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Aoki v. District Court of Denver

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FILED IN THE
SUPREME COURT
OF THE STATE OF COLORADO

FEB 10 1987

SUPREME COURT, STATE OF COLORADO

7SA47

Case No. _____

Mac V. Danford, Clerk

ORIGINAL PROCEEDING PURSUANT TO RULE 21 OF THE COLORADO
APPELLATE RULES

LAWRENCE S. AOKI,
Petitioner

v.

THE DISTRICT COURT IN AND FOR THE CITY AND COUNTY OF DENVER,
THE HONORABLE LEONARD PLANK, ONE OF THE JUDGES THEREOF,
Respondent

Lawrence Aoki, the Petitioner, moves this Court for an Order requiring the Respondent to show cause why an Order should not issue requiring the Respondent to refrain from compelling the testimony of Dr. John MacDonald at any pending motions hearing or jury trial on the following grounds:

1. On February 9, 1987 the District Attorney requested and received an Order from the Respondent court requiring Dr. MacDonald to testify in the jury trial of the case of the People v. Lawrence S. Aoki currently scheduled for February 17, 1987.

2. On February 9, 1987, Dr. Fredrick Miller had been ordered to testify by the Respondent court and upon his refusal to do so was held in contempt of court and fined \$100 per day until he complied with the court order.

3. Dr. MacDonald stated that he would testify only if the Respondent court ordered him to do so against his wishes.

Dr. MacDonald was thus forced to choose between violating his professional ethics or being held in contempt of court.

4. The Petitioner is without any plain, speedy or adequate remedy except pursuant to C.A.R. 21 and will suffer irreparable harm unless this Honorable Court grants Petitioner's relief.

5. If the testimony of Doctor MacDonald is protected by any constitutional right or statutory privilege then these rights cannot be protected on appeal: "[D]amage to him will occur upon their disclosure regardless of the ultimate outcome of any appeal from a final judgment." Clark v. District Court, 668 P.2d 3, (Colo. 1983). See also People v. District Court, 719 P.2d 722 (Colo. 1986).

6. Dr. MacDonald is a licensed physician in the State of Colorado. He is a professor of psychiatry at the University of Colorado Health Sciences Center in Denver, Colorado.

Dr. MacDonald has been qualified to testify as an expert witness in the area of psychiatry in criminal courts throughout the United States, primarily in the State of Colorado.

7. Deputy State Public Defenders with the office of the Colorado State Public Defender retained Dr. MacDonald to advise them in the case of People v. Lawrence Aoki. Mr. Aoki is charged in Denver District Court, case numbers 86CR852 and 86CR176, with

two counts of murder in the first degree, in violation of section 18-3-102, C.R.S. (1986 Repl. Vol 8B). The purposes of Dr. MacDonald's retention were to conduct a mental status evaluation of Mr. Aoki, to determine the propriety of a mental status defense in the murder cases, and to consult with the defense on trial tactics and strategy in presenting a psychiatric or psychological defense.

8. Dr. McDonald met with Mr. Aoki and advised him of the purpose of his evaluation. Dr. MacDonald advised Mr. Aoki that his evaluation was protected by the attorney-client privilege, section 13-90-107(1)(b), since he was acting as an agent of Mr. Aoki's attorneys. He further advised Mr. Aoki that any statements made during the evaluation would be confidential and would remain confidential unless the privilege was waived by Mr. Aoki and his attorneys.

9. After his evaluations, Dr. MacDonald orally reported his impressions and advice to the Office of the Public Defender. The doctor did not prepare a written report.

10. Mr. Aoki later entered pleas of not guilty by reason of insanity, pursuant to section 16-8-103, C.R.S. (1986 Repl. Vol. 8A), and not guilty by reason of impaired mental condition, pursuant to section 16-8-103.5, C.R.S. (1986 Repl. Vol. 8A).

11. In the course of trial preparation, the Office of the

District Attorney determined that Dr. MacDonald had visited Mr. Aoki in the Denver County Jail. Mr. Aoki had been ordered held in that facility without bond.

12. Subsequently, the District Attorney moved to endorse Dr. McDonald as a witness for the State. On September 11, 1986, the Respondent Court permitted these endorsements over the objection of defense counsel.

13. On September 12, 1986, Mr. Aoki's attorneys filed a Petition for Relief Pursuant to Rule 21 and a Motion for Emergency Stay. These pleadings requested, inter alia, this Court to enter an Order prohibiting the Respondent Court from requiring Dr. MacDonald to testify on behalf of the State. This Court denied both motions on that same date.

14. The sanity trial in Mr. Aoki's case began on September 15, 1986.

15. On September 24, 1986, counsel for Dr. MacDonald filed a Petition for Relief Pursuant to Rule 21 of the Colorado Appellate Rules in the Nature of Prohibition in this Court. That petition requested, inter alia, that this Court enter an Order requiring the Respondent Court to show cause why the subpoenas issued by the prosecution to Dr. Miller and Dr. Kadushin should not be quashed. That case was docketed as case number 86SA35. On or about that same date, counsel for Fredrick M. Miller, another

psychiatrist subpoenaed by the prosecution, and counsel for Mr. Aoki filed similar petitions. Those cases were docketed as case numbers 86SA352 and 86SA339, respectively.

16. On September 25, 1986, in case number 86SA352, this Court issued an Order to Show Cause. That Order required the Respondents to show cause why the relief granted in the prayer of Dr. Miller's and Dr. Kadushin's petition should not be granted. This Court issued similar orders in case numbers 86SA351 and 86SA339.

17. On or about October 9, 1986, the Office of the District Attorney filed a Motion to Discharge Rules to Show Cause. In that motion, the District Attorney stated that Mr. Aoki's case had proceeded to a sanity trial, that the jury had returned a verdict finding Mr. Aoki sane, and that Dr. Miller, Dr. Kadushin, and Dr. MacDonald had not been called to testify. The District Attorney, therefore, claimed that the "issue as to quashal of subpoenasf [was] moot as there [was] no longer a case or controversy."

18. On October 17, 1986, counsel for Dr. Miller and Dr. Kadushin filed a Motion Requesting Court not to Discharge Rules to Show Cause. Counsel for Dr. MacDonald filed a similar motion.

19. On October 20, 1986, this court granted the District Attorney's Motion to Discharge Rules to Show Cause.

20. After this court discharged the Rules to Show Cause, the

Office of the District Attorney re-subpoenaed Dr. Miller and Dr. Kadushin to testify in the criminal action against Mr. Aoki. Mr. Aoki's case is set for jury trial on February 17, 1987.

21. A hearing on the propriety of these subpoenas was held on December 17, 1986. At the conclusion of that hearing, the Respondent Court denied the motion to quash the subpoenas of Dr. Miller and Dr. Kadushin. A transcript of this ruling will be ordered.

22. The Respondent Court has acted in excess of its jurisdiction.

23. The Respondent Court's order violates the attorney-client privilege as set forth in section 13-90-107(1)(b), C.R.S. (1986 Cum. Supp.).

24. In the Respondent Court's order further requires Petitioner to violate his code of professional ethics. Specifically, Petitioners advised Mr. Aoki that his communications to them were confidential and would only be revealed to his attorneys.

25. The Respondent Court's order also violates the Due Process Clause of the state and federal constitutions. Under Ake v. Oklahoma, 470 U.S. ___, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), an indigent defendant has a due process right to a psychiatrist or psychologist who functions in two capacities -- evaluative and consultative. The evaluative services are "crucial to the

defendant's ability to marshal his defense." Ake v. Oklahoma, supra, 105 S.Ct. at 1095. Depending on the circumstances, the expert may conduct psychiatric and psychological tests, as well as an oral examination of the defendant, and, with the information obtained from these procedures, assist defense counsel in determining the feasibility of a psychiatric defense. If this right to the consultative assistance of a psychiatrist or psychologist is to have any meaning, it must entail restrictions on the prosecution's access to the expert retained by the defense. Defense counsel must be able to research his or her case in a context of confidentiality. The Respondent Court's order serves to eviscerate this right.

26. Additionally, The Respondent Court's order interferes with and deprives Mr. Aoki of the constitutional right to effective assistance of counsel. See U.S. Const. amend VI; Colo. Const. art II, section 16.

27. Moreover, the prosecution should be denied access to the testimony of Dr. MacDonald under the Fifth Amendment principles of Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981). If this privately retained expert is compelled to testify for the prosecution on the crucial issue of mental state, he must be viewed as an "agent of the State, recounting unwarned statements made in a postarrest custodial

setting." Estelle v. Smith, supra, 451 U.S. at 467. Accordingly, the experts testimony at trial should be prohibited because it will be based entirely on Mr. Aoki's unwarned statements and thus violate the Fifth Amendment to the United States Constitution and Article II, Section 18 of the Colorado Constitution.

28. Despite the assertions of the District Attorney in his Motion to Discharge Rules to Show Cause, the issue as to the propriety of the subpoenas is not moot. The District Attorney should not have moved to dismiss the Rules to Show Cause if he was aware that he intended to re-subpoena Dr. McDonald for other hearings in this case.

29. Wherefore, Petitioner requests the following relief:

a) That this Court exercise its original jurisdiction in this case;

b) That this court issue an Order directing the Respondent Court to show cause why the Respondent Court's Order to Dr. McDonald should not be vacated.

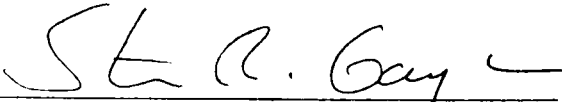
c) That this Court enter an Order prohibiting the Respondent Court from requiring Dr. MacDonald from testifying on behalf of the District Attorney; and

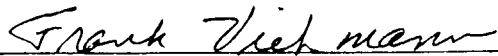
d) That this Court grant such further relief as it deems just and proper.

28. Petitioner has no plain, speedy, and adequate remedy

other than this request that this Court exercise its original jurisdiction.

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CERTIFICATE OF SERVICE

I certify that on _____ a copy of the foregoing petition was served by mail on each of the following parties:

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