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Summary of Ryan v. Dist. Ct., 123 Nev. Adv. Op. No. 42

Katie Maw

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Maw, Katie, "Summary of Ryan v. Dist. Ct., 123 Nev. Adv. Op. No. 42" (2007). *Nevada Supreme Court Summaries*. 475.

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***Ryan v. Dist. Ct.*, 123 Nev. Adv. Op. No. 42 (Oct. 11, 2007)¹**

CRIMINAL LAW – ATTORNEY CONFLICTS OF INTEREST

Summary

Petition for a writ of mandamus challenging a district court’s order denying petitioner’s motion to substitute counsel.

Disposition/Outcome

The Nevada Supreme Court granted petitioner’s writ of mandamus and directed the district court to determine whether both defendants waived their right to conflict-free representation “knowingly, intelligently, and voluntarily.”² In doing so, the court found that, so long as it does not interfere with the administration of justice, a criminal defendant has the right to knowingly, intelligently, and voluntarily waive conflict-free representation.

Factual and Procedural History

In March 2006, Kelly Ryan and her husband Craig Titus were charged with murder with the use of a deadly weapon, kidnapping, accessory to murder, and third-degree arson in relation to the murder of their roommate, Melissa Ann James. The State alleged that Ryan and Titus might have implicated each other in the murder.

In September 2006, Titus retained Marc Saggese, Esq., of Cristalli & Saggese. In February 2007, Ryan sought to substitute Michael Cristalli of Cristalli & Saggese as her new counsel, replacing attorney Gregory Denué. In light of the potential conflict of interest of such dual representation, Cristalli explained to Ryan the “particulars” of Cristalli & Saggese representing both defendants. He also drafted a conflict-waiver letter and had it signed by both Ryan and Titus. This letter stated the following:

(1) neither defendant has implicated the other in the crimes charged; (2) after a thorough review of discovery and lengthy discussions with multiple counsel, neither defendant intends to plead guilty or cooperate with the State; (3) a joint defense agreement has been prepared to be executed by both defendants and both attorneys; (4) either defendant’s decision to cooperate with the State might change the firm’s ability to continue representation; (5) in the event of a serious conflict or disagreement, the firm would be required to withdraw and represent neither defendant; and (6) the firm’s withdrawal would be ‘inconvenient and potentially adverse to each [defendant],’ but the defendants understood that the ‘present benefits of dual representation outweigh this contingent problem.’³

The district court appointed outside counsel to speak with Ryan about the potential conflicts of interest inherent in the dual representation. Though this attorney spent a

¹ By Katie Maw

² *Ryan v. Dist. Ct.*, 123 Nev. Adv. Op. No. 42 (Oct. 11, 2007).

³ *Id.*

“significant” amount of time with Ryan, he “had no meaningful dialogue” with her regarding the representation “because it appeared that her mind was already made up.”⁴

The district court then questioned both Ryan and Titus regarding the ramifications of the dual representation. Both defendants acknowledged that they had received copies of the conflict-waiver letter, that they understood the contents of the letter, and that they did indeed wish to waive any potential conflict.

The district court denied Ryan’s request for substitution of counsel. Its rationale was that, even if no clear conflict arose during the trial, the potential issue of ineffective assistance of counsel would likely come up on appeal. The court also found that the joint defense agreement posed “a very serious potential for conflict,”⁵ even if there was no actual conflict.

Upon the court’s denial of her request for substitution, Ryan petitioned the Supreme Court for a writ of mandamus.

Discussion

The Nevada Supreme Court looked to an Eighth Circuit case for the proposition that lawyers are not interchangeable. The Eighth Circuit explained,

[w]ithin the range of effective advocacy, attorneys will differ as to their trial strategy, oratory style, and the importance they place on certain legal issues. They may also differ with respect to expertise in certain areas of law, and experience or familiarity with opposing counsel and the judge. These differences will impact a trial in every way the presence or absence of counsel impacts a trial.⁶

The court concluded that, though a trial court has broad discretion in balancing the need for the overall administration of justice against a criminal defendant’s Constitutional choice of his own counsel, “there is a strong presumption in favor of a non-indigent criminal defendant’s right to counsel of her own choosing.”⁷ Once a criminal defendant has been cautioned regarding the potential dangers of conflicted dual representation, he cannot be constrained to choose his right to conflict-free representation over the right to his chosen defense strategy.⁸ However, if a criminal defendant does exercise his right, knowingly, intelligently, and voluntarily to choose a dual representation carrying a risk of potential conflict, he has forever waived the resulting conflict of interest.

Furthermore, the court concluded that when such a criminal defendant knowingly, intelligently, and voluntarily waives the right to conflict-free representation, he also waives any right he might have to later seek a mistrial arising out of the conflicted representation. He also waives his right to any appeal based on the ineffective assistance of counsel.

⁴ *Id.*

⁵ *Id.*

⁶ *United States v. Gonzalez-Lopez*, 399 F.3d 924, 934 (8th Cir. 2005).

⁷ *See United States v. Amini*, 149 F.R.D. 647, 651 (D. Utah 1993).

⁸ This does not violate the Model Rules of Professional Conduct so long as both conflicted counsel agree to the representation.

With this decision, the court overruled its prior holding in *Hayes v. State*,⁹ to the extent that the decision allowed a trial court to declare a mistrial due to a conflict of interest, even after such conflict had been knowingly, intelligently, and voluntarily waived.

In applying its rule, the court noted that the trial court “was not convinced that Ryan’s and Titus’s waivers of conflict-free counsel were knowing, intelligent, and voluntary.”¹⁰ Therefore, in granting Ryan’s petition in part, the court directed the district court to determine whether the parties did make a knowing, intelligent, and voluntary waiver, and to advise the parties that their waiver of the right to conflict-free representation prevents them from seeking a mistrial or raising claims of ineffective assistance of counsel resulting from any conflict arising from the waiver.

Dissent

MAUPIN, C.J., dissenting:

Chief Justice Maupin dissented from the majority’s conclusion that Ryan’s waiver of conflict-free representation could potentially be approved. Instead, he thinks that Saggese and Cristalli failed to assure that Ryan’s decision to waive the conflict was done knowingly, intelligently, and voluntarily. He was particularly concerned with the lack of access to, or advice from, outside counsel in making the determination.

Conclusion

When a non-indigent criminal defendant’s choice of legal representation results in dual or multiple representation of clients whose interests are potentially in conflict, the defendant may waive his right to conflict-free counsel. His attorney, in seeking the dual or multiple representation, must advise all defendants of their right to seek outside counsel for advice on the ramifications of the potential conflict of interest. Should the defendants opt not to seek that advice, they must waive their right to do so expressly. If they do not, their waiver of conflict-free representation will be ineffective. The district court must accept a defendant’s waiver to conflict-free representation so long as it is obtained knowingly, intelligently, and voluntarily. Upon the district court’s acceptance of the defendant’s waiver, he is forever prevented from seeking a mistrial arising out of the waived conflict, or from claiming that the waived conflict resulted in ineffective assistance of counsel.

⁹ *Hayes v. State*, 797 P.2d 962 (1990).

¹⁰ *Ryan v. Dist. Ct.*, 123 Nev. Adv. Op. No. 42 (Oct. 11, 2007).