

Bad Prosecutor - “Give It Up and Shut It Up.”

By: Monte E. Hester; Nov 2004

In State v. McDonald, 29117-7-II (August 10, 2004) Division II of the Court of Appeals once again reversed a conviction because the state failed to provide to the defense discovery in its possession and made improper remarks during closing.

The case involved two counts of rape, each involving a separate complainant and time period. The defendant testified to the allegations made by one complainant, but not the other.

The prosecutor possessed impeaching information as to the complaining witness as to one of the counts. There was no other evidence other than the complainant’s testimony versus the defendant’s, so the appellate court predictably held that the testimony was material to credibility of the witness against him. Moreover, because the testimony was the only evidence -----guilt the court held that there was a reasonable probability that if the information had been provided to the defense that the result of the proceeding would have been different. The court stated that if the probability is sufficient to undermine confidence in the outcome, then such withholding is a violation of due process.

Moreover, during its closing, the prosecution argued:

Now the defendant took the stand, and I’ll point this out again, two young women have come forward and said that they had been raped by Mr. MacDonald. He was given the opportunity to tell you about that, but he didn’t do it. He didn’t do that at all. You have to take the testimony that you’ve been given from the stand.

You know it’s kind of odd that you wouldn’t come forward and protest your innocence and explain your side. And that’s something you can consider in reaching your decision as to who’s telling you the truth.

The defendant took the stand and gave limited testimony regarding the encounter with one of the complainants. He did not testify at all about the encounter with the second complainant.

The appellate court held that MacDonald waived his Fifth Amendment privilege as to the one complainant, however the prosecutor did not cross him on whether he committed the rape.

The court stated he didn't waive his privilege regarding the second rape allegation. The court reversed and remanded the second count saying the prosecutor's comments about not testifying on his own behalf was an invitation to the jury to use his exercise of his right to remain silent in determining MacDonald's credibility. The court further found that the remarks denied him a fair trial and that the first degree rape conviction must be reversed.

Some individual prosecutors will do anything to get a conviction. It seems that even the most inexperienced prosecutors would have to be aware that the conduct of intentionally not providing material discovery to the defense and making prejudicial comments during closing are against the rules and that professionally it is wrong to do it even if you can get away with it at the trial level. Fortunately, we have a diligent Court of Appeals ensuring that individuals' rights do not succumb to overzealousness. Integrity should be the norm from both sides.

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