

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

JANUARY SESSION, 1997

FILED
May 7, 1997
Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,)

Appellee,)

VS.)

FABIEN ELDRIDGE,)

Appellant.)

C.C.A. NO. 01C01-9604-CC-00106

PUTNAM COUNTY

HON. LEON BURNS, JR.,
JUDGE

(Attempted Second Degree Murder)

CONCURRING OPINION

I concur fully with the result reached by my learned and able colleague, Judge Riley. I write separately to express my significantly different views concerning the role and manner of participation of privately employed attorneys in criminal prosecutions. I first note that while it is obvious that "private legal counsel" were pleased that they were allowed to assume almost total control of this criminal prosecution, and thus become "special prosecutors," they were able to do so only after the publicly employed prosecutors from the office of the district attorney general declined further significant involvement in the prosecution of this attempted murder case due to their "busy schedules."¹

The legislature has specifically authorized the victim of a crime or the family members of a victim of a crime to employ "private legal counsel to act as co-counsel with the district attorney general or the district attorney general's

¹Obviously, the lack of interest by the district attorney general was a result, at least in part, of his determination that his time would be better spent on other matters. Had it not been for the availability of the "special prosecutors," a plea agreement favorable to the Defendant might well have materialized.

deputies in trying cases, with the extent of participation of such privately employed counsel being at the discretion of the district attorney general.” Tenn. Code Ann. § 8-7-401 (emphasis added). If privately employed counsel’s only participation is in trying the case, as provided by the statute, and the district attorney general retains control of the prosecution, the potential for violation of the defendant’s rights is reduced.

Although the majority opinion does not conclude that this statute is unconstitutional as violating the due process rights of the criminal defendant, the opinion states that it is “unnecessary to reach the issue as to whether the district attorney general retained adequate control of the prosecution.” I believe that in determining whether a defendant’s due process rights are violated in a case involving private legal counsel serving as “special prosecutors,” it is indeed necessary to reach the issue as to whether the district attorney general retained adequate control of the prosecution. In this case, however, I have no hesitation in concluding that the district attorney general did not retain adequate control. In fact, it appears that the district attorney general retained very little control.

I agree, as pointed out by the majority, that the ethical dilemmas facing “special prosecutors” are quite serious and any ethical violations on their part are relevant to a determination of whether a defendant was deprived of his right to a fair trial. Perhaps it would be helpful if our supreme court specifically addressed these ethical concerns in our Code of Professional Responsibility. The majority opinion focuses on the ethical dilemma facing private counsel representing the victim in a civil suit to the exclusion of analyzing the level of participation of private counsel in the criminal prosecution. It appears to me,

however, that private counsel employed for a fixed fee solely to participate in the criminal prosecution faces essentially the same ethical dilemma as private counsel who also represents the victim in a related civil suit, namely the conflict between zealous representation of a private client and the pursuit of justice in the public interest.

I am not convinced that the participation as co-counsel of a victim's attorney who represents the victim in a related pending civil law suit against the criminal defendant necessarily and always will violate a defendant's right to due process of law and thus require a conviction, otherwise obtained in accordance with law, to be reversed. I believe this determination is necessarily dependent upon the degree of participation in the prosecution by private legal counsel and by the corresponding degree of control over the prosecution retained by the office of the district attorney general.

As many courts and commentators have recognized, the potential danger to the due process guarantee of fundamental fairness is most pronounced when private counsel participates in the discretionary functions of the district attorney general, such as the plea bargaining process as well as the decisions of what charges to seek and whether to prosecute at all.² See, e.g., Dick v. Scroggy, 882 F.2d 192 (6th Cir. 1989); Jones v. Richards, 776 F.2d 1244 (4th Cir. 1985)³;

² The legislative history of Tennessee Code Annotated section 8-7-401 indicates that the General Assembly was somewhat aware of the dangers of allowing private counsel to control the plea bargaining process. The original language of the House bill provided that private counsel could participate fully in cases, even where plea bargaining was deemed appropriate. Upon the recommendation of the House Judiciary Committee, however, the bill was amended to strike that language so that private counsel would not have excessive power over the plea bargaining process.

³ In Jones, another Fourth Circuit case, the court distinguished Ganger and found no due process violation. Private counsel was retained to assist in the criminal prosecution and simultaneously represented the plaintiffs in a civil suit arising from the same incident. In Jones, however, the public prosecutor retained control over discretionary functions, and there was no

Ganger v. Peyton, 379 F.2d 709 (4th Cir. 1967); John D. Bessler, *The Public Interest and the Unconstitutionality of Private Prosecutors*, 47 Ark. L. Rev. 511, 531-40 (1994); Patricia Moran, Note, *Private Prosecutors in Criminal Contempt Actions Under Rule 42(b) of the Federal Rules of Criminal Procedure*, 54 Fordham L. Rev. 1141, 1158-59 (1986); Andrew Sidman, Note, *The Outmoded Concept of Private Prosecution*, 25 Am. U. L. Rev. 754, 793 (1976). This heightened concern stems from the recognition that the discretionary functions of the district attorney general are, in a sense, more difficult to review than everyday trial practice. Prudence dictates that courts be most vigilant with regard to situations involving the potential for abuse which tend to evade judicial review through ordinary means. Thus, whereas improper trial conduct of private counsel is subject to review in much the same way as the trial conduct of an overzealous public prosecutor, the participation by private counsel in the discretionary functions of the district attorney general is of greater concern because of not only the ethical dilemma faced by private counsel but also the inherent inadequacy of judicial review of potential abuses of those discretionary functions by private counsel. It is therefore my belief that the degree of participation of private counsel in a prosecution has great significance regardless of whether private counsel is retained only to participate in the prosecution or represents the victim in a civil suit as well.

If, in the case sub judice, private legal counsel had participated in this trial by being seated at counsel table with the assistant district attorney, advising with the assistant district attorney during the course of the trial, and even participating

evidence of the private prosecutors' using their position to exact a more generous settlement in the civil case. While the court did not endorse private prosecutors also being involved in a civil case, it found that the level of involvement in that case did not constitute a due process violation.

in some questioning of some of the witnesses, I do not believe the Defendant's due process rights would necessarily have been violated. However, if private legal counsel had not participated in the trial at all, but the office of the district attorney general had deferred totally to private legal counsel on the issue of a plea agreement, I believe the Defendant's due process rights would have been violated.

Here, I conclude that the district attorney general failed to retain adequate control of the prosecution. It appears that the control of the criminal prosecution was totally relinquished to the attorneys representing the victim in a pending civil law suit arising from the same incident. The "special prosecutors" apparently communicated with defense counsel concerning a substantial cash settlement of the civil case in conjunction with a possible plea agreement in the criminal case.⁴ I concur that the degree of involvement of these "special prosecutors" went beyond the role of "co-counsel" at trial as anticipated by our legislature and violated the Defendant's due process rights and was prejudicial to the judicial process. I, therefore, agree that this case must be reversed and remanded for a new trial.

DAVID H. WELLES, JUDGE

⁴It is readily apparent that discussions of a cash settlement of a civil suit in conjunction with resolution of a criminal prosecution provide a significant and alarming setting for abuse.