

IN THE SUPREME COURT OF FLORIDA

CASE NO. 89,960

KENNETH D. QUINCE, N.K.A.,
RASHIKH ABDUL HAKIM,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR VOLUSIA COUNTY, STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

ARGUMENT I

THE MOTION TO DISQUALIFY JUDGE JOHNSON

The State is inconsistent when it argues: "Although the motion to disqualify appears to have been filed within the ten-day period provided in Florida Rule of Judicial Administration 2.160 (e), the states does not concede that the motion was timely." State Answer at 12.

Rule 2.160 e cannot be clearer:

Time: A motion to disqualify shall be made within a reasonable time not to exceed 10 days after discovery of the facts constituting the grounds for the motion and shall be promptly presented to the court for an immediate ruling.

The rule places no obligation or time element on counsel to discover facts constituting grounds for the motion. The State argues that counsel had an obligation to discover that Judge Johnson and Howard Pearl worked in the same office. The State argues that counsel could have learned this fact in "a more timely manner." Nothing in the rule requires that of counsel. On November 6, 1996, counsel for Mr. Abdul-Hakim learned that Judge Johnson was a former colleague of Howard Pearl and worked with Mr. Pearl in the Public Defender's Office from July 1, 1972 through December 22, 1980 and again from July 1, 1983 through December 31, 1984. Judge Johnson was an assistant public defender with Mr. Pearl at the time of Mr. Abdul-Hakim's trial. This conflict was never disclosed to Mr. Abdul-Hakim.

Moreover, an amended written motion to disqualify was timely filed after new facts were revealed in open court by Judge Johnson. At Mr. Abdul-Hakim's evidentiary hearing on November 8, 1996, when the initial Motion to Disqualify was filed, Judge Johnson, said on the record and in open court that he may have worked directly on Mr. Abdul-Hakim's case. Judge Johnson said he may have helped file Mr. Abdul-Hakim's direct appeal to the Florida Supreme Court after his conviction and sentence.

Because of Judge Johnson's relationship to Howard Pearl and his personal involvement with the case directly in front of him, Mr. Abdul-Hakim had a reasonable fear that he will not receive a full and fair hearing before Judge Johnson. The judge had previous knowledge of Mr. Pearl's trial practices and habit of carrying firearms to court. Additionally, the judge had previous and personal knowledge of Mr. Abdul-Hakim's case from when he was a public defender and may have worked on the case. As a public defender, Judge Johnson had previous knowledge of Mr. Abdul-Hakim's case and Mr. Pearl's status as a special deputy. Judge Johnson shared a relationship with Mr. Pearl that interfered with his ability to be a fair and impartial arbiter of the facts regarding the propriety of Mr. Pearl's actions.

The commentary to Canon 3E (1) (b) is equally clear:

a judge formerly employed by a government agency, however, should disqualify himself or herself in a proceeding if the judge's impartiality might reasonably be questioned because of such association.

(emphasis added).

Judge Johnson worked with Howard Pearl in the Public Defender's Office. Judge Johnson held a supervisory position and was involved in ensuring that Mr. Abdul-Hakim's appeal was filed. Judge Johnson also remembered an incident in which he "sent something around that required the lawyers to do something and he [Howard Pearl] got very mad at me and came pounding on my office door somewhat incensed" (PC-T. 13).

Counsel for Mr. Abdul-Hakim complained that Judge Johnson should not be in the position to judge Mr. Pearl's credibility because of their past relationship. The judge then asked the prosecutor if he had "any problem" with the fact that Judge Johnson and Mr. Pearl worked in the same office at the same time. The prosecutor had no objection.

The prosecutor's views were irrelevant. What was relevant was Mr. Abdul-Hakim's fear that he would not receive a fair trial before Judge Johnson. Mr. Abdul-Hakim signed a sworn affidavit to that effect. It did not matter what the prosecutor thought, only that Mr. Abdul-Hakim has a reasonable fear that he will not receive a fair hearing before Judge Johnson because of the these circumstances. The facts alleged by Mr. Abdul-Hakim are "sufficient to warrant fear on [Mr. Abdul-Hakim's] part that he would not receive a fair hearing by the assigned judge." Suarez V. Dugger, 527 So. 2d 191 (Fla. 1988).

The proper focus of the judge's inquiry is on "matters from which a litigant may reasonably question a judge's impartiality rather than the judge's perception of his [or her] ability to act

fairly and impartially." Chastine v. Broome, 629 So. 2d 293, 294 (Fla. 4th DCA 1993), and not on the prosecutor's opinion of the facts. Moreover, "It is not a question of how the judge feels; it is a question of what feeling resides in the affiant's mind and the basis for such feeling. The question of disqualification focuses on those matters from which a litigant may reasonably question a judge's impartiality rather than the judge's perception of his ability to act fairly and impartially." Livingston v. State, 441 So. 2d 1083, 1086 (Fla. 1983).

The State argues that reliance on Maharaj v. State, 684 So. 2d 726 (Fla. 1996) is misplaced and instead cites Barwick v. State, 660 So. 2d 685 (Fla. 1995). The State fails to explain that Barwick's motion to disqualify the judge was based on Barwick's disagreement with the trial judge's rulings. That is not the case here. Mr. Abdul-Hakim did not file the motion to disqualify because of adverse rulings. Rather, the motion was filed because of the relationship between Judge Johnson and Howard Pearl and Mr. Abdul-Hakim's fear that Judge Johnson could not be impartial.

The State argues that Judge Johnson correctly did not stop the proceedings so that Mr. Abdul-Hakim could file a writ of prohibition. The State argues that Mr. Abdul-Hakim's request was "in the nature of a motion for continuance, the denial of which is within the circuit court's discretion." Answer Brief at 16. The State is wrong. The three cases cited by the State, Sliney v. State, 699 So. 2d 662 (Fla. 1997); Branch v. State, 685 So. 2d 1250 (Fla. 1996); and Geralds v. State, 674 So. 2d 96 (Fla. 1996)

involve cases in which the defendant requested continuances in order to secure expert witnesses or investigators. None of the cases cited by the State deal with Writs of Prohibition to disqualify judges.

The Writ of Prohibition is the proper procedure for appellate review to test the validity of the motion to disqualify a judge. See Bundy v. Rudd, 366 So. 2d 440 (Fla. 1978); Castro v. Luce, 650 So. 2d 1067, 1068 (Fla. 2d DCA 1995); Time Warner Entertainment Company, L.P., v. Baker, 647 So. 2d 1070, 1071 (5th DCA 1994); Mangina v. Cornelius, 462 So. 2d 602 (Fla. 5th DCA 1985); Hayslip v. Douglas, 400 So. 2d 553, 555 (Fla. 4th DCA 1981). Mr. Abdul-Hakim's request to file a Writ of Prohibition went to the very issue of whether Judge Johnson should hear the case and his prior relationship with Howard Pearl. It was not as the State argued, a motion for a continuance.

This Court should reverse and remand the case for an evidentiary hearing in front of a new and impartial judge.

ARGUMENT II

MR. ABDUL-HAKIM'S INABILITY TO PRESENT HIS INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS AT THE EVIDENTIARY HEARING.

The State incorrectly argues that the judge said he understood the issue to be the ineffective issue only as it pertained to Howard Pearl's status as a special deputy and that "counsel did not contest this statement." Answer Brief at 19. On the contrary, counsel attempted to delve into areas relating to Mr. Pearl, his status as a deputy sheriff and the issue of ineffective assistance

of counsel, but could not do so because the trial court placed limits on her questioning. At each opportunity, the State objected to counsel's questions:

MR. DALY: Objection to the relevance of this line of questioning. Mr. Pearl's effectiveness has already been challenged in the previous 3.850 in this case and upheld. The only thing relevant that we have left to determine is the Howard Pearl special deputy sheriff question.

THE COURT: That's my understanding of the Supreme Court's directive. The only issue I would consider is that.

MS. BACKHUS: Well, Your Honor, I find it very difficult to prove conflict of interest and its affect on the outcome of Mr. Quince's trial without getting into some of this, but if that's your understanding I'll withdraw the question.

THE COURT: Isn't that the way you read their order, too?

MS. BACKHUS: I interpreted the order to deal with the Howard Pearl issue and any ineffective assistance that surround that issue, so....

(PC-T. 84). The Court then modified its statement:

THE COURT: Well, I understood it to be the ineffective issue only as pertains to his status as a special deputy sheriff in Marion County. That was the way I interpreted the order.

(PC-T. 84). Although the State "withdrew its objection," (PC-T. 85), and the court said it "had made no ruling limiting evidence," (PC-T. 85, 129), the State continued to object during the remainder of this line of questioning and the court sustained the last two objections. See e.g. PC-T. 85, 86, 88, 92. The State's argument

that counsel did not contest the trial court's order was clearly erroneous.

Furthermore, when counsel attempted to proffer additional witnesses regarding the ineffective assistance of counsel claim, the trial judge denied her request (PC-T. 132). Counsel twice requested to make a written proffer (PC-T. 129, 132). The court ignored each request, instead demanding that the defense rest.

The State argues in its Answer Brief at note 12 that "counsel knew that any such claims of ineffectiveness were beyond the scope of this hearing and subpoenaed no witnesses to support those claims." As was stated on the record, counsel had no obligation to subpoena witnesses who would voluntarily appear in court (PC-T. 131). Because there is no record evidence revealing what the proposed proffered testimony would have included, the exclusion of the proffer cannot be harmless beyond a reasonable doubt. Rozier v. State, 636 So. 2d 1386, 1388 (Fla. 4th DCA 1994); Pender v. State, 432 So.2d 800, 802 (Fla. 1st DCA 1983). Reversal and remand is warranted.

ARGUMENT III

THE CONFLICT CLAIM

The State argues that Harich v. State, 573 So. 2d 303 (Fla. 1980) is controlling here. The State's reliance on Harich is misplaced. As this Court already recognized, "[Howard Pearl clients] raise factually specific claims regarding Pearl's representation of them...The trial courts should consider the

appellants 3.850 claims individually..." Quince v. State, 676 So. 2d 369, 371 (1996).

The facts of Harich differ from the facts in the instant case. On August 11, 1980, Mr. Abdul-Hakim, on the advice of Howard Pearl, entered a guilty plea to felony murder and burglary. Mr. Pearl made this recommendation to Mr. Abdul-Hakim, even though he had only taken one deposition and had conducted no investigation into the case (PC-R. 446). On the advice of counsel, Mr. Abdul-Hakim also waived his right to an advisory sentencing jury despite Mr. Pearl's belief that Mr. Abdul-Hakim was not competent at the time (PC-R. 499). Mr. Pearl pled Mr. Abdul-Hakim guilty even though there was no plea agreement with the State and the State was seeking the death penalty (PC-T. 68).

The State argues that it was Mr. Pearl's status as a lawyer and not his status as a deputy sheriff that guided his representation of Mr. Abdul-Hakim, State Answer at 29. Without counsel being allowed to present evidence on ineffective assistance of counsel, it is impossible for the State to make this conclusory statement.

The State and the circuit court failed to address how Mr. Pearl's status as a deputy sheriff affected his performance at trial. Mr. Pearl's status as a deputy sheriff could only explain his vouching for the credibility of the police witnesses during Mr. Abdul-Hakim's trial. See Vol.III-11, 24. Mr. Pearl failed to challenge pre-trial statements given to the police in a motion to suppress. Mr. Pearl failed to investigate the adequacy of police

procedures, crime scene analysis or any other official procedure. Mr. Pearl testified that he did not challenge the credibility of the police officers because he knew them to be "fine" officers whom he could "trust" (PC-T. 83). Even if Mr. Pearl knew the reputation of each officer, he still had a duty to zealously represent Mr. Abdul-Hakim by putting the State to its burden of proof. Instead, Mr. Pearl acted as a second prosecutor by vouching for the State's case. This is an adverse interest and adverse effect. This is the conflict of interest under Cuyler v. Sullivan, 446 U.S. 335 (1980). Mr. Abdul-Hakim was entitled to know that his defense counsel was a deputy sheriff. Mr. Abdul-Hakim argues that he was not told about this status because he would have fired Howard Pearl and requested conflict-free and effective counsel, to which he was entitled to under the Sixth Amendment.

Mr. Pearl said he did not have to depose any of the investigative officers because chief investigator Larry Lewis "would talk to me" and "would do so privately. I didn't have to take his deposition or force him to speak to me" (PC-T. 80). Mr. Pearl also failed to take the depositions of other law enforcement officers because Mr. Lewis supervised others and had all encompassing knowledge of each person's actions (PC-R. 421, 445-46, 479). Mr. Pearl failed to depose the forensic examiners about the scientific evidence in this case. Mr. Pearl said that he discussed the information of Mr. Baer, one of the State's serologist, but did not depose him (PC-R. 447).

Mr. Pearl failed to make the State prove the elements of the crimes it had alleged against Mr. Abdul-Hakim. He failed to investigate the charge of sexual battery assuming that Mr. Abdul-Hakim had committed the crime even though the burden of proof rests with the State (PC-R. 448). Mr. Pearl assumed Mr. Abdul-Hakim to be guilty and did not challenge the State's case. In fact, Mr. Pearl testified that the evidence in Mr. Abdul-Hakim's case "was fairly straightforward and simple" (PC-T. 82).

Since Mr. Pearl failed to investigate this case, he could not advise Mr. Abdul-Hakim whether a guilty plea was proper.

A No person is guilty in my book until he either enters a plea of guilty or a jury finds him guilty. That's -- I don't determine whether a person is guilty or not, if you want me to restrict myself to that interpretation of your question.

(PC-R. 433-34). Mr. Pearl's loyalty to the State overshadowed his responsibility to Mr. Abdul-Hakim by not challenging the sexual battery issue. The sexual battery was used to aggravate Mr. Abdul-Hakim's case, making him eligible to be sentenced to death.

Mr. Pearl failed to challenge the charge of sexual battery allowed the State to use that offense as evidence to the trial court in support of the "in the course of a felony" aggravating circumstance. Mr. Pearl was ineffective for failing to challenge this aggravating circumstance as well as the other aggravators alleged against Mr. Abdul-Hakim. Because of Mr. Pearl's background and status as a special deputy sheriff, no effort was made to neutralize the aggravating circumstances.

Mr. Pearl's failed to contest the State's case. Mr. Pearl failed to file a motion to suppress Mr. Abdul-Hakim's statement obtained under custodial interrogation because Mr. Pearl trusted the interrogating officer to be honest.

A Well, I knew that he was honest. I knew that he was competent. He was generally -- had a good reputation in the community in which he worked and resided, and I knew from prior experience with him that I could rely on him to tell me the truth when he spoke.

(PC-T. 83).

...it appeared as if the statements made by Mr. Quince to Detective Lewis had been made after Miranda warning and were voluntary.

Q When did you make this determination?

A When I learned of the fact that he made these statements.

(PC-T. 91).

Without challenging the State's case or conducting any independent investigation, Mr. Pearl advised Mr. Abdul-Hakim to plead guilty to the offense.

Q That you failed to demand a trial by jury.

A I did. I did so fail. That is true.

Let me rephrase that. I decided upon reflection and upon analysis of the case that a jury trial was not the best way to present the Defendant's defense. Therefore, I advised the Defendant that we should waive the jury trial.

(PC-R. 481). Since Mr. Pearl was laboring under a conflict that he had not conducted any investigation, therefore, no decision can be the result of any strategy. He had not deposed critical law

enforcement officers, he had not investigated the elements of the crime with which Mr. Abdul-Hakim was charged, and he failed to require the State to prove each and every element of the offense. Since Mr. Pearl was part of the State police authority itself, any advice to Mr. Abdul-Hakim to plead guilty is seriously suspect in light of the fact that Mr. Pearl believed Mr. Abdul-Hakim to be incompetent at that time.

Mr. Pearl advised Mr. Abdul-Hakim to enter a plea of guilty even though he believed that Mr. Abdul-Hakim was not competent.

Mr. Pearl testified:

And I felt that a discussion with Mr. Quince at that time concerning those unresolved matters would be fruitless and unprofitable.

I want to add that in essence you had to be there. Mr. Quince, when I know him, appeared to be and impressed me to be an extremely impaired person. We did not communicate in ordinary conversation. His responses were mostly limited to 'yeses' or 'noes.' When I asked him whether he understood something I had said, he indicated that he did. But, he was so uninformative, so seemingly uninterested, so seemingly out of it and unresponsive that I doubted whether in fact I was communicating with him effectively. That may have restricted to some extent the amount of information I might have otherwise shared with him because I see no profit in talking about things to a person who does not understand or appreciate the information that I'm giving him. And I was --

Throughout the time that I was representing Mr. Quince, I had that problem with him. My impression was he was impaired and that communication with him was not getting through.

(PC-R. 429-30).

I felt that certainly, in my opinion, Mr. Quince at the time I was dealing with him was partially or totally incompetent to stand trial because he was, based on my experience with him, unable to communicate with me sufficiently to help me prepare defenses for him. More or less, I was left on my own and wasn't getting much help.

(PC-R. 431).

The only thing I wanted to add was that back then Mr. Quince, I call him -- I know he has a new name but I only knew him by Mr. Quince -- did not respond to the things I was saying. He seemed somehow to be out of it. I couldn't communicate with him. He wasn't responsive to me seemingly in any way. It impressed me so much that I asked that he be examined by a clinical psychologist because I thought that he must have some mental problem.

(PC-T. 87-88).

Although Mr. Pearl felt strongly that Mr. Abdul-Hakim was not competent to stand trial he advised Mr. Abdul-Hakim to enter a plea of guilty and knowing that Mr. Abdul-Hakim could not question Mr. Pearl's judgment.

Because of Mr. Pearl's status as a deputy sheriff, he failed to investigate and present the compelling evidence of Mr. Abdul-Hakim's background. If he had conducted investigation he would have found that Mr. Abdul-Hakim's father had died in an automobile collision when Mr. Abdul-Hakim was five years old. He was raised by a single mother who was forced to work outside the home to support her family of eight children. Mr. Abdul-Hakim was raised with his brothers and sisters in a small home with no supervision.

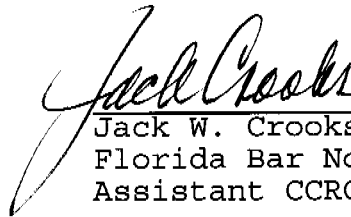
Not only was Mr. Abdul-Hakim's home life troubling but he also suffered from severe learning disabilities that resulted in poor

grades and eventually brought Mr. Abdul-Hakim's education to a close in the tenth grade. These learning disabilities kept Mr. Abdul-Hakim from understanding the nature of the constitutional rights he was waiving and also from fully understanding the recommendations Mr. Pearl was making to him.

Mr. Pearl represented the State at the same time that he represented Mr. Abdul-Hakim. Mr. Pearl was more interested in ending the criminal proceeding as soon as possible with as little trouble to the persons accusing Mr. Abdul-Hakim of first-degree murder. As part of the patronage given to Mr. Pearl by the various sheriffs, Mr. Pearl was under an obligation to them and ignored the duty he owed to his mentally ill, capital client. An effective advocate, as contemplated by the Sixth Amendment, would have at least determined whether the State could meet its burden of proving that Mr. Abdul-Hakim guilty and would not have sacrificed Mr. Abdul-Hakim's to the State because he thought Mr. Abdul-Hakim may have committed the crime.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief has been furnished by United States Mail, first-class, to all counsel of record on April 6, 1998.



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