed.) In the official commentary on this section, it is stated:

... when the possibility of a conflict of interest arises, the prosecutor should recuse himself or herself ... It is of the utmost important that the prosecutor avoid participation in a case in circumstances where any implication of partiality may cast a shadow over the integrity of the office.

## APPENDIX H

Due to an equally compelling need to avoid the appearance of impropriety and conflict of interest, and to safeguard the corresponding constitutional implications, the Pickaway County Prosecutor's Office should not participate in the plea withdrawl hearing.

Ohio courts have recognized the importance of maintaining the integrity of the bar. In **White Motor Corporation v. White Consolidated Industries, Inc.** (January 10, 1980), Cuyahoga App. No. 956, 771, unreported, the court explained that the "paramount concern, as expressed in the Code of Professional Responsibility, is that public confidence must reign supreme at all times." *Id.* at 10. The Court then continued, stating "that the public interest involved dictates that any doubt as to the existence of an asserted conflict should be resolved in favor of disqualification." *Id.* at 14. To maintain public confidence in the integrity of the criminal justice system, the prosecutor's office must be disqualified in the present case.

In **State v. Cooper** (1980), 63 Ohio Misc. 1, the Court was confronted with a situation where the accused's counsel was appointed as an assistant prosecuting attorney for Hancock County, Ohio. The accused objected to the continued involvement of the prosecuting attorney's office, as representative of the State in that prosecution. In response, the trial court ordered that the entire prosecutor's office be recused and that a special prosecutor be appointed to represent the case on behalf of the government. The Court stated in its opinion:

This Court specifically finds that there has been no communication between Mr. Fry [the defendant's former defense counsel, now assistant prosecutor] and the prosecutor or any member of his staff, but because of the overriding requirement that the public must be able to maintain the right to believe in the total integrity of the bar as a whole, the motion for the Hancock County Prosecutor and

his staff to step aside and a special prosecutor appointed is sustained.

In making this ruling the Court finds that Mr. Fry is not guilty of any impropriety, but to insure the faith of the people in the efficacy of the judicial system, this ruling must be made. A substantial interest of the defendant is involved.

Id. at 7. In that case the court ordered appointment of a special prosecutor, even after a specific finding of no improper communication of information by the former defense counsel to his new employer, because of the court's overriding desire to avoid the appearance of impropriety and the concern for the protection of the interest of the accused.

This appearance of impropriety is compounded when an attorney switches teams and is involved in prosecuting the same case he or she had previously defended. Courts are occasionally willing to allow attorneys to prosecute their former clients if their previous representation had been confined to unrelated matters. In *State v. Booher* (1988), 54 Ohio App. 3d 1, the court ruled that the prosecutor did not have a conflict of interest, because he had worked on a few legal matters for the defendant and the murder victim (her husband). The Court allowed him to prosecute defendant only because the criminal charges "in [no] way related to the charge herein involved." *Id.* at 16. In the current case, the issue as to whether Mr. Horsley may withdraw his guilty plea to the assault is inextricably intertwined with Mr. Archer's representation of him for that same charge. Clearly, in this case, Mr. Horsley is entitled to an appointment of a special prosecutor to handle the case on behalf of the Pickaway County Prosecutor.

WHEREFORE, Defendant David Horsley respectfully requests this Court to

Respectfully submitted,

*David H. Bodiher* /*92*  
DAVID H. BODIKER - 0016590

Ohio Public Defender

*Tracey Leonard*  
TRACEY LEONARD  
Assistant State Public Defender  
Atty. Reg. No. 0064013

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**COUNSEL FOR DEFENDANT**

**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing DEFENDANT'S MOTION TO  
DISQUALIFY THE PICKAWAY COUNTY PROSECUTOR'S OFFICE was forwarded to  
Alan Sedlack, Assistant Pickaway County Prosecutor, P.O. Box 910, 118 E. Main  
Street, Circleville, Ohio 43113, this 30 day of September, 1999.

*Tracey Leonard*  
TRACEY LEONARD - #0064013  
Assistant State Public Defender

**COUNSEL FOR DEFENDANT**

96805

**APPENDIX H**