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Criminal Law - Perjured Testimony - Attorney and Client - Right to Counsel.

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An unpublished manuscript prepared for the National Criminal Justice Reference Service.

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Johnson, Etc. v. United States of America, D.C.App. No. 13055, July 2, 1979. Reversed and remanded per Yeagley, J. (Ferrin and Wagner, J.J. concur). Linda J. Ravdin for appellant. Charles L. Hall with Earl J. Silbert, John A. Terry, Peter E. George and Donald L. Golden, for appellee.

A lawyer's professional duty requires him or her to be honest with the court and to conform to recognized legal ethics in the protection of the client's interests. Counsel, however, is never under a duty to perpetrate or aid in the commission of a crime to free the client, and must not tender evidence or make a statement known to be false in an attempt to obtain an acquittal at any cost. The standards and pertinent cases which address the situation of a client announcing to counsel the intention to commit perjury are standards directed at defense counsel, and not directed to the trial court judges. Therefore, reversible error occurs when a trial judge suspects that perjury may be committed if a defendant testifies, and imposes restrictions on counsel and on the presentation of the defense.

In the recent case of Johnson, Etc. v. United States of America[1] appellant who had been found guilty by a jury of attempted petit larceny[2] challenged his conviction on the ground that he was denied his rights to testify and to effective assistance of counsel when the trial court, having concluded that appellent's testimony would be perjurious, ruled that if appellant took the stand his attorney could not elicit testimony through questioning and could not argue the testimony to the jury. Mr. Johnson's appeal was successful because the District of Columbia Court of Appeals concluded that the trial court improperly imposed these restrictions.

The government's evidence indicated that on June 24, 1977 the store manager of the Capital Supermarket observed the appellant removing a large plastic trash can from the shelf and place several hams inside the can. The check-out clerk informed Johnson that the charge for the trash can was $4.80. Appellant placed $2.31 on the counter. After being told that the amount was insufficient, appellant put his money back into his pocket, picked up the trash can, and moved towards the door. As he reached the door, however, he was stopped by a special police officer and arrested. When

the police officer discovered the hams, the appellant said that he did not know how they got inside the can. A subsequent search of the appellant revealed that he had only $2.33 on his person and carried no checks or credit cards.

Prior to the swearing in of the jury, the trial court asked appellant's attorney for a proffer of the defense. Counsel responded that the defendant was a cab driver and had driven to the grocery store at the request of a woman passenger. When they arrived at the store, she asked him to park the cab and to meet her inside the store and help carry her groceries. Once inside the store, she handed him a covered trash can, provided him with money, and told him that she would meet him back at the cab. Defendant said that he did not know that the hams were in the can until they were discovered by the officer at the check-out counter.

After the state presented its case and rested, the defense also rested. The trial court called the parties to the bench and inquired as to why appellant was not going to testify as had been proffered before trial. After conferring with appellant, defense counsel stated that appellant would take the stand after all.

At the court's direction, counsel then proffered that appellant's testimony would be that he never attempted to leave the store.

Because of the inconsistency between the first and second proffer the court felt that counsel would be suborning perjury if he assisted his client in presenting the second version. The court stated that if appellant took the stand, counsel was required by the Canons of Ethics to refrain from questioning his client on direct examination and from arguing his client's testimony to the jury in the closing argument. Although counsel disagreed with the ruling, he again conferred with Mr. Johnson and it was decided that appellant would not testify. The jury eventually returned a verdict of guilty.

On appeal, the District of Columbia Court of Appeals agreed with the defendant that the inconsistency between his proffered defenses was insufficient to establish that the second proffer was false. The trial court's conclusion to the contrary was based on a surmise, and not based on substantial evidence uncovered by defense counsel.

Where defense counsel knows that the defendant intends to commit perjury it is not a denial of the

right to assistance of counsel for the defense attorney to restrict his or her presentation of the defendant's testimony in accordance with § 7.7 of The American Bar Association Project on Standards for Criminal Justice: The Prosecution Function and the Defense Function (Approved Draft, 1971).[3] The District of Columbia Court of Appeals had previously noted the obligations of counsel under § 7.7, in the case of Thornton v. United States 357 A.2d 429 (D.C.App. 1976). Under § 7.7(c), if a defendant insists upon testifying falsely, the defense attorney may not lend his aid to the perjury, and must therefore limit his or her further participation as follows:

> The lawyer must confine his examination to identifying the witness as the defendant and permitting him to make his statement to the trier of fact or the triers of fact; the lawyer may not engage in direct examination of the defendant as a witness in the conventional manner and may not later argue the defendant's known false version of facts to the jury as worthy of belief and he may not recite or rely upon the false testimony in his closing argument.

The Thornton court recognized that while a defendant has the right to testify in his own behalf with the

effective assistance of his attorney, there is no right to commit perjury or to make the attorney a party to the commission of perjury.[4]

The government in the Johnson appeal contended that the ruling in Thornton is equally applicable when the restriction set forth in § 7.7 are imposed by the trial court rather than self-imposed by counsel. Such an argument is premised upon the trial court's responsibility to monitor and assure a lawyer's ethical conduct during a trial.[5] This premise was left undiscussed by the Johnson court, although Judge Yeagley acknowledged that trial courts may have a monitoring role under some circumstances.[6] The appellate judges also refused to examine the propriety of the trial court's request for proffers of the defense case; both of which requests were considered by Judge Yeagley to be causes for concern. The appellate court was satisfied that by imposing restrictions on counsel, the trial court impermissibly interjected itself in the case. The appellate court also held that §§ 7.7 speaks to a situation in which the falsity of the defendant's testimony is known and not merely suspected. Previous District of Columbia cases in which such a

problem arose involved situations in which the attorney knew, based on independent investigation of the case or on prior discussion with the client, that the defendant's testimony was false. It was in such a context of clear impropriety that the District of Columbia Court of Appeals held that the attorney could limit his or her representation in accordance with § 7.7, and remain consistent with the defendant's rights.[7]

Where, as in the Johnson circumstances, the veracity or falsity of the defendant's testimony is only conjectural, the ethical dilemma does not arise.[8] The standards set forth in § 7.7 will seldom if ever apply to a trial court, because the court will not have available the quality and extent of information needed to determine with the requisite degree of certainty that the defendant intends to commit perjury. Therefore the trial court will rarely be able to impose itself upon the manner of the defense presentation. Only the defense counsel is in a position to evaluate the veracity of the intended testimony by comparing it to knowledge gained in consultation with the defendant and independent investigation of the case. Moreover, if the trial court were to fully inquire into the matter, it would

necessarily intrude upon the privileged communications of the client and the attorney. Therefore, the trial court must accept counsel's good faith representations that the defendant will not commit perjury, and rely upon counsel's ethical duty to regulate professional conduct.

Generally, where the trial court suspects that a defendant is about to commit perjury, it may properly advise counsel at the bench. If, however, counsel does not believe that the defendant intends to perjure himself, and decides to put the defendant on the stand consistent with counsel's own sense of ethical conduct and professional responsibility, the court cannot interfere. In the extreme event that the court is not satisfied with counsel's decision, the appropriate recourse for the trial judge is to report the matter to the Board of Professional Responsibility for such disciplinary action as may be indicated.[9]

As the Court of Appeals indicated, in the Johnson case appellant's counsel did not believe his client's intended testimony would be perjurious, and the appellate judges felt unable to conclude that the evidence warranted a contrary decision. Under those circumstances then, it was improper for the trial court

to interfere with the defense counsel's conduct of the trial and to compel the appellant to choose between not testifying and taking the stand without assistance of his counsel and without having his testimony argued to the jury. Not only did the trial judge's ruling contravene the appellant's right to the assistance of counsel, but it precipitated his decision to forego testifying, thereby denying him the right to take the stand in his own defense.[10]

The appellate panel was unconvinced by the government's answer that the appellant should be precluded from later claiming that he was deprived of his right to testify because of the tactical courtroom decision not to take the stand. The fact that the court imposed itself when appellant decided that he in fact wanted to testify, and restricted the proper actions of counsel could not be ignored on appeal. The appellate judges also found unconvincing the government's argument that appellant was not prejudiced by choosing between not testifying and having an inadequate presentation. The government felt that it was sufficient that the defendant was able to present his theory (that he did not intend to leave the store) to the jury in closing argument through his counsel.

Such presentation notwithstanding, Judge Yeagley concluded that the right to testify and the right to the effective assistance of counsel - including assistance in testifying and in arguing the testimony to the jury - are not alternative rights. Rather, a criminal defendant is fully entitled to both and he cannot be made to substitute one for the other. As the Third Circuit stated:

> A defendant in a criminal proceeding is entitled certain rights and protections which derive from a variety of sources. He is entitled to all of them; he cannot be forced to barter one for the other. When the exercise of one right is made contingent upon the forebearance of another, both rights are corrupted.[11]

Although there is no unanimity between the courts or legal commentators, cases which have addressed the issue indicate that it is improper for an attorney to knowingly present a client's testimony after the client has made known to counsel the intent to perjure himself on the witness stand.[12]

Canon 7 of the Code of Professional Responsibility provides that in representing a client within the bounds of the law, a lawyer shall not knowingly use perjured testimony or false evidence.[13] If a lawyer

receives information which clearly establishes that his client has, in the course of the representation, perpetrated a fraud upon a person or tribunal, the lawyer must promptly call upon his client to rectify the same, and if the client refuses or is unable to comply, the lawyer shall reveal the fraud to the affected person or tribunal. Because, however, a lawyer whose client has not violated the laws against perjury and fraud, owes to the client an obligation for zealous advocacy, the lawyer may feel that he or she is trapped between various conflicting responsibilities. The ethical attorney realizes the consequences of permitting the perjury to occur, but he also realizes that the likelihood of a conviction in a criminal trial is increased enormously when the defendant does not take the stand. Consequently, the attorney who prevents a client from testifying only because the client has confided a degree of guilt and a desperate intent to commit perjury, is violating the confidence of the client by acting upon the information in a way that will seriously prejudice the client's interests.[14]

As expounded by Dean Freedman, the obligation of

confidentiality, in the context of the adversary system of justice, allows an attorney no alternative to putting a perjurious witness on the stand without explicit or implicit disclosure of the attorney's knowledge to either the judge or the jury. If the attorney were to inform the judge of the defendant's intentions, there is the liklihood that the judge would declare a mistrial, or that an appellate court would determine that the judge had become biased.[15] Freedman places defense attorneys in a "trilemma," that is:

> The lawyer is required to know everything, to keep it in confidence, and to reveal it to the court. Moreover, the difficulties presented by those conflicting obligations are particularly acute in the criminal defense area because of the presumption of innocence, the burden upon the state to prove its case beyond a reasonable doubt, and the right to put the prosecution to its proof.[16]

In Freedman's opinion, the attorney's obligation in a potential perjury situation would be to advise the client that the proposed testimony is unlawful, and that because of the likelihood for its discovery under cross-examination, tactically unwise, but then to

proceed with the case in the normal fashion, and argue the case to the jury if the client insists on going forward. Any other course is seen to be a betrayal of the assurances of confidentiality given by the attorney in order to induce the client to reveal everything.

Although Dean Freedman refutes any misconception of the attorney as a "hired gun" for any person who can meet the price, he nevertheless demonstrates the severe moral limitations of the adversary system. Looking only at the immediate needs of society, Mr. Freedman seems to feel that the very highest obligation of an attorney is to the client, even to the participation in a charade. If our criterion for judgment of lawyer's ethics were merely the "Measure of Man" then such zeal required of lawyers by that standard might condone the subornation of perjury. If rather the ethical attorney feels obligated to a standard of justice that elevates the presentation of testimony to the same level as the worship of the Source of justice, then the lawyer must seek a better way to plead his client's case.[17] Gladly, American case law acknowledges the combined responsibilities of

the trial attorney to the client and to the law itself. Cases specifically cited by the District of Columbia Court of Appeals indicate that although defense counsel assumes a dual role as a zealous advocate and as an officer of the court, neither role countenances disclosure to the trial court of the counsel's private conjectures about the guilt or innocence of his client; it is the role of the judge or jury to determine the facts, not that of the attorney.[18] Only after investigation by the attorney can he form a conscientious decision not to put on testimony which would be perjurious, and not deny his client effective assistance of counsel.[19]

The courts' reconcilliation of the various responsibilities of an attorney does not require the transformation of the courtroom into a theater, but the proper application of the courts' standards do require an attorney to carefully investigate his client's statements, and to act only upon clear indications of potential perjury. Even then, the attorney's actions should not harm the client, as would occur by withdrawl, but should permit the client alone to present the client's statements without coaching from the attorney. For although counsel are not exempt

from prosecution under statutes denouncing crimes of obstruction of justice and subornation of perjury, the cornerstone of our system of justice would be undermined if attorneys volunteered mere unsubstantiated opinions concerning the perjured testimony of their clients. Likewise, as in the Johnson situation, a trial court may exercise its broad discretionary authority over counsel only on a informed basis.[20]

Johnson should be considered an important affirmation of the balance which exists between the rights of criminal defendants to the undiluted protection of their rights, and the ethical standards created by attorneys for the maintenance of justice.

FOOTNOTES

[1]Johnson, Etc. v. United States of America, No. 13055 (D.C. App. July 2, 1979) The opinion of the District of Columbia Court of Appeals is found at 107 Wash. Law Rep. 1489 (August 24, 1979)

[2]D.C. Code 1973, §§ 22-2202, 22-103

[3]The Standards were adopted by the ABA House of Delegates in 1971 and are designed to be compatible with the ABA Code of Professional Responsibility. Much has been subsequently written on the topic of a lawyer's obligation when confronted by client perjury or the intent to commit perjury, and scholars differ strongly on the proper course of the lawyer's conduct in such circumstances. See Wolfram, Client Perjury, 50 So.Cal.L.Rev. 809 (1977) (and the articles cited therein). Despite the differences of opinion, the ABA Standards can be said to represent an authoritative consensus.

[4]Thornton v. United States, 357 A.2d 429, 437 (1976) See Herbert v. United States, 340 A.2d 804 (D.C.App. 1974) in which the appellate court stated that, "The ethical strictures under which an attorney acts forbid him to tender evidence or make statements which he knows to be false as a matter of fact." See also Mitchell v. United States, 259 F.2d 787, 792 (U.S.App.D.C., 1958) in which the Federal Court stated that, "Although he correctly deliniates defense counsel's paramount duty, that duty must be met in conjunction with, rather than in opposition to. other professional obligations. Counsel

does have an 'obligation to defend with all his skill and energy, but he also has moral and ethical obligations to the court, embodied in the canons of ethics of the profession."

[5]When a question of the continued effectiveness of counsel is voiced, the court then has a duty to inquire into its basis. See Brown v. United States, 264 F.2d 363, 369 (U.S.App.D.C., 1959).

[6]While the court has broad discretionary authority over motions to appoint new counsel and requests by counsel to withdraw, such authority may properly be exercised only on an informed basis. See McKoy v. United States, 263 A.2d 645, 648 (D.C.App., 1970)

[7]Herbert v. United States, 340 A.2d 802 (D.C.App. 1974)

[8]An attorney may not volunteer an unsubstantiated opinion that his client's protestations of innocence are perjured. United States ex rel Wilcox v. Johnson, 555 F.2d 115 (3d Cir. 1977).

[9]In his own self-protection, counsel should then make a record of the fact that the defendant is taking the stand against the advice of counsel, should that be the circumstance, and the counsel should restrict direct examination to identification of the witness as the defendant and permit him to make his statement, in accordance with the ABA Standards § 7.7.

[10]In Wilcox, the Court of Appeals had ruled that the trial judge's ruling that if defendant took the stand the court would permit appointed counsel to withdraw and defendant would be forced to represent himself constituted an impermissible infringement on defendant's right to testify and his sixth amendment right to counsel. If the trial judge believed that on defendant's taking the stand defense counsel should have been permitted to withdraw the remedy was to appoint substitute counsel.

[11]Wilcox, supra, at 120

[12]Annot. 64 A.L.R.3d 385 (1974)

[13]American Bar Association, Code of Professional Responsibility, 1970, DR 7-102(A)(3) and DR 7-102(B)(1)

[14]M. Freedman, Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions, 64 Mich. L. Rev. 1469, 1476-77 (1966), Dean Freedman's article, and subsequent articles on legal counseling appear in Teaching Professional Responsibility, Materials and Proceedings from the National Conference, (1979)

[15]The Ninth Circuit Court of Appeals has noted the potential abuse of an attorney whose deliberate misconduct in refusing to aid a client to any extent is interpreted as the strategic causing of a mistrial. See Lowery v. Cardwell, 575 F.2d 727 (9th Cir. 1977)

[16]M. Freedman, Lawyer's Ethics in an Adversary System 28 (1975)

[17]T. Kavanagh, Christian Lawyer's Ethics in an Advocacy System (August 1978)(unpublished manuscript)

[18]Wilcox, supra

[19]Herbert, supra

[20]Thornton, supra, The District of Columbia Court of Appeals noted that the appellant contended that reversible error was committed when the first trial judge directed counsel to proceed in accordance with ABA Standard § 7.7(c). The court found no order to that effect, but rather only a suggestion. Even if there had been an order, however, the court's disposition of the claim of ineffective assistance of counsel would have turned upon the actual effect of such an order on the performance of the counsel during the trial. See Angarano v. United States, 312 A.2d 295 (D.C.App. 1973), and United States v. Von Der Heide, 169 F.Supp 560 (D.C.Dist.Col. 1959)