COURT OF APPEALS
DECISION
DATED AND RELEASED

MAY 14, 1996

No. 95-2466-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANDREA M. WHITE,

Defendant-Appellant.

APPEAL from an order of the circuit court for Shawano County: THOMAS G. GROVER, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

LaROCQUE, J. Andrea White appeals an order denying her motion to disqualify the Shawano County district attorney and his assistants from prosecuting burglary and misdemeanor theft charges against her on grounds of conflict of interest.[1] The victim of White's alleged crimes is a full-time secretary in the Shawano County district attorney's office. White argues that the employment relationship between the victim and the prosecution staff

[1] We granted leave to appeal from the nonfinal order on September 27, 1995.

in a small five-person office creates an appearance of impropriety that requires disqualification. We conclude that the trial court's denial of White's motion was an acceptable exercise of its broad discretionary authority in this area. We affirm the trial court's order.

Evidence, including White's confession, as well as statements by counsel and the court at the motion hearing, establish the basis for the trial court's decision. White went to the home of Christine Radlitz, a full-time secretary in the Shawano County district attorney's office, who was holding a rummage sale. White discovered that no one was home, entered an unlocked porch and "decided to take the items without paying for them ...." She indicated that she did not enter the living quarters because the inner door was locked. She told the police she took almost everything from the porch, and after placing as many items as she could inside her car, tied some things to the outside of her car. A witness had observed the incident and called the police who later apprehended White with the goods still in her car. White gave the police a written statement of admission.

Counsel for each side made further representations, either in trial briefs or statements in open court, which, while not presented under oath in evidentiary form, were tacitly accepted as a basis for the trial court to resolve the motion. Because neither side objected to these uncontested factual assertions, we will treat them as stipulated facts.

The Shawano County district attorney's office consists of three attorneys and two secretaries, who work with each other every day on a close personal basis under circumstances in which trust and confidence are essential. Radlitz, one of the secretaries, as well as some of her relatives are potential witnesses in the case against White. The Shawano County district attorney, Gary Bruno, has been the county's prosecutor for almost eighteen years. It is not unusual for him to be called upon to prosecute cases where he knows the victims or the defendants personally. He advised the court that "[t]his matter is being handled just like any other burglary case." The district attorney made offers of settlement to White's former counsel several months before the motion hearing. The offer was "identical to offers that [the district attorney's office makes] in all first time offender burglary cases." White has a criminal record consisting of two misdemeanor retail thefts and an obstructing conviction, all in the 1980s.

White's defense counsel advised the court that she was not accusing the district attorney of handling this matter any differently from the way he may have handled others. White did not raise an issue regarding the application of a statutory disqualification.[2] White relies instead upon the close employment relationship as the basis of an appearance of impropriety.[3]

This court previously determined that an appearance of impropriety is a sufficient basis for the disqualification of a prosecuting attorney. ***State v. Retzlaff***, 171 Wis.2d 99, 490 N.W.2d 750 (Ct. App. 1992). In ***Retzlaff***, we decided:

> A court may disqualify counsel based upon an appearance of impropriety if the conduct is sufficiently aggravated. The issue whether the conduct is sufficiently aggravated is submitted to the trial court's discretion. ... While the appearance of impropriety is not a basis

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[2] Section 978.045 (1g), STATS., provides in relevant part:

> A court on its own motion may appoint a special prosecutor under sub. (1r) or a district attorney may request a court to appoint a special prosecutor under that subsection.

Section 978.045 (1r) provides in relevant part:

> The judge may appoint an attorney as special prosecutor if any of the following conditions exists:
>
> ....
>
> (h) The district attorney determines that a conflict of interest exists regarding the district attorney or the district attorney staff.

[3] White has neither alleged nor shown *actual* prejudice in respect to the matter at issue, and has not raised an issue with the trial court's finding of no actual prejudice. In fact, defense counsel stated to the trial court that she did not accuse the prosecutor of handling this matter any different from any other cases in his office. Finally, there was no evidence presented that Radlitz had any actual influence on the exercise of the district attorney's decisions in this case. White did allude briefly to the fact that Radlitz wrote a cover letter accompanying discovery material from the prosecution to the defense, but she does not pursue the significance of that action. The trial court expressly drew the inference that Radlitz was merely performing routine duties as a secretary. Where two competing inferences can be drawn from the facts, we are bound to accept the inference drawn by the finder of fact. ***State v. Friday***, 147 Wis.2d 359, 370-71, 434 N.W.2d 85, 89 (1989). We conclude that the finding of no actual prejudice is not clearly erroneous.

> for automatic disqualification, it is an element that the trial court may consider in making disqualification determinations.
>
> ... We recognize that some fact situations are so clearly detrimental to the integrity of the legal profession and the administration of justice that counsel should be disqualified as a matter of law.

Id. at 103, 490 N.W.2d at 752.

In ***Retzlaff***, a district attorney determined that a theft case against Retzlaff did not have prosecutive merit. ***Id.*** at 100, 490 N.W.2d at 751. The crime victim donated $300 to the district attorney's successful opponent in the next election, the largest contribution to the campaign outside that of the candidate himself and his spouse. ***Id.*** at 101, 490 N.W.2d at 751-52. The new district attorney reviewed several cases for prosecutive merit and decided to charge Retzlaff in the theft case. ***Id.*** at 101, 490 N.W.2d at 752. We decided the trial court did not erroneously exercise its discretion when it refused to disqualify the district attorney based upon the facts presented.

A circuit court possesses broad discretion in determining whether the facts of a case warrant the disqualification of counsel. ***Burkes v. Hales***, 165 Wis.2d 585, 590, 478 N.W.2d 37, 39 (Ct. App. 1991). A discretionary determination must be made upon the facts appearing in the record and in reliance on the applicable law. Additionally, and most importantly, a discretionary determination must be the product of a rational mental process by which the facts and law relied upon are stated and considered together for the purpose of achieving a reasoned and reasonable determination. ***Hartung v. Hartung***, 102 Wis.2d 58, 66, 306 N.W.2d 16, 20-21 (1981). Although the trial court did not make formal findings of fact, this court may affirm the trial court if it reached a result that the evidence would sustain had a specific finding supporting that result been made. *See* ***Moonen v. Moonen***, 39 Wis.2d 640, 646, 159 N.W.2d 720, 723 (1968). The parties agree that a prosecutor has an ethical responsibility to seek justice, not merely to seek a conviction. *See* STANDARDS FOR CRIMINAL JUSTICE, THE PROSECUTION FUNCTION 3-1.1(c) (1980).

The undisputed evidence made known to the trial court supports its determination that there was an insufficient appearance of a conflict of

interest to require disqualification. The district attorney's office had in place long established and well-known guidelines for disposition of criminal cases. The district attorney offered the same disposition to White as he did to other first-time burglary defendants, although White has prior theft convictions. The trial court took judicial notice, based upon approximately eighteen years of experience with the incumbent district attorney, that the guidelines were "follow[ed] religiously" in resolving criminal matters. Although White is charged with a serious felony, it is a property crime with no apparent aggravating circumstances, and there is no evidence that the victim expressed an opinion regarding disposition of the matter.

Finally, in ***Retzlaff*** we upheld the trial court's consideration of prosecutive merit in weighing any appearance of impropriety. ***Id.*** at 105, 490 N.W.2d at 753. The alleged evidence against White suggests there was an eyewitness to the crime, White was apprehended by the police shortly thereafter with the stolen property still in her possession and she gave a written confession to the police.

We decline to adopt White's suggestion for disqualification of the district attorney's staff as a matter of law, despite the absence of a finding of actual prejudice. We conclude, as we did in ***Retzlaff***, that unless the appearance of impropriety is sufficiently egregious, disqualification is a matter of trial court discretion properly exercised. Absent a showing of actual prejudice or egregious circumstances, deference to trial court discretion is influenced by practical considerations. Prosecutors in medium-sized and small counties are inescapably placed in ethical predicaments rooted in an infinite variety of relationships of various degrees of proximity. As public officials in a small community, they inevitably deal with victims, witnesses and defendants in social, professional and political contexts. While we view the issue here as a close call, whether the particular relationship calls for recusal of a prosecutor and his staff absent a showing of actual prejudice is fact specific, and not subject to any bright line test. It must be resolved on a case-by-case basis as was suggested by the analysis in ***Retzlaff***.

Because the trial court applied the evidence of record to the relevant legal standards to reach a reasonable conclusion, it acted within the boundaries of its broad discretion to deny the motion.

By the Court. – Order affirmed.

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