October 2024

Goodwin v. District Court In and For Tenth Judicial Dist.

IN THE SUPREME COURT

FOR THE STATE OF COLORADO

NO.

RICHARD F. GOODWIN, Defendant-Petitioner, vs. THE DISTRICT COURT, IN AND FOR THE TENTH JUDICIAL DISTRICT, STATE OF COLORADO, and THE HONORABLE RICHARD CONOUR, Specially Appointed as a District Judge In and For the Tenth Judicial District, State of Colorado, Plaintiff-Respondent.	MEMORANDUM IN SUPPORT OF PETITION FOR RELIEF IN THE NATURE OF MANDAMUS AND PROHIBITION PURSUANT TO COLORADO APPELLATE RULE 21

COMES NOW the above-named Defendant-Petitioner, by and through his attorneys, R. D. Jorgensen, James H. Frasher, Jr. and Rollie R. Rogers, and respectfully submits the following memorandum of law in support of Defendant-Petitioner's petition for relief in the nature of mandamus and prohibition.

STATEMENT OF ISSUE

WHETHER THE DEFENDANT'S RIGHT TO DISCOVERY PURSUANT TO RULE 16, COLORADO RULES OF CRIMINAL PROCEDURE, ENCOMPASSES THE WRITTEN STATEMENT, TAPE RECORDINGS AND REPORTS REFERRED TO IN DEFENDANT-PETITIONER'S PETITION FOR RELIEF IN THE NATURE OF MANDAMUS AND PROHIBITION?

Rule 16(I)(a)(1)(I) requires that the prosecuting attorney disclose to defense counsel "the names and addresses of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial, together with a relevant written or recorded statement; . . ." (emphasis added). As indicated in the factual recitation contained in the petition attached hereto, all of the items sought by the defense herein fall within this classification. The written statement of Ralph Force, the tape recordings of Force's conversations with defense counsel, the tape recordings of the witness Goodman's conversations with the District Attorney's Office and the Colorado Bureau of Investigation, and the reports of those two agencies concerning conversations with both Mr. Force and Mr. Goodman are all within the purview of the aforementioned rule. The Colorado Supreme Court on numerous occasions has quoted from and referred to favorably the cases of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d

215 and Giles v. Maryland, 386 U.S. 66, 87 S.Ct. 793, 17 L.Ed.2d 737. The case of People v. Smith, _____ Colo. _____, 524 P.2d 607 (1974) contains the following quotation from the concurring opinion of Mr. Justice Fortas in Giles:

> ". . . A criminal trial is not a game in which the State's function is to outwit and entrap its quarry. The State's pursuit is justice, not a victim. If it has in its exclusive possession specific, concrete evidence which is not merely cumulative or embelishing and which may exonerate the defendant or be of material importance to the defense--regardless of whether it relates to testimony which the State has caused to be given at trial--the State is obliged to bring it to the attention of the court and the defense. . . ."

The Colorado Supreme Court went on to state that "we are in agreement with the foregoing statement." People v. Smith, supra. at 611. See also People v. Walker, _____ Colo. _____, 504 P.2d 1098 (1973); People v. Holmes, _____ Colo. _____, 553 P.2d 786 (1976). In Cheatwood v. People, _____ Colo. _____, 435 P.2d 402 (1968), the Colorado Supreme Court stated:

> "Clearly, it is the duty of both the prosecution and the courts to see that no known evidence in the possession of the People which might tend to prove a defendant's innocence is withheld from the defense before or during trial. (citations omitted) Evidence which might be helpful to a defendant and which is suppressed by the police or the prosecution or which is ignored by a trial court when presented to it, results in a denial of due process of law just as surely as would, for example, the knowing use of perjured testimony. (citation omitted)."

Two things appear to be beyond question based upon the foregoing cases: 1) compliance with Rule 16, Colorado Rules of Criminal Procedure, is mandatory and there is no discretion lying with the trial court to deny defense information or documents which fall within the purview of said Rule; 2) that if it is demonstrated that certain evidence in the possession of the prosecution may be exculpatory or helpful to the defense, said information must be provided. In the instant case, it has been clearly demonstrated on the record that the written, signed statement by Ralph Force is totally exculpatory to the Defendant. In addition, the other items requested by the Defendant herein will be helpful

to the defense. The Colorado Supreme Court, in Smith, supra. at 611, left no doubt that this determination is a defense function. The Court stated:

> "Moreover, in our view the determination of usefulness of evidence in this context is a defense function, not a prosecutorial function. In certain cases even an in-camera hearing imposes unfairness on the defense, as only the defense can determine what will be material and helpful to its case. See Alderman v. United States, 394 U.S. 165, 89 S.Ct. 961, 22 L.Ed.2d 176."

The trial court's finding in its order denying Defendant's motion for discovery that the defense already has knowledge of the contents of the written, signed statement of Ralph Force and of the tape recordings of Force's conversation with defense counsel, overlooks two very critical facts presented at the hearing on said motion. With regard to the written statement of Mr. Force, counsel for the Defendant have not seen said statement since it has been signed by Mr. Force. Therefore, counsel is unaware of what changes, if any, Mr. Force may have made in said statement prior to or subsequent to his signing of same. The statement was in the exclusive control of Mr. Force for an extended period of time prior to being given to an investigator for the District Attorney's Office. With regard to the tape recordings of Mr. Force's conversations with defense counsel, it was clear at the hearing that Mr. Force had the ability, during those conversations, to turn the recording on and off and, therefore, edit the conversation at will. Counsel is unaware of what portions of the conversations may be recorded and what portions Mr. Force may have chosen not to record. In addition, counsel obviously cannot recall verbatim the conversations which took place.

As to the reports and notes of investigators for the Colorado Bureau of Investigation and the District Attorney's Office concerning conversations had with the witnesses in the instant case, the Colorado Supreme Court has stated that these matters are subject to discovery pursuant to Rule 16. See Ortega v. People, 162 Colo. 358, 426 P.2d 180 (1967); DeLuzio v. People, ____ Colo. ____, 494 P.2d 589 (1972).

In addition to the obvious necessity for defense counsel to have the requested materials for the preparation of the actual trial of this case, there are two other substantial problems which would be created by the denial to the

defense of said materials. The first of these problems is the possible violation of Defendant's Sixth Amendment right to due process of law and effective assistance of counsel. The extent to which the prosecution may interfer with the functioning of defense counsel in interviewing the witnesses appearing against the Defendant may become a substantial issue in this case. The acts of the District Attorney, the Pueblo Police Department, and the Colorado Bureau of Investigation in secretly recording defense counsel's conversations with a key witness in a criminal prosecution and allowing said witness to edit, at will, those conversations raises the spectre of possible violations of the Defendant's Sixth Amendment rights. However, a final determination by defense counsel of the merits of this contention cannot be made without access to the information requested herein. The second additional problem that will be created by denial of the requested information to the defense is that counsel cannot properly or adequately make a determination as to whether they must become witnesses in the instant case and, therefore, withdraw as counsel for the Defendant. Canon 5 of the Code of Professional Responsibility provides that "A lawyer should exercise independent professional judgment on behalf of a client." Disciplinary Rule 5-102: Withdraw As Counsel When the Lawyer Becomes a Witness: provides, in part, as follows:

> "(A) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial, . . ."

Ethical consideration 5-9 states as follows:

> "Occasionally a lawyer is called upon to decide in a particular case whether he will be a witness or an advocate. If a lawyer is both counsel and witness, he becomes more easily impeachable for interest and thus may be a less effective witness. Conversely, the opposing counsel may be handicapped in challenging the credibility of the lawyer when the lawyer also appears as an advocate in the case. An advocate who becomes a witness is in the unseemly and uneffective position of arguing his own credibility. The roles of an advocate and of a witness are inconsistent; the function of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively."

In the instant case, it is impossible, without access to the information requested herein, for defense counsel to intelligently determine whether they must appear as witnesses in the Defendant's case to testify to the falsity of accusations made by Mr. Force concerning witness tampering.

In summary, the information requested by the defense herein is: 1) discoverable within the mandatory dictates of Rule 16(I)(A)(1)(I), Colorado Rules of Criminal Procedure; 2) the items requested have been demonstrated to be or may be exculpatory in nature and helpful to the defense; 3) the items requested are necessary for defense counsel to adequately determine the merits of possible allegations of violations of the Defendant's Sixth Amendment right to effective assistance of counsel; 4) the items requested are necessary for a proper determination by defense counsel of whether it will be necessary for them to appear as witnesses in behalf of the Defendant at trial of this matter.

Respectfully submitted,

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