

IN THE MISSOURI COURT OF APPEALS

FOR THE

WESTERN DISTRICT OF MISSOURI

NO. 65540

STATE OF MISSOURI, Appellant,

vs.

KENNETH MIDDLETON, Respondent/ CrossAppellant,

Appeal from the Circuit Court of Jackson County, Missouri
16th Judicial Circuit
The Honorable Edith L. Messina

BRIEF FOR CROSS-APPELLANT

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***(Oral Argument Requested: 22 min. total)**

United States Constitution and the Constitution of Missouri, Article I, Section 10), because: (1) the prosecutor had an improper, undisclosed financial interest in the outcome of the case arising from his referral of the victim's family to the prosecutor's father's law firm for representation in wrongful death/probate actions brought against Cross-Appellant; and, (2) the prosecutor ordered the release of jewelry worth over \$18,000 to a witness three days after the jury's verdict, thereby circumventing known pending probate proceedings, and creating, at best, the appearance of impropriety with a trial witness. These actions reflect negatively upon the administration of justice and cast doubt upon the integrity of the prosecutor as well as the proceedings.

Standard of Review

The standard of review applicable to the preceding Point should be employed in considering this allegation of error as well. State v. Moore, 99 S.W.3d 579 (Mo. App. S.D. 2003)(legal conclusions reviewed *de novo*).

Prosecutorial Misconduct/ The Trial Court's Ruling

After the criminal trial ended, Mr. Middleton learned that Katherine Middleton's surviving sisters had retained the law firm where Prosecutor Pat Peters' father was of counsel to pursue a wrongful death action. (LF Vol. II p. 296, Ex. 37, p. 2; LF Vol. II p. 297, Ex. 38) This potential compromise of Mr. Peters' obligated objectivity was not disclosed to the defense. (LF Vol. II p. 305, Ex. 42) This conflict of interest and

potential subjective interest in the outcome of Mr. Middleton's criminal trial on the part of Prosecutor Peters deprived Mr. Middleton of due process and a fair trial.

Worse yet, just three days after trial, Pat Peters directed Detective Ray Vasquez to give State's witness Mildred Anderson, (the sister-in-law of Kenneth Middleton), \$18,700 worth of jewelry which was not run through Katherine Middleton's pending probate estate. (LF Vol. III pp. 424-25, Ex. 55, Ray Vasquez' deposition; LF Vol. II pp. 333, 336, Ex. 45, p. 1, 4; see also, LF Vol. II p. 299, Ex. 38, letter from firm to Middleton refusing to provide information about the jewelry given to Anderson)

The Circuit Court ruled that no misconduct on the part of Mr. Peters was proven. The Court found Mr. Peters credible when he testified that he did not recall referring the wrongful death case against Mr. Middleton over to Peters' father. Moreover, Peters testified that neither he or his father received a financial benefit from that civil litigation. (LF Vol. V p. 856) As regards the provision of jewelry to witness Anderson, the Court found Mr. Peters credible when he testified that it was routine to instruct detectives to release such items to family members of the victim once the trial was concluded. Judge Messina also believed Peters' claims that he had no improper motive, nor was he intentionally seeking to circumvent the contemporaneously pending probate proceedings, when he ordered Detective Vasquez to give Ms. Anderson the jewelry. (LF Vol. V p. 858)

Cross-Appellant submits that these findings and conclusions run contrary to the weight of the evidence, and the applicable precedents.

- (1) *The prosecutor had a potentially improper, undisclosed financial interest in the outcome of the case arising from his father's firm's representation of Katherine Middleton's family in wrongful death/probate actions brought against Mr. Middleton.*

While motive is not an element of a murder charge, Pat Peters knew that without an explanation for why Kenneth Middleton was accused of shooting his wife, there would likely be no conviction. In an attempt to learn about the Middletons, and in an effort to controvert Mr. Middleton's assertion that this shooting was accidental, Peters directed Detective Vasquez to investigate their financial condition. (LF Vol. III p. 413, Ex. 55, Ray Vasquez' deposition) Vasquez learned that Mr. Middleton worked hard all of his life, amassed a fair amount of savings, and held substantial land in Arkansas. (LF Vol. III pp. 414, 416, Ex. 55, Ray Vasquez' deposition) Peters' reaction to this information was abnormal. He obtained an unprecedented bond condition from the Circuit Court which restrained Mr. Middleton from disposing of any assets without Peters' approval. (LF Vol. II p. 297, Ex. 38; LF Vol. II p. 300, Ex. 39, admitted into evidence at 2004 "29.15" Hearing Volume I, p. 90; see also LF Vol. IV pp. 554-618, Ex. 55 - Missouri Civil Case – wrongful death trial transcript; see also 2004 "29.15" Hearing Volume II, pp. 235-37 – testimony of legal expert Christopher Carter about

ethical impropriety of prosecutor seeking a condition allowing his office a voice in disposition of accused's assets during trial) There is certainly a fair inference that Peters' motives in seeking this unheard-of bond condition was to benefit his father's firm. Before seeking the condition, Peters told the press, "[M]iddleton was not a threat to others, and police were not afraid he would flee." LF Vol. II p. 301, Ex. 40, THE EXAMINER, February 28, 1990, admitted into evidence at 2004 "29.15" Hearing Volume I, p. 91)

Although Peters denied knowledge of the wrongful death case when he testified in June, 2004 (see 2004 "29.15" Hearing Volume I, p. 47), the fact remains he was well aware of it at the time of Middleton's 1991 trial. (Trial Tran. p. 298) The question which then follows is whether the civil case affected Peters' prosecutorial decisions. Most glaring under the light of this inquisition is Peters' failure to respond to trial counsel Duncan's December 20, 1990 letter asking Peters for the gun powder residue test results on Katherine Middleton's left hand. (See LF Vol. I pp. 113-14, Ex. 11) A positive test result would all but end not only the criminal prosecution, but also the wrongful death case.! Peters had at least constructive notice of his father's firm's representation of Ms. Middleton's family some 8 months prior to Duncan's letter, when Peters' father's firm wrote a letter to Detective Vasquez, notifying him that none of Ms. Middleton's personal effects should be distributed to anyone, since *the firm* had initiated the opening of a probate estate court proceeding. In other words, the April 25, 1990

letter formally announced the firm's representation of Katherine Middleton's family to the prosecution, as if it did not know already. (See LF Vol. II pp. 297-99, Ex. 38)

Peters' father's firm's representation of Katherine Middleton's family infringed the lead prosecutor's mandated impartiality, and was never communicated to Mr. Middleton or his attorney. (See LF Vol. II pp. 296-97, Ex. 37 p. 2, 38, p. 1; LF Vol. II p. 305, Ex. 42, Duncan affidavit regarding this issue) Peters' father's firm procured a \$1,350,000.00 "default judgment" against Mr. Middleton. (LF Vol. II p. 306, Ex. 43, admitted into evidence at 2004 "29.15" Hearing Volume I; p. 91) The firm also secured the entirety of Katherine Middleton's probate estate for its clients. (LF Vol. II p. 304, Ex. 41, Estate's Final Accounting) Additionally, an Arkansas chancery court judgment against Mr. Middleton will bring at least another \$150,000 to the plaintiffs. (See LF Vol. II p. 307-332, Ex. 44, admitted into evidence at 2004 "29.15" Hearing Volume I, p. 91)

There was no true attenuation between Peters and his father's firm, which was necessary to preserve Peters' mandated disinterested status. The civil judgments were obtained against Mr. Middleton by using the same evidence Peters presented in the criminal trial. (See LF Vol. V pp. 554-618, Ex. 55, Missouri Civil Case – wrongful death trial transcript)

Where the government has not revealed all facts and circumstances material to the case, the court defrauded may, on its own motion, vacate the affected judgment.

Demianjuk v. Petrovski, 10 F.3d 338 (6th Cir. 1993)(government withheld exculpatory evidence from war crimes defendant fighting extradition from Ohio to Israel; defendant subsequently acquitted; defrauded federal district court, on own motion, vacated earlier extradition motion, though rendered moot by extradition, trial and acquittal, on grounds of prosecutorial misconduct). The United States Supreme Court established a “categorical rule” against the appointment of an interested prosecutor in Young v. ex rel. Vuitton, 107 S.Ct. 2124, 481 U.S. 787, 95 L.Ed.2d 740 (1987)(holding that appointment of an interested prosecutor is so fundamental and pervasive an error that it requires reversal without regard to facts and circumstances of particular case). The Supreme Court noted that “an arrangement represents an actual conflict of interest if its potential for misconduct is deemed intolerable.” Id., 481 U.S. at 807. The Court also offered this scenario amplifying its disdain for mitigated impartiality of a prosecutor:

If a Justice Department attorney pursued a contempt prosecution for violation of an injunction benefiting any client of that attorney involved in the underlying civil litigation, that attorney would be open to a charge of committing a felony under §208(a). Furthermore, such conduct would violate the ABA ethical provisions, since the attorney could not discharge the obligation of undivided loyalty to both clients where both have a direct interest.

Id., 481 U.S. at 805.

The Supreme Court was obviously concerned with the vast discretion a prosecutor exercises in a criminal case, and was sending a clear message that such discretionary power should not be tainted by outside influences, particularly monetary gain. This concern also resonated with the Fourth Circuit Court of Appeals in Ganger v. Peyton, 379 F.2d 709 (4th Cir. 1967) which wrote, “a prosecuting attorney is a representative of the public in whom is lodged a discretion which is not to be controlled by the courts or by an interested individual.” Id., 379 F.2d at 713. The Ganger court held that when a prosecuting attorney attempts “to serve two masters” (i.e., both the public interest for purposes of the criminal case and a private interest for purposes of a related civil case), such conduct “violates the requirement of fundamental fairness assured by the Due Process Clause of the Fourteenth Amendment.” Id., 379 F.2d at 714.

In Granger, the defendant’s prosecutor was representing defendant’s wife in her divorce from defendant at time of his criminal trial, much like Mr. Peters’ father’s firm was representing Ms. Middleton’s family against Mr. Middleton. See Granger, 379 F.2d at 711-12 (“Because of the prosecuting attorney’s own self-interest in the civil litigation (including the possibility that the size of his fee would be determined by what could be extracted from defendant) he was not in a position to exercise fairminded judgment with respect to (1) whether to decline to prosecute; (2) whether to reduce the charge to a lesser degree of assault, or (3) whether to recommend a suspended sentence or other clemency.”)

As the facts reveal, Mr. Peters used his position as lead prosecutor to “serve two masters.” Mr. Peters exploited his position as representative of the public interest to extract a more generous sum in the civil suits against Mr. Middleton to benefit his father’s law firm. (See testimony of Movant’s expert Chris Carter, opining that Peters could benefit indirectly as an heir, 2004 “29.15” Hearing Volume II, p. 263; see also LF Vol. II p. 296, Ex. 37, obituary of Mr. Peters’ father) This misconduct denied Mr. Middleton his right to due process and a fair trial. See State v. Boyd, 560 S.W.2d 296, 297 (Mo. App. W.D. 1977)(“A prosecuting attorney is a quasi judicial officer, an arm of the state, and he has the duty not only to see that the guilty are brought to justice but also that the innocent go free. A vital concomitant in the exercise of either function is to assure a fair trial and avoid impropriety in any prosecution. Equally important is the duty to avoid any *appearance of impropriety*.”)(emphasis added); see also, Vaughan v. State, 614 S.W.2d 718, 724 (Mo. App. W.D. 1981)(“The general rule is that ‘[a] prosecuting attorney who has a personal interest in the outcome in a criminal prosecution such as might preclude his according the defendant the fair treatment to which he is entitled should be disqualified from the prosecution of such a case.’ State v. Harris, 477 S. W.2d 42, 44 (Mo. 1972); Mo. Rev. Stat. Section 56:110 (1978); and a defendant thus convicted has not been afforded due process of law. Ganger, 379 F.2d 709; State v. Jones, 306 Mo. 437, 268 S.W. 83 (Mo. 1924)”).

Prosecutor Peters and the Blue Springs Police Department never disclosed any of this to Mr. Middleton or Mr. Duncan at the time of trial. (See LF Vol. II p. 305, Ex. 42, Duncan affidavit; see also LF Vol. II pp. 297-99, Ex. 38, letter from firm to Vasquez confirming representation) The April 25, 1990 letter formally announcing the firm's representation of Ms. Middleton's family to the prosecution never made it into the police file from which discovery was provided to Mr. Middleton prior to his criminal trial. (See LF Vol. II pp. 297-99, Ex. 38) On September 17, 1996, Detective Vasquez admitted he decided not to send the letter to the records unit. For this transgression, Vasquez' supervisor ordered him to place an explanatory memo in his own personnel file. (LF Vol. III pp. 427-433, Ex. 55, Vasquez deposition) The next day, the letter from the law firm and the letter from Vasquez were turned over to Middleton for the first time. (LF Vol. II pp. 298-99, Ex. 38; see also LF Vol. III pp. 427-433, Ex. 55, Vasquez deposition)

Peters' non-disclosure of his father's firm's interest in seeing Middleton convicted constitutes a violation of a prosecutor's duty to turn over all exculpatory and impeaching evidence to the accused prior to trial. See State v. Robinson, 835 S.W.2d 303, 306 (Mo. 1992), citing Brady v. Maryland, 373 U.S. 83 (1963): "Prosecutors must disclose even without request, exculpatory evidence, including evidence that may be used to impeach a government witness....The prosecutor and the entire law enforcement community represents the state. The state's interest in the criminal trial

is not in convicting the innocent but that justice be done. See Bagley, 473 U.S. at 675 and n. 6.”

Mr. Middleton was therefore denied the opportunity to seek disqualification of Mr. Peters, pursuant to RSMo. 56.110, which states that, “[i]f the prosecuting attorney be interested or shall have been employed as counsel in any case where such employment is inconsistent with the duties of his office... the court having criminal jurisdiction may appoint some other attorney to prosecute... the cause.” The Missouri Supreme Court, like the United States Supreme Court in Young, *supra*, believes this to be a most serious matter, as it concerns how the justice system is portrayed, and could impinge upon the public’s confidence in public officials. As such, the Missouri Supreme Court held in State v. Ross, 829 S.W.2d 948 (Mo. 1992):

As stated in Burns, 322 S.W.2d at 742, this Court will not require a showing of actual prejudice in a case of this type. *Prejudice is presumed*, subject to rebuttal only upon a showing that the defendant waived the conflict *and* that steps were taken to insulate the actual prosecution from the conflict. ... *In every case - upon discovery by any party or counsel of the potential conflict of interest - that person shall disclose the conflict in open court in the presence of the defendant. Absent a waiver of the conflict of interest by the defendant, a special prosecutor shall be*

appointed. ... The judgment below is reversed, and the case is remanded for a new trial in accordance with this opinion.

Id., 829 S.W.2d at 952 (emphasis added)

To remedy this wrong, Mr. Middleton's convictions and sentences should be set aside, and a new trial ordered.

- (2) *The prosecutor ordered the release of jewelry worth over \$18,000 to witness Mildred Anderson three days after the jury's verdict, thereby circumventing known pending probate proceedings, and creating, at best, the appearance of impropriety with a trial witness.*

Mr. Middleton was denied his right to due process of law under the Fourteenth Amendment because the prosecution failed to disclose that just three days after trial, Pat Peters directed Detective Ray Vasquez to give State's witness Mildred Anderson, (the sister-in-law of Mr. Middleton), \$18,700 worth of jewelry which was not run through Katherine Middleton's pending probate estate. Mildred Anderson's significance to this case, besides being the lead plaintiff in Mr. Peters' father's law firm's wrongful death action against Kenneth, was that Mildred provided the State with testimony of a motive for its theory that Kenneth shot Katherine. Mildred testified at trial that Kenneth had been hiding from Katherine and her family that he had significant land holdings in Arkansas. (Trial Tran. pp. 298-99)

Mr. Peters argued the next morning that the jury should convict Kenneth because, “[f]or this man to walk out of here at the end of your deliberations so that he can spend the property of Mr. and Mrs. Middleton –” (Trial Tran. p. 535) Shortly after 1:00 p.m. that afternoon the jury returned a guilty verdict and recommended life without parole and 200 years incarceration. (Trial Tran. pp. 554-55) Three days later – after the trial but well before sentencing - Peters directed Vasquez to give Anderson the jewelry worn by Katherine. (LF Vol. III pp. 424-25, Ex. 55, Vasquez deposition; LF Vol. II p. 333, Ex. 45, p. 1; see also, LF Vol. II p. 299, Ex. 38, letter from firm to Mr. Middleton refusing to provide him information about the jewelry given to Anderson) These gems were valued *in 1991 dollars* at \$18,700. (LF Vol. II p. 336, Ex. 45, p. 4)

Years later, on March 25, 1999, Mildred Anderson gave testimony in the Arkansas lawsuit against Kenneth Middleton which shows she perjured herself in February, 1991 (a class A felony in Missouri, prohibited by RSMo. 575.040(1)). Mildred testified that she and her family had indeed been fully aware of all assets belonging to Kenneth Middleton, including those properties in Arkansas, *prior to Katherine Middleton’s death.* (LF Vol. II pp. 309-10; 320-21, Ex. 44, Arkansas trial transcript; see also 311-14; Geraldine Lockhart (Mildred’s sister) at 321, 322-24, 325, including Anderson’s and Lockhart’s lists of Mr. Middleton’s Arkansas assets) Mr.

Middleton had been hiding nothing from his wife. There was no motive for him to have shot her, contrary to the State's speculative and erroneous closing argument.

There can be no doubt that the State erred unforgivably by this misconduct. First, the lead prosecutor and a detective provided a significant amount of jewelry to a prosecution trial witness just 4 days following her testimony, thereby allowing her to circumvent pending probate proceedings and avoid sharing this \$19,000.00 windfall with other family members. See Missouri Supreme Court Rules 4-3.4(b) ("Fairness to Opposing Party and Counsel"), 4-3.8 ("Special Responsibilities of a Prosecutor") and 4-8.4 ("Misconduct"); see also Boyd, 560 S.W.2d at 297 ("A prosecuting attorney is a quasi judicial officer, an arm of the state, and he has the duty not only to see that the guilty are brought to justice but also that the innocent go free. A vital concomitant in the exercise of either function is to assure a fair trial and avoid impropriety in any prosecution. Equally important is the duty to avoid any *appearance of impropriety*.")(emphasis added).

Secondly, no one disclosed any of this to the accused or his attorney despite the obligation to do so, even if Peters' influence over the civil case amounted to merely an "appearance" of impropriety.³ (See 2004 "29.15" Hearing Volume II, p. 240 – testimony

³ Cutting against the idea of categorizing this as a mere "appearance" of impropriety is Mildred Anderson's strange deposition testimony wherein she actually attempted to convince Middleton's counsel that she really could not recall receiving any jewelry

of legal expert Christopher Carter, "It is basically a gift to a witness."; see also Robinson, 835 S.W.2d at 306; Trimble v. State, 693 S. W.2d 267, 274 (Mo. App. W.D. 1985)(conviction vacated where victim's mother *may* have given money to state's witnesses).)

These issues reflect so poorly on the administration of justice that they cry out for remedy. See State v. Mims, 674 S.W.2d 536, 538 (Mo. 1984)(conviction based upon perjured testimony consciously used by prosecutor must be vacated; re-trial only appropriate where State's use was without knowledge of falsity); see also State v. Clover, 924 S.W. 2d 853, 856-57 (Mo. 1996)(re-trial barred by Double Jeopardy clause of Constitution prosecutor's misconduct intentional); State v. Miner, 748 S.W.2d 692, 693-94 (Mo. App. E.D. 1988)(double jeopardy claim must be presented in same proceeding as assertion of misconduct); United States v. Wallach, 979 F.2d 912, 914 (2nd Cir. 1992)(standard for vacating conviction is not just whether prosecutor *knew* testimony was false, but also in cases where prosecutor *should have known*); accord, United States v. Catton, 130 F.3d 805, 808-09 (7th Cir. 1997)(following Wallach, but denying request for application of double jeopardy bar to re-trial because defendant did

whatsoever from the State after the verdict, that is until she was reminded that one of the rings she got that day in 1991 was the same ring she wore just 10 days later during the Chancery Court trial. Compare Anderson deposition excerpt, LF Vol. II pp. 330-32, Ex. 44 against LF Vol. II pp. 317, Ex. 44, Chancery Court excerpt)

not request hearing at which he could have shown prosecutor's wrongful use of testimony was done knowingly).

In spite of a prosecutor's unequivocal duty to safeguard the integrity of criminal proceedings, the conduct of the prosecution in the case at bar infected the trial with unfairness so as to make the resulting conviction a denial of due process. Mr. Middleton, unfortunately, is the victim of egregious prosecutorial misconduct, where his rights were subverted. The former Missouri Governor and Jackson County Prosecutor, Joseph P. Teasdale, who also served in the United States Attorney's Office, testified that he sent a letter to former Jackson County Prosecutor (now, the Honorable) Bob Beaird which stated:

I wanted to write you to thank you for meeting with Cliff Middleton and I on January 23, 2001, regarding Mr. Ken Middleton's case. My request was that you read the sixty-two (62) page brief with exhibits which corroborate Ken Middleton's allegations of gross ineffective assistance of counsel with serious prosecutorial misconduct. I also requested you to read the trial transcript which contains a 'fabricated confession' in closing argument. ... In the cases of State v. Storey, 901 S.W.2d 886 at 900 (Mo. 1995), and State v. Weiss, 24 S.W.3d 198 (Mo. App. W.D. 2000), both prosecutors in each case considered closing argument as testimony.

... In all my 41 years [as a lawyer], this is the worst violation of
defendant's Constitutional Rights that I have witnessed. !

(LF Vol. II p. 294, Ex. 36, admitted into evidence at 2004 "29.15" Hearing Volume I,
p. 43)

Governor Teasdale also testified at the June, 2004 hearing, and stated that
if Mr. Middleton's case had been brought to his attention during his tenure in
office, Governor Teasdale would have pardoned him. ! (2004 "29.15" Hearing
Volume I, p. 43)

The prosecution in this case "overstepped the bounds of fairness" so crucial to
our system of justice. This type of prosecutorial misconduct should not be tolerated.
Because the State's misconduct was an offense to the appearance of ordered justice as
well as a direct violation of Mr. Middleton's right to due process of law, his convictions
and sentences should be vacated on this point alone, and he should be discharged.

CONCLUSION

WHEREFORE, in light of the above and foregoing, Mr. Middleton respectfully
requests that if this Court somehow finds error with the Circuit Court's ruling that he
receive a new trial because of the cumulative ineffectiveness of his trial counsel, the
Court nevertheless affirms that Mr. Middleton's convictions be vacated and set aside,
and he should be discharged, or in the alternative, a new trial should be ordered for him,
based on each of the grounds raised in this brief, independently and/or collectively.

Respectfully submitted,

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Certificate of Compliance

I hereby certify that the above and foregoing complies with all limitations and type-volume restrictions set by Missouri Supreme Court Rule 84.06(a). This brief contains 24,364 words in 2,090 lines of monospaced type. This brief was typed on a computer utilizing Microsoft Word 6.0, but the format has been saved to allow for viewing and/or modification on a computer utilizing Microsoft Word 5.0. Furthermore, the diskettes accompanying this brief, on which it is saved, have been checked for viruses by the undersigned.

Jonathan Laurans

Certificate of Service

I hereby certify that two copies of the above and foregoing brief of Appellant were placed in the United States mail, postage pre-paid, this 11th day of October, 2005 to: Mr. Shaun Mackelprang, Assistant Attorney General, Post Office Box 899, Jefferson City, Missouri 65102.

Jonathan Laurans