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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-v-

JULIE J. LIVERMORE,

Defendant-Appellant.

No. 53072
Application for
Leave to Appeal

TO: Judges
FROM: Marilyn Morris Wanger
DATE: January 27, 1981; for submission February 10, 1981.

COMMISSIONER'S REPORT

FACTS:

Defendant, who was represented by Alphonse Lewis, Jr. a Grand Rapids attorney, has filed an application for leave to appeal from the July 17, 1980 order of dismissal in which acting circuit judge David E. Burrows affirmed defendant's conviction for cruelty to animals following a 77th District Court bench trial on January 12, 1978 before District Judge Robert L. Miles. A copy of that order, Judge Burrows' opinion, and an order staying sentence and continuing bond are attached to the application.

According to the complaint, a copy of which is attached to the application, defendant was charged with a misdemeanor in which the punishment was imprisonment for not more than 3 months and/or a fine of not to exceed $500 plus costs. Defendant has been sentenced to 30 days in jail, but has not served them yet because of the stay pending appeal.

According to the certified concise statement of proceedings and facts, defendant was initially represented by Attorney Walston. He obtained a trial date of January 12, 1978. On December 27, 1977 Walston agreed to a substitution in his place of Attorney Alphone Lewis, Jr., for the purpose of representing the defendant in this case.

Defense counsel Lewis alleged that District Judge Miles, on December 23, 1977, agreed to an adjournment of the trial to be held at Big Rapids, because defense counsel would be in Kent

County Circuit Court that day and would not accept the case without an adjournment.

On December 28, 1977, District Judge Miles wrote a note to defense counsel stating that "Neither Attorney Walston nor the prosecutor's office * * * knows of Ms. Livermore's desiring to change her attorney". Further, the note said that an adjournment would not be granted.

On January 9, 1978, defense attorney Lewis received a notice of trial, also for January 12, 1978. The notice was dated January 4, 1978. Counsel talked to the prosecutor by phone that night.

Upon receipt of the trial notice, defense counsel filed a motion for continuance to be heard on January 11, 1978 at 1:30 p.m. The district judge informed defendant by phone that there was no need to come to Big Rapids or Reed City as the motion was denied. This motion was renewed on January 12, 1978, including the stated agreement of the judge for such adjournment before acceptance thereof by counsel, and the court's directions to his clerk and the prosecutor.

The district judge had no jury in court for trial and no waiver, but discovered that defendant had not been arraigned on the complaint and warrant. The court then arraigned defendant and when she pleaded not guilty, he refused a demand for a jury trial.

The defendant also filed a motion to disqualify the district judge and an affidavit, under DCR 405 (repealed, January 18, 1978).

Defendant states the issues to be:

I. "WHETHER A DISTRICT JUDGE WHO GRANTS AN INCOMING COUNSEL ADJOURNMENT OF A KNOWN TRIAL DATE AS A CONDITION FOR ENTRY OF AND CHANGE OF COUNSEL CAN UNILATERALLY CHANGE THE ARGUMENT AND REFUSE THE CONTINUANCE WHERE COUNSEL IS REQUIRED TO BE IN CONTINUATION OF TRIAL IN A CIRCUIT COURT."

II. "WHETHER APPELLANT'S RIGHT TO A JURY TRIAL CAN BE DENIED WHERE NOT WAIVED AND WHERE SPECIFICALLY DEMANDED UPON ARRAIGNMENT ON THE NEW WARRANT MAKING A NEW CHARGE WHICH WAS NOT PRESENTED TO COUNSEL UNTIL THE ALLEGED TRIAL DATE."

III. "WHERE A MOTION TO DISQUALIFY A JUDGE IS FILED, SUPPORTED BY AFFIDAVIT OF PREJUDICIAL OPINION OF GUILT, CAN THE COURT PROCEED TO TRIAL AND AVOID REQUESTED COMPLIANCE WITH FORMER DCR 405?"

DISCUSSION:

Initially, defendant contends that it was reversible error for the district judge to refuse a continuance because the district judge had agreed with counsel that he would adjourn the known trial date as a condition for entry of and change of defense counsel. Further, defense counsel contends that on the district court trial date, January 12, 1978, he was to appear for continuation of a trial in Kent County Circuit Court.

The People have answered contending that the trial judge did not abuse his discretion in denying an untimely motion for continuance. Further, they point out that defense counsel did in fact appear on the scheduled district court trial date, in spite of earlier protestations of impossibility, and so no constitutional right to counsel is alleged or shown to be involved in this case. The circuit court in this opinion noted that the factual situation in this case was somewhat complex and not without some apparent discrepancy. For example, he noted that Judge Miles denied Attorney Lewis' claim that a continuance had been agreed upon between them prior to Lewis becoming defense counsel. The actual holding of the circuit judge on this first issue seems to be that when an attorney accepts a case in which he knows a trial has been scheduled within 20 days and is notified by the trial court orally at least one week before the trial that no continuances will be allowed, the trial court has not abused its discretion when it denies a request for a continuance when written notice of the motion was not made at least 4 days before the scheduled hearing, citing DCR 108.4. The circuit judge found that defense counsel had failed to comply with that rule and that there was no abuse of discretion on the part of the trial court in denying the motion for continuance. He noted that Attorney Lewis had sufficient time to prepare for trial, or in the alternative, to

do what was necessary to obtain adjournment.

The granting or denial of a continuance lies within the trial court's discretion, and absent an abuse of discretion this decision will not be overturned. People v Masonis, 58 Mich App 615, 619 (1975). DCR 108.4 does provide that a written motion, other than one which may be heard ex parte, and notice of a hearing thereof shall be served not later than 4 days before the day specified for the hearing, unless a different period is fixed by the court rules or for good cause shown, and in such latter event, authorization by the court shall be endorsed in writing on the face of the notice or by separate order. When a motion is supported by an affidavit, the affidavit shall be served with the motion; and except as otherwise provided by the court rules, opposing affidavits may be served not later than one day before the hearing, unless the court permits them to be served at some other time.

It appears that there was clearly no abuse of discretion in denying the continuance in this case, unless the district judge had agreed with defense counsel, prior to his accepting the case, to allow an adjournment of the trial date. Resolution of that issue depends, in this case, upon credibility, apparently. The People have quoted in their counterstatement of facts from the transcript with regard to the alleged agreement. The colloquy between the court and defense counsel follows and shows that the court emphatically denied such an agreement.

"MR. LEWIS: Your Honor, would it be fair to state for the record that I did not accept the retainer in this case until I talked with this court and arranged for an adjournment of the 12th based on the fact that I had to appear in Circuit Court in Kent County today, and that was done at the time that these people were able to first talk to me personally after having tried to get ahold of me in Mecosta County Circuit Court while I was engaged in a trial until last Friday night at ten o'clock?

"THE COURT: It might be fair, but it's not true.

"MR. LEWIS: Well . . .

"THE COURT: So that is my comment on that. It is not true that you arranged with this court for an adjournment of this case. You were told to contact the Osceola County Prosecuting

Attorney. That is what you were told. You were not--you are not telling the truth when you say that you arranged with this court for the adjournment of this case from this date." (Tr, pp 7-8; emphasis in original.)

The People also quote in their counterstatement of facts from an earlier portion of the trial transcript where the court made the following statement:

"Now, I've been through this before with you, counsel, I have been in conversation with you a great many times, and by telephone as well; and I don't want to hear anymore about your convenience or your inconvenience or anything else in this case. This case was set for trial on this date and there has been a substitution of attorneys filed as late as January 4th, 1978 in this court, whereby the former attorney, Mr. Stanley J. Walson, Attorney of Howard City, Michigan, has substituted in his place and stead Mr. Alphonse Lewis, Attorney of Grand Rapids, Michigan. Now in that--in that situation, knowing as of that time that this case was set for trial, that it does involve livestock, and a crime charged in connection with abuse of livestock, and this court has told you not once, but a number of times, Mr. Lewis, that this case would not be adjourned or postponed in advance of your filing your Motion and everthing else. Now, this matter has been adjourned and postponed at the request of the defendant for a number of times and I have said that that is the last adjournment and that's exactly what the court meant. If you could not take this case on then you should have rejected it. . . ." (Tr, p 2; emphasis in original.)

It appears that the acting circuit judge was reluctant to decide the credibility issue as between counsel and the district judge, and therefore avoided it by reliance on counsel's failure to comply with DCR 108.4, coupled with counsel's knowledge some 6 or 7 days before that the district judge would not grant him a continuance.

For the Court's information, this Court's file contains what appears to be a Clerk's office notation indicating some question as to whether or not defense counsel has been disbarred, and acceptance of his pleadings on the basis that there had been a temporary stay of discipline entered. Also, for the Court's information, this Court's file contains what appears to be a notation in the district judge's handwriting, signed by him, and dated December 28, 1977, which reads:

"People v Livermore will be tried Jan. 12, 1978 at 9:30. No further adjournments will be granted.

"Neither Attorney Walston nor the Prosecutor's Office at Reed City knows of Ms. Livermore desiring to change her attorney, nor will the prosecutor consent to further delay to such purpose. Nor will I grant same."

Also of interest is part of the concluding paragraph of Osceola County Acting Circuit Judge Burrows' opinion which reads:

"In conclusion, it is apparent from the pleadings and actions of defense counsel that delaying tactics were being employed, and it is apparent that Judge Miles was equally determined to get the matter heard without further delay -- at least one adjournment has already been granted defendant. I find no error. * * * "

It appears to the writer that the first issue, relative to denial of a continuance lacks merit.

The second issue presented by defendant relates to her right to a jury trial. It is defendant's position that her right to a jury trial was not waived and cannot be denied where her counsel specifically demanded it upon arraignment on the date set for trial.

It is the People's position that a right to a jury trial was waived because it was not demanded in this case until after the court had convened the cause for trial.

Acting Circuit Judge Burrows ruled on this issue that where defendant had received two notices that her trial was scheduled as a non-jury trial, the court did not err in denying her motion for a jury trial when that motion was not made until the trial date. He said that to permit a defendant to wait until the time of trial to demand a jury could only result in delay and confusion. In support of his ruling, the acting circuit judge relied upon DCR 508.2 and 508.4. Those subrules provide that any party may demand a jury trial of any issue so triable by right by filing a demand and paying the jury fee not later than 10 days after filing of the answer, and that failure of a party to file a demand and pay the jury fee as required by the rule, constitutes waiver of trial by jury. The acting circuit judge tried to avoid defense counsel's argument that Rule 508 applied only to civil cases, not criminal cases, by relying on DCR 11. However, examination of that rule shows that it simply states that the district court rules also govern the practice in criminal actions "to the extent indicated". Both the acting circuit court

and the People have ignored the fact that DCR 785 specifically applies to criminal procedure and that subrule DCR 785.4 provides that whenever a defendant is arraigned on an offense over which the district court has jurisdiction he must be informed of, among other things, his right to a trial by jury (unless he is charged under an ordinance that does not correspond to a criminal statute or permit a jail sentence). That exception does not apply to this case, and so when the district court arraigned defendant on the day of trial, January 12, 1978, he was obliged to inform her of her right to a trial by jury. It is undisputed that defense counsel requested a jury trial on the day of trial, which was also the day of arraignment in this case. The trial court denied that request. It appears to the writer that reversible error occurred in this case when the demand for jury trial was denied. The writer would agree with the circuit court that ordinarily waiting until the time of trial to demand a jury could only result in delay and confusion and should not be allowed. However, in the present case, the district court apparently determined that defendant had not been previously arraigned on the charge. This being so, there would be little point in the district court being obliged to advise defendant of her right to a trial by jury and then denying the exercise of that right which was attempted on the same day.

In his opinion, the circuit judge cited People v Masonis, 58 Mich App 615 (1975) as authority for the proposition that in trials for offenses that can result in a maximum of 3 months imprisonment and/or a maximum fine of $500, waiver of defendant's right to a trial by jury is implied where the defendant proceeds to trial without objection and without any indication of a desire for a jury trial. In fact though, that case does not help the circuit court's position because defendant in the present case did not proceed to trial without objection and without any indication of a desire for a jury trial.

A further indication that the circuit court was in error in relying upon DCR 508 as applying to criminal cases as well as civil cases is found in the copy of the notice of trial attached to the application and dated January 4, 1978. The form language states in part "If your case is set for trial a jury may be demanded no later than four days before the TRIAL Date."

DCR 508 provides for a trial by jury in a civil case where a party has demanded a jury trial and pays the jury fee not later than 10 days after filing of the answer. Clearly, the language in the notice of trial issued in the present case which allows for a jury trial where demanded no later than 4 days before the trial date is quite different from the jury demand requirements of DCR 508.

Additionally, the writer is not persuaded by the fact that defendant's attorneys each received a notice of a non-jury trial date. While such notice could constitute waiver on the part of the attorney, the writer does not see how it can constitute waiver on the part of the defendant herself when she had not yet been arraigned personally by the district court and informed of her right to a jury trial. DCR 785.4 does provide that the information which the district court must give a defendant whenever arraigned on an offense may be given in a writing that is made a part of the file, or by the court on the record, but the writer seriously doubts that a waiver of jury trial can come before the defendant knows that she personally has a right to a jury trial. At least, the issue seems to warrant review by this Court.

Defendant's final argument is that where a motion to disqualify a judge is filed, supported by affidavit of prejudicial opinion of guilt, the court cannot proceed to trial and avoid the requested compliance with former DCR 405.

Subrule DCR 405.2, since repealed, provides that:

"Whether or not the challenged judge has refused to disqualify himself, whenever the motion is supported by affidavit, another judge from the same district or a judge from any other district upon assignment by the court administrator, shall hear the facts alleged and rule on the motion. Only one such motion shall be filed as to any judge." (Emphasis added.)

It is defendant's position that since this motion for disqualification of the trial judge was supported by an affidavit of defendant, and that since the district judge refused to disqualify himself, the motion should have been ruled upon by another judge from the same district or a judge from any other district upon assignment by the court administrator.

The People reply that there was no error in denial of a belated, unmeritorious motion to disqualify. They ignore the defendant's argument that the motion should have been ruled upon by another judge.

Acting Circuit Judge Burrows, in his opinion, stated that the issue of disqualification of the trial judge was an interesting one. He then stated that GCR 1963, 912 applies to the matter of disqualification of judges in the district courts of the State of Michigan, and proceeded to rely upon subrule 912.3(a) as supporting a finding that counsel's motion for disqualification was not timely.

The difficulty with that analysis is that the court rule that applied to disqualification of the trial judge in this case was DCR 405, not GCR 912. DCR 405 was not repealed until January 18, 1978, 6 days after the January 12, 1978 trial date in this case, which was also the date that the motion was made for disqualification of the trial judge. Even so, the writer thinks that ordinarily a motion for disqualification of the trial judge made on the date of trial would be untimely. However, defendant alleges in her brief that the affidavit and motion were filed only after prejudicial statements were made by the district judge shortly before the alleged trial date. There is some conflict in that statement and one in the People's answer

that said that the motion to disqualify was made orally after the court had convened for trial of the matter. Either way, the motion might not be untimely, providing the basis for the affidavits, alleged prejudicial statements by the judge, had been made only recently. In other words, one could hardly require a motion for disqualification to be made 10 days before the trial if the statements giving rise to the motion for disqualification were not made until the day of trial.

Another aspect of this final issue is that apparently no one made any effort to get another district judge assigned by the court administrator to hear the motion for disqualification. The court rule is silent as to who has the obligation to contact the court administrator for assignment of another judge to hear the motion. However, it seems to the writer that the obligation should fall upon the moving party, the defendant in this case. If that be so, then no reversible error occurred since defendant did not exhaust her remedies by seeking assignment of another district judge to rule on the motion for disqualification.

RECOMMENDATION:

It is recommended that the application for leave to appeal be granted because the second issue, relative to waiver of jury trial, may have merit.

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