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State v. Williams 2021-Ohio-3152

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State v. Williams
2021-Ohio-3152

I. INTRODUCTION

Courts across the United States have long grappled with the issue of joint representation of criminal defendants.¹ While representation of individual criminal defendants by the same attorney has never been explicitly outlawed by the federal government or the state of Ohio, discussions surrounding the issue, including calls for the practice to be stopped, have grown in prevalence since the 1970's.² In fact, even the various sets of ethical rules governing the conduct of attorneys, such as the Model Rules of Professional Conduct promulgated by the American Bar Association, allow this practice.³ Critics of the practice have pointed out that joint representation, especially of criminal defendants, often forces attorneys to make tough choices that may benefit one of their clients while harming the other.⁴ For instance, an attorney representing two criminal defendants may be forced to withhold a plea offer by the state for one of his clients if it involves them testifying against another of his clients in the same case.⁵

While critics of the practice of joint representation certainly have fair arguments, attorneys, their clients, and legislators in favor of the practice also have made several interesting points. To begin, joint representation is often the most economical option for criminal defendants, especially those wishing to avoid resorting to public defenders.⁶ Such joint representation can also potentially make for a stronger case for each defendant, offering a so-called “united front.”⁷ Lastly, defendants often want the best attorney in the subject matter of the crime they are alleged to have committed, or are familiar with a certain attorney, and do not want to be foreclosed from retaining them because their co-defendant already has retained them.⁸

1. George L. Blum, Annotation, *Circumstances Giving Rise to Prejudicial Conflict of Interests Between Criminal Defendant and Defense Counsel—State Cases Concerning Waiver of Conflict: Form and Context of Waiver, Duty of Court and Counsel, Responsibilities of Defendant, Impact of Applicable Rules and Regulations, Colloquy Related to Waiver, and Discretion and Analysis of Court*, 19 A.L.R.7th 3, *2 (2015).

2. Debra Lyn Bassett, *Three's a Crowd: A Proposal to Abolish Joint Representation*, 32 RUTGERS L.J. 387, 391 (2001).

3. *Id.* at 412.

4. *Id.* at 423.

5. Blum, *supra* note 1, at 32.

6. Bassett, *supra* note 2, at 433.

7. *Id.* at 434.

8. *Id.* at 433-34.

In *State v. Williams*, the Supreme Court of Ohio declined to adopt a holding that would have required courts to inquire about potential conflicts associated with joint representation anytime jointly represented co-defendants came before them, thus affirming the ruling of the Eighth District Court of Appeals.⁹ While joint representation of criminal defendants certainly should not be outlawed in the state of Ohio, the Court was wrong to allow the practice to continue without any oversight. This decision will continue to propagate the negative effects of joint representation, allowing defendants' constitutional rights to be potentially violated, all while a simple solution remains available to the Court.

II. STATEMENT OF FACTUAL AND PROCEDURAL HISTORY

This case originated in the Cuyahoga County Court of Common Pleas resulting from the December 2018 indictment of husband and wife Marshall and Shawnte Williams on drug related charges.¹⁰ Both Marshall and Shawnte retained the same legal counsel during this process, and as a result, procured a joint plea agreement.¹¹ While Marshall pled guilty to one count of drug trafficking and one count of drug possession, first and fourth-degree felonies respectively, Shawnte was only required to plead guilty to a single count of possession of criminal tools, a fifth-degree felony.¹² Marshall received a total of nine years prison time while Shawnte received five years of probation and a \$2,000 fine.¹³

Following the proceedings in the trial court, Marshall appealed his conviction to the Eighth District Court of Appeals, claiming that he received ineffective assistance of counsel, "in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Ohio Constitution."¹⁴ This appeal was prefaced on Marshall's claim that the trial court failed to ensure that no conflict was present as a result of his joint representation with Shawnte.¹⁵ Marshall's appeal was overruled, as the court of appeals found no reason for the trial court to question the joint representation of Marshall and Shawnte, specifically the court found that Marshall had neither objected to the arrangement, nor informed the trial court of his displeasure with the arrangement.¹⁶

9. *State v. Williams*, Slip Opinion No. 2021-Ohio-3152 at 13 (2021).

10. *Id.* at 2.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Williams*, 2021-Ohio-3152 at 3.

15. *Id.*

16. *Id.*

Marshall subsequently filed a motion for reconsideration with the court of appeals, and an appeal with the Supreme Court of Ohio.¹⁷ Before the Supreme Court of Ohio accepted Marshall's appeal, the court of appeals "vacated its judgment in Williams I and issued a subsequent opinion, once again affirming Marshall's convictions."¹⁸ Marshall then abandoned his appeal of the original decision by the court of appeals, and appealed the Court's subsequent affirmation of his conviction, which the Supreme Court of Ohio accepted for consideration.¹⁹

III. THE COURT'S DECISION AND RATIONALE

A. *The Majority Opinion*

Justice Stewart delivered the majority opinion of the Supreme Court of Ohio, in which Justices O'Connor, Kennedy, Fischer, DeWine, and Donnelly concurred.²⁰ Justice Brunner offered the lone dissenting vote and opinion.²¹ In Justice Stewart's majority opinion, the Court found that "when a trial court does not know, and should not reasonably have known, of a possible conflict of interest in an attorney's representation of two or more codefendants charged with a crime, the trial court has no affirmative duty to inquire whether a conflict of interest exists."²²

In explaining its decision, the Court began by reaffirming the constitutional right to counsel, stating that it mandates that "[b]oth defense counsel and the trial court are under

an affirmative duty to ensure that a defendant's representation is conflict-free."²³ The Court then went on to lay out the test it utilizes in determining whether a criminal defendant was unduly prejudiced by joint representation.²⁴ The Court stated that when a criminal defendant objects to their joint representation, or when the trial court "knew or reasonably should have known that a possible conflict existed" as a result of joint representation, it must inquire about said conflict.²⁵ If it does not do so, then it has failed its affirmative duty, and the case must be remanded for a hearing to determine whether the conflict affected the verdict.²⁶

17. *Id.*

18. *Id.* at 3.

19. *Williams*, 2021-Ohio-3152 at 4.

20. *Id.* at 1, 13.

21. *Id.* at 13.

22. *Id.*

23. *Williams*, 2021-Ohio-3152, at 5 (quoting *State v. Dillon*, 74 Ohio St.3d 166, 167-168 (1995)).

24. *Id.*

25. *Id.*

26. *Id.*

If a criminal defendant does not object to joint representation, and the trial court has no reason to suspect that joint representation of criminal defendants will cause a conflict, then the criminal defendant must prove that some actual conflict due to their joint representation unduly prejudiced them.²⁷ According to the Court, such an actual conflict arises when “the defendants’ interests do diverge with respect to a material factual or legal issue.”²⁸ A criminal defendant simply raising the possibility of such a divergence is not enough to overturn a conviction.²⁹

The Court then utilized two of its own prior decisions to support its findings, beginning with *State v. Manross*.³⁰ In *Manross*, the Court upheld the conviction of a defendant who had been jointly represented by the same attorney as his codefendant, even though the trial court did not inquire about any possible conflict due to this representation.³¹ In doing so, the Court declined to impose an affirmative duty on a trial court to inquire about such conflicts any time jointly represented codefendants came before them.³² On the other hand, the Court did state that when a trial court “knows or has reason to know of a potential conflict,” or if a defendant shows the existence of an actual conflict, then the trial court does have the duty to inquire about joint representation.³³

The Court also went on to analyze its decision in *State v. Gillard*.³⁴ In this case, a jointly represented codefendant accepted a plea deal to avoid jail time, and subsequently was presented as a defense witness at his codefendant’s trial.³⁵ In part due to this testimony, the codefendant was convicted and sentenced to death.³⁶ Upon review by the Supreme Court of Ohio, it was found that “the trial court knew (or at least should have known) that a possible conflict of interest existed” and thus its affirmative duty to inquire about joint representation arose.³⁷ Since the trial court did not make any such inquiry, nor advised the codefendant of his right to conflict-free representation, the case was remanded to the trial court for a hearing to determine whether an actual conflict had tainted the jury’s verdict.³⁸

27. *Id.* at 6.

28. *Id.* (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 356 (1980)).

29. *Id.*

30. *Id.*

31. *Id.* at 7.

32. *Id.*

33. *Williams*, 2021-Ohio-3152, at 7.

34. *Id.* at 8.

35. *Id.*

36. *Id.* at 9.

37. *Williams*, 2021-Ohio-3152, at 9 (quoting *State v. Gillard*, 64 Ohio St.3d 304, 311-12, 595 N.E.2d 878 (1992)).

38. *Id.*

Following this analysis, the Court turned its attention to the case at hand.³⁹ For several reasons, the Court found that Marshall had neither raised the issue of a possible conflict nor entered anything into the record that would have put the trial court on notice of a potential conflict.⁴⁰ For example, Marshall notified the trial court that he was satisfied with the representation he received.⁴¹ Additionally, upon examination of the trial court record, there was nothing that indicated the “possibility of a conflict” due to the joint representation of Marshall and Shawnte.⁴² As such, the Court found that the trial court did not have an affirmative duty to inquire about the joint representation in this case.⁴³

The Court further found that there was no proof that an actual conflict existed because of Marshall and Shawnte’s joint representation.⁴⁴ While Marshall did raise the possibility that such a conflict existed, he fell short of proving definitively that it did, which the Court stated is required to “establish ‘the constitutional predicate for [a] claim of ineffective assistance of counsel.’”⁴⁵ Additionally, the Court stated that the fact that Shawnte was “charged with fewer offenses” and “received a more advantageous plea offer” did not prove the existence of an actual conflict.⁴⁶

Finally, the Court addressed Marshall’s request that it hold that a trial court must inquire about the propriety of joint representation of defendants in every criminal case.⁴⁷ While the Court agreed with Marshall that such a practice would offer the best protection against the pitfalls of joint representation, the Court declined to adopt such a rule.⁴⁸ According to the Court, such a decision should be left to the legislature to decide whether or not such a practice is necessary.⁴⁹

As such, the Court found that the trial court’s affirmative duty to inquire about joint representation had not been triggered since the neither Marshall’s own statements about his representation nor the trial court’s record revealed that the trial court knew or should have known of a possible conflict.⁵⁰ Additionally, the Court found that Marshall had shown no actual conflict had arisen because of his joint representation with Shawnte.⁵¹

39. *Id.*

40. *Id.* at 10.

41. *Id.*

42. *Williams*, 2021-Ohio-3152, at 10.

43. *Id.* at 13.

44. *Id.*

45. *Id.* at 11 (quoting *State v. Manross*, 40 Ohio St.3d 180, 182, 532 N.E.2d 735 (1988)).

46. *Id.*

47. *Williams*, 2021-Ohio-3152, at 12.

48. *Id.*

49. *Id.*

50. *Id.* at 13.

51. *Id.*

Because of this, the Court affirmed the Eight District Court of Appeals' judgment, upholding Marshall's conviction.⁵²

B. Justice Brunner's Dissenting Opinion

Justice Brunner was the lone dissenting Justice in this case and delivered the dissenting opinion.⁵³ According to the dissent, a proper analysis of the Ohio Constitution reveals that an inquiry into the propriety of joint representation of criminal defendants is required by Article I, Section 10 of the Ohio Constitution.⁵⁴ While this is the case, the dissent also went on to provide guidance for a potential rule or statute regarding this issue.⁵⁵

The dissent's argument in favor of the proposition that Article I, Section 10 of the Ohio Constitution require trial courts to inquire about joint representation is that this section provides a broader right to counsel than the United States Constitution.⁵⁶ The dissent would interpret this provision of the Ohio Constitution to give criminal defendant's the right to be independently represented, requiring such a right to be waived in a "knowing and intelligent" manner.⁵⁷ As such, the dissent would require that trial courts advise defendants of this right, and the potential pitfalls of joint representation, before accepting any such waiver of the right by a defendant.⁵⁸ Such pitfalls include the possibility that an attorney for multiple criminal defendants in the same case may not be able to effectively negotiate plea deals, may not be able introduce certain exculpatory evidence if it harms one of the codefendants, and cannot pass blame from one codefendant to another.⁵⁹

The dissent also pointed out the failure of the majority's rule, finding that the conflict that arises when criminal defendants are jointly represented often prevents an attorney from making the record that is required to trigger the trial court's affirmative duty.⁶⁰ Additionally, attorneys and clients are not always aware of the potential conflicts inherent in joint representation and will not always be able to point them out to the trial court.⁶¹ Likewise, not all attorneys are even capable of handling a case in which they represent

52. *Williams*, 2021-Ohio-3152, at 13.

53. *Id.*

54. *Id.* at 13-14.

55. *Id.* at 14.

56. *Id.* at 17.

57. *Williams*, 2021-Ohio-3152, at 17.

58. *Id.* at 18.

59. *Id.*

60. *Id.*

61. *Id.* at 19.

multiple codefendants.⁶² An attorney may be encouraged to take such a case, even though they are unsure of their ability to handle it, because of the prospect of greater monetary compensation.⁶³

Finally, considering the majority's suggestion that requiring judicial inquiry into joint representation by trial courts should only be required by rule or statute, the dissent suggests some factors to consider in formulating such a rule or statute.⁶⁴ To begin, the dissent suggests that any future rule or statute be modeled after Federal Rule of Criminal Procedure 44.⁶⁵ Essentially this rule requires that the court inform defendants of the potential problems that arise with joint representation anytime they wish to enter into such a situation.⁶⁶ The dissent also posits a few other considerations for such a rule or statute, such as suggesting that the ". . . advisement by the trial court should be placed on the record," ensuring that the trial court's obligation to guard against conflicts continues throughout a trial, and that defendants should be required to waive their right to separate representation in a manner understandable to the common individual.⁶⁷

As seen above, the dissent would ideally find that the trial court always has an obligation to inquire about joint representation whenever it arises in a criminal case.⁶⁸ Accepting that the majority of the Court has decided otherwise, the dissent lays out some guidelines for establishing a future rule or drafting a future statute that will require such an inquiry by trial courts in the future.⁶⁹

IV. ANALYSIS

A. Introduction

The Court's decision here, at least for the time being, settles an issue of great importance. From now on, unless the legislature adopts a statute placing a different burden on trial courts, they will continue to apply the test announced by the Supreme Court of Ohio in this case.⁷⁰ This ruling will continue to significantly affect the rights of criminal defendants in Ohio until the Legislature acts. This analysis will give a summary of the effects of this ruling, while also suggesting how best to move forward.

62. *Williams*, 2021-Ohio-3152, at 19.

63. *Id.* at 20.

64. *Id.* at 21.

65. *Id.*

66. *Id.*

67. *Williams*, 2021-Ohio-3152, 22-23.

68. *Id.* at 20.

69. *Id.* at 24.

70. *Id.* at 5.

*B. Discussion**i. Effects of This Ruling on Future Criminal Trials*

The ruling by the Court in this case will perpetuate a significant disadvantage faced by criminal defendants seeking to utilize joint representation, while also perpetuating what may one day be decisively labeled as a violation of a criminal defendant's rights under both the United States and Ohio constitutions. Before proposing a remedy for this issue, it seems necessary to highlight some of the more concrete harms that defendants will continue to suffer under the Court's ruling.

To begin, one of the major problems with joint representation of criminal defendants is that it is often hard to gauge whether the defendant understands the situation enough to intelligently and independently waive their right to independent representation.⁷¹ This is largely due to an attorney's self interest in obtaining such a waiver, given the significant financial compensation involved in joint representation cases.⁷² Additionally, societal pressures, such as those posed by a codefendant that is a spouse, friend, or coworker can cause defendants to waive their right to independent counsel without fully understanding the consequences of such a decision.⁷³ For instance, in this case the codefendants were husband and wife.⁷⁴ As such, without proper judicial inquiry into joint representation situations, it is likely that a defendant is waiving a constitutional right without being fully informed of the consequences.

Additionally, without any requirement that courts inquire about the potential conflicts associated with joint representation, it is possible that a joint representation situation which was conflict free at the outset develops a serious conflict during the litigation which will go unaddressed.⁷⁵ For instance, the discovery on new evidence implicating one codefendant and not the other, as well as plea negotiations requiring testimony by one codefendant against another may raise conflicts during the later stages of a case that simply were not present at the outset.⁷⁶ Continuing the practice of allowing joint representation of criminal defendants without any judicial supervision will only exacerbate these issues.

Lastly, both attorneys and clients are more inclined to enter joint representation arrangements because of the financial incentives for each

71. Bassett, *supra* note 2, at 392.

72. *Id.* at 442.

73. *Id.* at 441-42.

74. Williams, 2021-Ohio-3152, at 2.

75. Bassett, *supra* note 2, at 443.

76. Williams, 2021-Ohio-3152, at 18.

party.⁷⁷ While joint representation offers a chance for an attorney to receive more compensation for their work, it also allows codefendants to save some money, as these services are often discounted slightly for codefendants.⁷⁸ In this way, attorneys feel pressure to enter joint representation arrangements even when there is the potential for conflicts to arise, due to financial compensation involved.⁷⁹ On the other hand, codefendants are pressured into such arrangements due to the financial savings that may be realized.⁸⁰ Without judicial oversight, these financial incentives for both parties encourage uninformed and irrational waiver of a constitutional right.

ii. Solutions to the Issue at Hand

In looking at how to move forward considering the Court's decision and the various pitfalls associated with joint representation, several solutions seem not only appropriate but necessary. From the legislature passing a statute to address this issue to collaborating with the courts to adopt a new court rule addressing joint representation, the solution is now largely out of the hands of the Court following their decision here.⁸¹

The easiest and most economical solution to the issue of joint representation of criminal defendants is for the Ohio legislature to pass a statute outlining the requirements of trial courts faced with joint representation situations. As Justice Brunner stated in his dissent, a statute based on Federal Rule of Criminal Procedure 44 would best address this issue.⁸² Such a statute would ensure that a trial court always has the obligation to inquire about joint representation situations whenever it is faced with one.⁸³ Additionally, it would require that criminal defendants wishing to be jointly represented be "personally advise[d]" by the court of their right to separate representation.⁸⁴ Such a solution would have the added benefit of being in line with Federal court requirements on the subject, ensuring compliance with the United States Constitution's requirements regarding joint representation.⁸⁵

In addition, the Supreme Court of Ohio and the Ohio Legislature could collaborate to adopt a rule of practice governing the trial courts of Ohio in relation to joint representation of criminal defendants.⁸⁶ In Ohio, the

77. Bassett, *supra* note 2, at 442.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Williams*, 2021-Ohio-3152, at 13-14.

82. *Id.* at 21.

83. *Id.*

84. *Id.* (quoting Fed. R. Crim. P. 44(c)(2)).

85. *Id.* at 21.

86. *Williams*, 2021-Ohio-3152, at 21.

practice for adopting “rules of practice and procedure” for courts is handled by the Supreme Court of Ohio.⁸⁷ The Supreme Court of Ohio has the authority to “prescribe rules governing practice and procedure in all courts of the state” subject only to veto by the Ohio Legislature via a concurrent resolution of disapproval from approved by both house of the legislature.⁸⁸ Such a rule promulgated by the Court, so long as it is not vetoed by the legislature, would have the same effect as a statute pronouncing a new obligation for the courts of Ohio.⁸⁹ This would be the best option, as it allows for a collaborative effort to take place between the Court and the legislature, though it is unlikely to happen given the Court’s unwillingness to adopt such a rule in this case.

Looking to other jurisdictions, it is clear that the majority of jurisdictions have adopted rulings similar to that of Ohio.⁹⁰ For instance, Washington only requires a trial judge to inquire about multiple representation when “there are special circumstances such that the court knows or reasonably should know that a particular conflict exists.”⁹¹ Georgia has also adopted a similar ruling.⁹² However, Delaware has adopted a rule more akin to that suggested by Justice Brunner in his dissent, imposing “the duty to promptly inquire with respect to . . . joint representation [by codefendants] and [to] personally advise each defendant of the right to the effective assistance of counsel, including separate representation.”⁹³ As such, while there is not much support among the states for requiring a trial judge to inquire about joint representation every time they are presented with the situation, some state like Delaware have taken this step.⁹⁴

V. CONCLUSION

The ruling by the Court in this case represents a significant perpetuation of a practice that can adequately be described as violating the constitutional rights of criminal defendants. While it is understandable that the Court is wary of pronouncing a rule that the legislature has no input in crafting, it is imperative that the process of formulating such a rule take place to safeguard these constitutional rights. As Justice Brunner pointed out in his

87. *Commission on the Rules of Practice and Procedure*, SUPREME COURT OF OHIO, <https://www.supremecourt.ohio.gov/Boards/practiceprocedure/constitution.asp> (last visited Jan. 26, 2022).

88. *Id.*

89. *Id.*

90. *State v. Frank*, 1999 Wash. App. LEXIS 520 at 12 (1999); *Burns v. State*, 281 Ga. 338, 341 (2006); *State v. Avina-Murillo*, 301 Neb. 185, 203 (2018).

91. *Frank*, 1999 Wash. App. LEXIS, at 12.

92. *Burns*, 281 Ga. At 341.

93. *Lewis v. State*, 757 A.2d 709, 716 (2000).

94. *Id.*

dissent, a criminal defendant's right to separate representation is protected by Article I, Section 10 of the Ohio Constitution.⁹⁵ Failing to protect this right by declining to require trial courts to, at the very least, ensure that criminal defendants waive it in a "knowing and intelligent" manner means that some criminal defendants undoubtedly will be prejudiced by the practice.⁹⁶ Given that attorneys are often forbidden to even point out the conflicts that may arise as a result of joint representation because of their ethical obligations, it is unlikely that the process adopted by the Court in this case will adequately safeguard this right.⁹⁷ As such, the Ohio Legislature or the Supreme Court of Ohio should remedy this violation of criminal defendants' constitutional rights by passing a statute or adopting a rule of practice requiring that trial courts inquire about the propriety of joint representation anytime they are faced with such a situation.

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95. *Williams*, 2021-Ohio-3125, at 13-14.

96. *Id.* at 17.

97. *Id.* at 18.