Everett E. SHELTON v. STATE of Arkansas

CR 81-53 627 S.W. 2d 18

Supreme Court of Arkansas
Opinion delivered January 25, 1982

1. CRIMINAL LAW — PRESUMPTION OF EFFECTIVE ASSISTANCE OF COUNSEL — BURDEN ON PETITIONER TO SHOW PREJUDICE RESULTED. — There is a presumption of effective assistance of counsel, and it is the duty of a petitioner who alleges ineffective assistance of counsel to overcome this presumption and show he was prejudiced by the conduct of his counsel. *Held:* Petitioner has not met the burden of proving prejudice as a result of the assistance which the public defender gave him during the trial.
2. CONSTITUTIONAL LAW — RIGHT OF PETITIONER TO REPRESENT HIMSELF — ACTION BY TRIAL COURT DIRECTING THAT PUBLIC DEFENDER ADVISE PETITIONER DURING TRIAL, EFFECT OF. — The

fact that the court asked the public defender to sit with petitioner and advise him during the trial did not violate petitioner's right to represent himself throughout the trial.

Petition to proceed pursuant to Rule 37, Arkansas Rules of Criminal Procedure; petition denied.

Lessenberry & Carpenter, by: *Thomas M. Carpenter,* for appellant.

Steve Clark, Atty. Gen., for appellee.

PER CURIAM. This is a petition pursuant to Rule 37.2, Arkansas Rules of Criminal Procedure (Repl. 1977). Petitioner contends he was effectively denied assistance of counsel at his original trial. The case was affirmed in the original action in an unpublished opinion by the Court of Appeals on April 29, 1981 (CA CR 81-35).

Briefly, the history of the case reveals petitioner was charged with theft of property in excess of $2500 in violation of Ark. Stat. Ann. § 41-2203 (Repl. 1977). He engaged the services of three different attorneys but for one reason or another all three were disqualified or resigned. On February 29, 1980, the public defender was appointed to defend the petitioner and the case was set for trial on April 10, 1980. At a hearing on April 1, 1980, the petitioner persuaded the court to allow him to serve as his own defense counsel at the trial. Although the court attempted to persuade the petitioner that it would not be wise for him to do so, it nevertheless granted petitioner the right to proceed as his own attorney. The court then informed the public defender to continue to serve in an advisory capacity and to be available for the trial. The petitioner requested an out-of-state attorney be present to testify on his behalf but for some unknown reason the out-of-state attorney was either not contacted or did not appear. However, the parties stipulated into the record what the testimony of this witness would have been had he been present. The petitioner had also requested the presence of two other witnesses and another attorney. No subpoena was issued for the local attorney, and the two other witnesses did not appear.

The trial was held on April 10, 1980; petitioner was convicted of theft of property and sentenced to a term of 20 years in the Arkansas Department of Correction with five years suspended. During the course of the trial petitioner encountered much difficulty in cross-examining witnesses. The court became annoyed by the frequent conferences between the petitioner and the public defender. The court ordered the public defender to sit down and keep quiet until the defendant requested him to do something on his behalf. On another occasion the court called a brief recess and instructed the petitioner to get with his attorney during the recess and prepare to finish the trial. Later, the court told the petitioner he was apparently unable to couch his questions in proper form but the public defender would be able to do so and thus enable the court to make a proper ruling. Petitioner was informed by the court he could still object if he disagreed with the actions of the public defender. The petitioner agreed with this proposal and allowed the public defender to do the questioning from that point on with some minor exceptions when the petitioner injected himself into the proceedings. For all practical purposes the public defender conducted the balance of the trial until the state rested.

After the state rested the public defender made several motions which were denied by the court. The court was then informed that the petitioner did not wish to take the stand. This statement was verified by the court asking the petitioner if the statement was correct and by the petitioner agreeing that he did not wish to take the stand. In fact, at this time petitioner stated that whatever the public defender said was all right with him. The court then stated:

> You're the attorney, now, and this is a judgment that you can make. Mr. Rosenzweig is just trying to get you through the technical areas of getting evidence into the court and keeping evidence out of court. But this is an area in which you can have just as much judgment as Mr. Rosenzweig. He can advise you but is this your decision in this case?
>
> MR. SHELTON: Yes, sir.

THE COURT: Not only that you not testify but do not desire to call any witnesses?

MR. SHELTON: No, sir.

THE COURT: Go ahead.

At no time during the trial did the public defender indicate to the court that he was unprepared to proceed or participate with the trial. Neither did the petitioner argue that the public defender was not prepared to try the case. The record indicates the petitioner did want to call two local witnesses and an attorney but for some reason they were not subpoenaed. Also, he claimed his wife should have been allowed to testify. His statement at the conclusion of the state's case and upon rejection of his motions was plainly to the effect that he did not wish to present any evidence. Nevertheless, the two local witnesses would have been able to testify only concerning a collateral matter. The out-of-state attorney was present by stipulation and no part of the stipulation was rejected by the state and no additional stipulation was requested by the petitioner. Therefore, it does not appear that the petitioner was prejudiced by the failure of this witness to appear. The petitioner knew far better than anyone else what his wife would have been able to testify to and he chose not to have her present. This is merely one of the dangers one runs into in representing himself in a criminal procedure. He was told by the court he had a constitutional right to represent himself but he was urged strongly not to do so and warned that he would probably run into much difficulty in representing himself.

We recently held in the case of *Blackmon* v. *State*, 274 Ark. 202, 623 S.W. 2d 184 (1981), that there was a presumption of effective assistance of counsel and it was the duty of a petitioner to overcome this presumption and show he was prejudiced by the conduct of his counsel. It was there stated:

> We now hold that in addition to showing prejudice the appellant must show by clear and convincing evidence that the prejudice resulting from the representation of trial counsel was such that he did not receive a fair trial.

Under the circumstances and facts of this case we do not feel the petitioner has met the burden of proving prejudice as a result of the public defender's representation of him during the trial.

We disagree with petitioner in the matter wherein he states the court relieved him as his own attorney and appointed the public defender during the middle of the trial. The public defender was first appointed on February 29, 1980, and slightly more than a month later was relieved at the request of petitioner. On April 1, 1980, petitioner was allowed to proceed pro se but the court wisely ordered the public defender to be present at the trial and to sit with and advise the petitioner during the course of the trial. The trial was held on April 10, 1980. The court never stated that it was taking the petitioner out of the case in his capacity as his own attorney but did obtain consent from the petitioner to allow the public defender to go forward with a portion of the trial. The proceeding in this case did not violate petitioner's right to represent himself throughout the trial. *Faretta* v. *California,* 422 U.S. 806 (1975).

Petition denied.