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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

BLUFFORD HAYES, JR.,

Petitioner,

v.

THE SUPERIOR COURT OF SAN JOAQUIN
COUNTY,

Respondent;

THE PEOPLE,

Real Party in Interest.

C067903

(Super. Ct. No. 30924)

A 1980 capital case conviction was reversed 25 years later after the Ninth Circuit Court of Appeals determined that the prosecutor, now a superior court judge in the same county, knowingly presented false evidence and failed to correct the record. (*Hayes v. Brown* (9th Cir. 2005) 399 F.3d 972.)

Petitioner Blufford Hayes, Jr., seeks to recuse the San Joaquin County District Attorney's Office from prosecuting his retrial, alleging that Judge Terrence Van Oss (Van Oss) remains personally embroiled in the current prosecution and the deputy

now assigned to the case has requested the judge's input, solicited additional false evidence, vindictively filed charges under the "three strikes" law, and engaged in other conduct demonstrating the office is not prosecuting petitioner in an even-handed manner. The trial court denied petitioner's request for an evidentiary hearing to prove his allegations and denied his motion to recuse the district attorney's office.

Petitioner seeks a peremptory writ of mandate commanding the trial court to recuse the San Joaquin County District Attorney's Office (the DA) from prosecuting him, and to enter an order granting the motion or, alternatively, to hold an evidentiary hearing on the motion. Although the DA urges us to deny the petition, he acknowledges that "petitioner's entitlement to relief hinges on the resolution of factual disputes" and, alternatively, asks us to order the trial court to hold an evidentiary hearing. We agree the trial court abused its discretion by refusing to hold an evidentiary hearing based on the voluminous facts and legal reasoning set forth below. The petition is therefore granted in part and denied in part.

FACTS

In 1981 a jury rejected petitioner's defense of self-defense and convicted him of the first degree felony murder of Vinod Patel, burglary, and robbery, and found true two special circumstances. (*Hayes v. Brown, supra*, 399 F.3d at p. 977.) The prosecution's key witness was Andrew James. James, a friend of petitioner who was living at the motel where the murder occurred, testified that petitioner told him he had "'offed'"

the motel manager. (*Id.* at pp. 975-976.) According to James, petitioner explained that after the manager awakened him, the manager "'swung on him'" so petitioner "'did the do with him.'" (*Id.* at p. 976.) James also testified that petitioner told him he "'tore'" up the office looking for money. (*Ibid.*)

The jury did not know that the prosecutor, Terrence Van Oss, had made a secret deal with James's attorney whereby James's pending felony charges would be dismissed in return for his testimony. (*Hayes v. Brown, supra*, 399 F.3d at pp. 978-979.) The court summarized the magistrate's pertinent findings and the evidence in support of those findings. (*Id.* at pp. 979-980.)

In a file entry dated February 7, 1980, James's attorney wrote: "Van Oss s[ai]d [he] didn't want to make[a] deal on this case on [the] record, but will guarantee that [James'] O.R. [own recognizance release] will be reinstated. He wants to keep case felony for now so if [James] splits they can extradite. After Hayes over, [James] can P[lead] G[uilty] to misd[emeanor] for straight prob[ation]-no jail." (*Hayes v. Brown, supra*, 399 F.3d at p. 979, bracketed material supplied by district court.)

Later, the attorney wrote, "'the case will be disposed of after Hayes trial" and "case to be dismissed on 12/15/81.'" (*Ibid.*)

In an evidentiary hearing on another case, Van Oss testified he had no reason to dispute the validity of the lawyer's notes and conceded that he "'must have told him.'" (*Ibid.*)

The Ninth Circuit Court of Appeals opinion summarized the evidence in support of the findings. "Although felony charges

against James were pending, the State assisted him in moving to San Diego. James later moved to Florida. The government paid for his airplane transportation from Florida to California to testify in the Hayes trial. James freely traveled to California, apparently without fear that he would be placed in custody on the pending felony charges. The notes from James's attorney indicate that a court appearance on his charges was scheduled for October 20, 1981, but was continued until November 17, 1981. James testified at the Hayes trial on October 29, 1981. The jury returned a guilt-phase verdict on November 16, 1981. The next day, the chief prosecutor in the Hayes trial, Terrence Van Oss, appeared at the continued arraignment scheduled for James. The transcript of the hearing reflects there was a discussion off the record with the judge, after which the arraignment was continued until December 15, 1981. James's counsel's notes on November 17, 1981, said that 'case to be dismissed on 12/15/81. We need not appear.' The jury returned its verdict of punishment by death on November 25, 1981. On December 15, 1981, the charges against James were dismissed, and the State paid for James's safe return to Florida by air." (*Hayes v. Brown, supra*, 399 F.3d at p. 979.)

Van Oss thereafter misled the trial judge and the jury that there had been no negotiations whatsoever about James's testimony and pending charges. The court concluded: "Thus, the record is clear that: (1) before the Hayes trial, the State had made a deal with James's attorney for the dismissal of pending felony charges after his testimony; (2) the State specifically

represented to the trial judge that there was no such deal; (3) the State elicited sworn testimony from James at trial that there was no such deal, both on direct and re-direct examination; and (4) the State failed to correct the record at trial to reflect the truth." (*Hayes v. Brown, supra*, 399 F.3d at p. 980.)

Van Oss bitterly contests the Ninth Circuit's characterization of his conduct. But his response to the Ninth Circuit opinion was not the first time he interceded in the postconviction proceedings. On December 16, 1986, Van Oss contacted the California Supreme Court directly, rather than through the Attorney General, regarding the prosecutorial misconduct alleged in petitioner's then pending habeas petition. In his letter, he expressed that he was "acutely concerned about the proportions to which this matter has grown I want this matter cleared up and am willing to do whatever is necessary to do so." The Supreme Court denied the petition on the merits. (*People v. Hayes* (1990) 52 Cal.3d 577, 613, fn. 4.)

After the Ninth Circuit's en banc ruling in 2005, Van Oss excoriated the Attorney General for failing to petition for a writ of certiorari. On April 12, 2005, he wrote, "I would like to know why the Attorney General decided not to petition for review of this decision. . . . [¶] This is particularly puzzling in view of the material misstatement of fact supporting the latest decision." With increasing fervor he continued: "[I]t is extremely troubling that this egregiously mischievous result will be allowed to stand as precedent for future cases,

especially since it relies on a demonstrably false premise. [¶] While I can live with the unwarranted damage to my reputation this astonishing error has caused, the [Attorney General] does not appear to have well served the people of California or the administration of justice by conceding defeat this easily." He concluded that he hated to have his name connected with "this threatening precedent."

The Attorney General provided a thoughtful and thorough response to Van Oss's criticism, debunking his statements that the office had not championed the victims' cause and that Van Oss was the only person to whom the victims could turn, and inviting Van Oss to refer the victims to the Attorney General's Office for assistance. More importantly, the Attorney General explained in detail why it would be inappropriate to attack the factual findings of the court.

The Attorney General pointed out that the California Supreme Court, in rejecting the claim of prosecutorial misconduct, did not have all the evidence that was subsequently presented in federal court. That evidence included a 1997 transcript that clearly indicated Van Oss was shown all the notes and entries in James's attorney file. The Attorney General concluded, as did the magistrate, that Van Oss's "testimony could reasonably be read to indicate that you had no disagreement with any of the attorneys' notes in that file." Indeed, in answer to a question whether he had any reason to disbelieve the entry in the attorney's file (pertaining to a secret deal), Van Oss responded, "No, I must have told him, I

guess." Thus, the Attorney General concluded that, contrary to Van Oss's position, "[t]he en banc court did not misstate the facts when setting forth the factual findings of the magistrate judge and the district court." The Attorney General explained that therefore, any further challenge to the factual findings would be futile.

In a letter dated May 5, 2005, Van Oss expressed appreciation to the Attorney General for his detailed response and regret for the frustrated tone of his prior letter. He then targeted the defense team. He wrote, "To give the devil his due, I have to admire the shrewdness and persistence of the effort mounted by the petitioner's legal team. They cleverly manipulated my testimony to convince the Circuit Court of their point of view. . . . [N]otwithstanding their egotistical belief in their moral superiority, I also think they are privately committed to the belief that the end justifies the means regardless of the implications for the legal system."

Van Oss's interest in the case did not subside. The case was transferred back to San Joaquin County for retrial. The deputy assigned to retry the case, Thomas Testa, solicited his advice in opposing petitioner's motion to dismiss for deprivation of due process. Van Oss wrote Testa at least two memos. In one memo, his criticism of the Ninth Circuit opinion was blistering. He wrote that the "motion should not be governed by the Circuit Court's sanctimonious blustering." He insisted not only that the court's "statement of facts is demonstrably wrong," but that they were "deliberately

misstated." He rehashed his version of the facts and concluded, "The whole thing is insane, although it gives attorneys like Such something to distract them from worrying about their own mortality."

Apparently, Testa also asked Van Oss to suggest questions for the hearing on the motion to dismiss. The judge provided some guidelines to help Testa formulate the questions. He again disputed the facts, reiterated his accusation that the court had deliberately misstated the facts, and accused the court of writing a defense brief rather than an objective opinion. Unable to let go of the court's determination, he told Testa, "I am still working on getting to the bottom of that curious turn of events." He insisted that Testa should not concede "the facts are as the [Ninth Circuit] stated them."

Petitioner alleges that Van Oss not only kept a deal with James secret, but that he also concealed evidence petitioner could have used to impeach a second witness. That witness, James Cross, testified that petitioner had assaulted him a few days after the Patel murder. He further testified he had done nothing to provoke the assault and he was sober at the time. But the attorney who represented petitioner during years of postconviction proceedings discovered exculpatory evidence that Cross was a chronic alcoholic who drank a pint of whiskey a day and had suffered at least one alcoholic seizure. Even while hospitalized, he was allowed two ounces of liquor whenever he got severely agitated. Van Oss did not disclose this evidence to the defense. In his letter to Testa, he dismissed the

accusation he hid evidence as "merely a self-serving declaration by defendant's trial attorney."

While petitioner alleges Van Oss's continued involvement in the prosecution is the most egregious example, he claims it is not the only example that the prosecutor is not treating him in a fair and even-handed manner. He alleges several other examples of improper bias, conflict of interest, failure to exercise proper prosecutorial discretion, and a documented pattern of misconduct so pervasive as to prevent him from receiving a fair trial.

Petitioner asserts that on retrial he will present evidence of imperfect self-defense. He asserts that his use of deadly force resulted from his fear of being assaulted by members or friends of the Arafiles family, who had threatened him, his sister, and his family because his sister had testified against Johnny Arafiles in a murder trial. The threats were so credible, in fact, that according to petitioner, the prosecution had entered into an agreement with his sister to place her in a witness protection program and relocate her to Oregon. Petitioner offered numerous declarations of witnesses who either heard the threats or knew his sister had been in the witness protection program, a copy of a request to be placed in protective custody in his sister's handwriting, and a declaration by a law enforcement officer in Oregon who supervised her.

Despite this evidence to the contrary, the prosecutor maintains that there was never any credible information that

petitioner, petitioner's sister, or petitioner's family were ever threatened or assaulted, or that petitioner's sister was in a witness protection program. In opposition to the motion to disqualify his office, the prosecutor secured declarations from a former district attorney and a former investigator, both of whom stated that petitioner's sister was a drug addict and prostitute, and that her lifestyle, not any threats of violence, concerned them. They had intervened only to make sure she would appear at trial and testify.

Petitioner also claims overly zealous prosecution of unrelated and trivial charges under the three strikes law for offenses he committed in prison. He points out that in one of those cases a superior court judge from another county refused to hold petitioner to answer. In another case, the superior court judge dismissed the prior strikes allegations in the interest of justice. Nevertheless, he pleaded guilty and a six-year term was imposed.

Petitioner cites to two other instances in which the prosecutor's conduct evidences a bias against him. Knowing that defense counsel and former prosecutor Ralph Cingcon is the half brother of Johnny Arafiles, against whom petitioner's sister had testified in a murder trial, and that he had prosecuted petitioner in 1980, the prosecutor stood silently as the court appointed Cingcon to represent petitioner. And petitioner objects to the prosecutor's request to appoint the prosecutor's friend and former detective as petitioner's investigator without disclosing that he was a prosecution witness.

Finally, petitioner fears the prosecutor is repeating the same pattern of withholding evidence. He relies on the investigator's direction to provide a "Reader's Digest" version of the reports petitioner requested, suggesting that not all of the original documents would be disclosed. He also contends that a police report in the Anderson murder case refers to a recorded statement by his sister on October 14, 1977, but that statement has been excluded from discovery.

The trial court denied petitioner's request for an evidentiary hearing and denied the motion to disqualify the San Joaquin County District Attorney's Office. The court was persuaded that the prosecutor's offer to resolve the case by allowing petitioner to plead guilty to second degree murder alone dispelled any accusation or appearance of vindictive prosecution. The court rejected petitioner's allegations of misconduct and ultimately denied his petition for a writ of mandate. Petitioner filed a petition for a writ of mandate with this court.

DISCUSSION

Penal Code section 1424 provides that a motion to recuse a prosecutor "may not be granted unless the evidence shows that a conflict of interest exists that would render it unlikely that the defendant would receive a fair trial." The statute requires a two-part inquiry: "(i) is there a conflict of interest; and (ii) is the conflict so severe as to disqualify the district attorney from acting?" [Citation.] (*Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 711 (*Haraguchi*)). A conflict,

"within the meaning of section 1424, exists whenever the circumstances of a case evidence a reasonable possibility that the [district attorney's] office may not exercise its discretionary function in an evenhanded manner." (*People v. Conner* (1983) 34 Cal.3d 141, 148.)

"Presumably the Legislature had a reason for selecting the words 'unlikely' and 'fair,' rather than the usual 'miscarriage of justice' standard of article VI, section 13 of the California Constitution. Had the latter standard been adopted, a trial court would recuse the district attorney only when it believes it is reasonably probable the defendant will obtain a more favorable result if the district attorney is disqualified. [Citation.] The legislative decision to adopt a different standard based on the likelihood of a fair trial suggests a more expansive view concerned not only with the prospective result but also with the fairness of a defendant's trial. This broad concern reflects the constitutional principle that '[a] fair and impartial trial is a fundamental aspect of the right of accused persons not to be deprived of liberty without due process of law. [Citations.]' [Citation.] Against this backdrop, a court's prospective determination of what may be an unfair trial in our criminal justice system requires inquiry, among other things, into whether an appearance of impropriety exists and, if so, its likely effect, if any, on the fairness of the proceedings." (*People v. Lopez* (1984) 155 Cal.App.3d 813, 822-823.)

Within the legislative framework of determining what conduct is likely to jeopardize a fair trial, the trial court plays a pivotal role, and we review the court's denial of a motion to recuse the prosecutor, even in a capital case, for an abuse of discretion. (*People v. Gamache* (2010) 48 Cal.4th 347, 361.) The Supreme Court contrasts the role of the trial courts, in deciding, and appellate courts, in reviewing, motions to recuse. "We review rulings on motions to recuse only for abuse of discretion precisely because trial courts are in a better position than appellate courts to assess witness credibility, make findings of fact, and evaluate the consequences of a potential conflict in light of the entirety of a case, a case they inevitably will be more familiar with than the appellate courts that may subsequently encounter the case in the context of a few briefs, a few minutes of oral argument, and a cold and often limited record." (*Haraguchi, supra*, 43 Cal.4th at p. 713.)

The trial court in this capital case, however, denied petitioner's request for an evidentiary hearing despite the fact that "petitioner's entitlement to relief hinges on the resolution of factual disputes." (*In re Serrano* (1995) 10 Cal.4th 447, 455, quoting *People v. Romero* (1994) 8 Cal.4th 728, 739-740.) Indeed, as pointed out above, the Attorney General concedes "petitioner's entitlement to relief hinges on the resolution of factual disputes."

If, as petitioner contends, Van Oss continues to be a driving force in the prosecution, a conflict would not only

exist, but would be so severe as to require disqualification of the district attorney. Certainly a defendant's right to a fair trial would be highly unlikely if the prosecutor, who presented false evidence in the first trial, were allowed to prosecute his case on retrial. But the factual inquiry regarding the extent of Van Oss's involvement and prosecutor Testa's reliance on Van Oss's advice and remonstrations has not occurred. In the absence of an evidentiary hearing during which the trial court has the opportunity to assess the credibility of the witnesses, including Van Oss and prosecutor Testa, and render findings of fact, we cannot perform our appellate duty to review the factual findings for an abuse of discretion.

In the absence of a hearing, the record suggests the trial court overly relied on the single fact that the prosecutor had offered petitioner a deal. The deal, however, from petitioner's perspective, is in reality an empty promise. He assesses the probability of achieving a grant of parole from the Board of Parole Hearings and surviving the Governor's review as slim to none. Thus, although he would stand convicted of second degree murder rather than capital murder, he would not achieve his sole objective of leaving prison after more than three decades behind bars. We need not, of course, determine whether petitioner's probabilities are accurate, but we do agree that the mere fact the prosecutor was willing to offer a plea agreement with unknown practical consequences does not alone justify the denial of the motion.

More importantly, petitioner makes a compelling showing that Van Oss has been a vocal force throughout the appellate process and since the case was remanded to the very court on which he now sits. He urged the Supreme Court to reject petitioner's habeas petition. In a letter directly to the Supreme Court, he demanded, "I want this matter cleared up and am willing to do whatever is necessary to do so." Then when the Ninth Circuit ultimately granted the petition, he complained bitterly to the Attorney General that he was not serving the public by failing to challenge the ruling. Rather than expressing a dispassionate tone with language befitting an objective professional, he lobbed accusations at both the Attorney General and the Ninth Circuit. He wrote, "[T]he AG does not appear to have well served the people of California or the administration of justice by conceding defeat this easily."

After receiving a comprehensive and polite response from the Attorney General patiently explaining how the Ninth Circuit had not misrepresented the facts, Van Oss turned his wrath on defense counsel. He wrote, "To give the devil his due, I have to admire the shrewdness and persistence of the effort mounted by the petitioner's legal team. They cleverly manipulated my testimony to convince the Circuit Court of their point of view. . . . [N]otwithstanding their egotistical belief in their moral superiority, I also think they are privately committed to the belief that the end justifies the means regardless of the implications for the legal system."

For our purposes, it does not matter whether the Ninth Circuit was right or not. It does not matter what the true facts involving Van Oss were. What does matter is Van Oss's distressed emotional reaction to the opinion and, most importantly, his continued involvement in the case. After all, he is a superior court judge sitting on criminal cases in the very county where petitioner is being retried and where the deputy district attorneys prosecuting him continue to appear. In the absence of an evidentiary hearing, however, petitioner did not have the opportunity to examine the extent of Van Oss's ongoing involvement in the prosecution.

Petitioner did make a threshold showing of impropriety, albeit without a thorough vetting of prosecutor Testa to determine the scope and nature of his communication with Van Oss about petitioner's retrial. For example, upon request, Van Oss wrote to Testa that the motion to dismiss "should not be governed by the Circuit Court's sanctimonious blustering." He insisted not only that the court's "statement of facts is demonstrably wrong," but that they were "deliberately misstated." He rehashed his version of the facts and concluded, "The whole thing is insane, although it gives attorneys like Such something to distract them from worrying about their own mortality." In another memo he told Testa, "I am still working on getting to the bottom of that curious turn of events." He insisted that Testa should not concede "the facts are as the 9th stated them."

The Attorney General insists that it is entirely proper for a prosecutor, when preparing for a retrial, to seek input from the prosecutor who originally tried the case. In the absence of an evidentiary hearing, however, the trial court did not have all the evidence to determine whether, in fact, Testa crossed the acceptable boundaries in soliciting input not just from the prosecutor who tried the original case, but from the prosecutor whose misconduct required a retrial and from the prosecutor who resented the ultimate findings of fact by the federal court. Again, it is premature for us to assess whether the collaboration compromised petitioner's ability to receive a fair trial and even-handed treatment when the court refused to conduct the kind of evidentiary hearing that would have exposed the facts necessary to make the requisite findings.

We conclude Van Oss's letters and memo are enough to require an evidentiary hearing, particularly where, as here, there has been no showing that an ethical wall has been established between the former prosecutor, now a sitting judge, and the prosecutor's office. On appeal the Attorney General argues that the San Joaquin County District Attorney's Office is large and dispersed geographically, thereby making recusal of the entire office unnecessary. But the Attorney General made no factual showing in the trial court to provide assurance of the erection of the type of ethical wall necessary to assure petitioner and the public of the fair administration of justice. In fact, the memos written by Van Oss to prosecutor Testa suggest just the opposite.

According to petitioner, Van Oss is not the only villain here. Indeed, his conduct is relevant only insofar as it influences the current prosecution. Petitioner offers a catalogue of missteps by Thomas Testa suggesting that he continues to fail to treat petitioner even-handedly. We have set forth those allegations at length in the statement of facts and need not reiterate each of them here. Suffice it to say, he accuses Testa of misrepresenting facts, failing to disclose evidence, overzealous and vindictive prosecution, and bias. He cites evidence in support of his allegations, evidence again that was not vetted in an evidentiary hearing.

Needless to say, Thomas Testa is at the heart of petitioner's challenge to the district attorney's office. Given the Attorney General's concession that petitioner's entitlement to recusal hinges on the resolution of factual disputes, the trial court must conduct an evidentiary hearing to determine whether Testa committed any or all of the acts of misconduct alleged by petitioner. The truth may be that Testa's conduct is impeccable; that his interaction with Van Oss was brief, courteous, and routine; that his prosecution of petitioner for crimes committed in prison was appropriate; and that he remains an unbiased and even-handed prosecutor. These are factual findings the court will be equipped to make following the evidentiary hearing to which petitioner is entitled.

And finally, the court must determine whether there are sufficient barriers within the district attorney's office to assure that Van Oss is not participating in the prosecution of

petitioner on retrial. In other words, has the district attorney erected a sufficient ethical wall, and if not, does he make the requisite showing that the office is big enough to sequester Van Oss's influence? Is it possible for the petitioner to receive even-handed treatment when the prosecutors must appear before the judge who previously prosecuted petitioner and who has publicly expressed his strong views about the outcome of the appellate proceedings and the danger petitioner poses to society?

We therefore must remand the case to the trial court to conduct an evidentiary hearing to resolve the many factual disputes upon which petitioner's entitlement to relief hinges. In the absence of these factual findings, we cannot review the trial court's findings for an abuse of discretion. We accept the Attorney General's alternative request to order the superior court to hold an evidentiary hearing to develop the factual basis for petitioner's motion.

DISPOSITION

The matter is remanded for the purpose of conducting an evidentiary hearing to develop the factual basis for petitioner's motion to recuse the San Joaquin County District Attorney's Office from prosecuting the retrial of petitioner's 1980 conviction.

We concur: RAYE, P. J.

BLEASE, J.

ROBIE, J.