10-1980

Wood v. Georgia

Lewis F. Powell, Jr.

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December 11, 1980

Re: 79-6027 - Wood v. Georgia

Dear Lewis:

In my judgment your memorandum sets forth an appropriate disposition of this somewhat unusual case. My only suggestion of substance is that I am not sure we should indulge in the speculation that this lawyer was motivated by the employer's interest in having a test case on this issue. It seems to me you have enough basis for questioning his fidelity to his client without that speculation and I think it is perhaps too far beyond the record to be appropriate.

Respectfully,

Justice Powell

Copies to the Conference

I find this a bit puzzling. I don't understand what other "basis" we have for questioning the lawyer's fidelity--unless the theory is simply that Zell had no reason to try hard for his clients because he was paid by a third party.

PS
December 11, 1980

Re: 79-6027 - Wood v. Georgia

Dear Lewis:

In my judgment your memorandum sets forth an appropriate disposition of this somewhat unusual case. My only suggestion of substance is that I am not sure we should indulge in the speculation that this lawyer was motivated by the employer's interest in having a test case on this issue. It seems to me you have enough basis for questioning his fidelity to his client without that speculation and I think it is perhaps too far beyond the record to be appropriate.

Respectfully,

Justice Powell

Copies to the Conference
December 11, 1980

Re: 79-6027 - Wood v. Georgia

Dear Lewis,

I shall probably write separately in this case; but even so, I may also join you.

Sincerely yours,

Mr. Justice Powell

Copies to the Conference
December 11, 1980

Re: No. 79-6027 - Wood v. Georgia

Dear Lewis:

I agree with your memorandum.

Sincerely,

T.M.

Justice Powell
Re: No. 79-6027 - Wood v. Georgia

Dear Lewis:

I have given careful consideration to your memorandum. It seems to me that it proposes a proper way of disposing of a troublesome case and, at the same time, preserves the basic issue for review in the future in a better case.

I therefore would join an opinion prepared on the basis of your memorandum.

Sincerely,

Mr. Justice Powell
cc: The Conference
December 18, 1980

Re: No. 79-6027 Wood v. Georgia

Dear Lewis:

In the event your opinion becomes the opinion of the Court, I will be happy to join it.

Sincerely,

Mr. Justice Powell

Copies to the Conference

Bill told me he would join 4

9 now have
T. M.
H. A. B.
B. R. W. (possibly)
W. J. B.
ATLANTA, Jan. 18 (AP) — Almost all of Atlanta’s adult bookstores and movie theaters have agreed to close in return for dismissal of charges against their employees. A prosecutor hailed the bargain as proof that “law enforcement now has the upper hand” against pornography.

“If you need a dirty book, you'll have to leave Atlanta to get it,” said Glenn Zell, an attorney for the stores.

Mr. Zell said the owners of at least 16 adult bookstores had agreed Friday to close if the Fulton County Solicitor General, Hinson McAuliffe, would dismiss all charges against their employees. Leonard Rhodes, an assistant solicitor general, said this would leave one adult bookstore, three adult theaters and one peep-show still operating in Atlanta.

Employees at some of the bookstores and theaters began packing their belongings as sales were being advertised at many of the concerns. “We're tired of fighting,” said a worker at one of the bookstores. “We're getting out of here.”

Mr. Zell said his clients had decided to leave Fulton County. He said “hassles with the police, fees for lawyers” and higher rents had made “the marginal profits for pornography unbelievably low.”

Under the agreement, the state will withhold prosecution for six months. If there is no attempt to resume operations by then, Mr. McAuliffe will seek to dismiss about 40 cases against people working in the businesses.

For the Solicitor General, the agreement ended a long antipornography campaign, which had already reduced the number of bookstores and theaters from 44 about four years ago.

At first, deputies cited employees of the businesses for selling pornography, persuading the courts to impose steadily higher fines, most of which were paid by the owners. Then the police began bringing charges against customers for such offenses as solicitation, sodomy and indecent exposure.

Repeated prosecutions of customers allowed authorities to build up records against the concerns as public nuisances, and they then began arguing in court that they should be closed.

Mr. McAuliffe also obtained court orders closing the lucrative “peep-show” sections of the bookstores, and filed petitions in United States District Court against what he called the “paper corporations” holding title to many of the stores.

“I have always felt that the people of Fulton County wanted pornography banished from the county, so I don’t really feel vindicated,” Mr. McAuliffe said. “The critics never bothered me anyway.”
December 31, 1980

79-6027 Wood v. Georgia

MEMORANDUM TO THE CONFERENCE:

In light of Byron's memorandum circulated today, I will make some changes in my memorandum that I hope will be responsive.

L.F.P., Jr.

ss
January 6, 1981

Re: No. 79-6027 Wood v. Georgia

Dear Lewis:

Please join me.

Sincerely,

Mr. Justice Powell

Copies to the Conference
RE: 79-6027 - Wood v. Georgia

Dear Lewis:

I agree generally with your analysis and could join a disposition along the lines you propose.

Regards,

Mr. Justice Powell

Copies to the Conference
January 9, 1981

Re: 79-6027 - Wood v. Georgia

Dear Lewis:

Please join me.

Respectfully,

Justice Powell

Copies to the Conference
Re: No. 79-6027 - Wood v. Georgia

Dear Lewis:

This is a formal join in your opinion.

Sincerely,

Mr. Justice Powell

c: The Conference
January 9, 1981

Re: No. 79-6027, Wood v. Georgia

Dear Lewis:

I join.

Regards,

[Signature]

Justice Powell

Copies to the Conference
SUPREME COURT OF THE UNITED STATES

No. 79-6027

Raymond Wood et al., Petitioners,

v.

State of Georgia.

[January —, 1981]

JUSTICE WHITE, dissenting.

The Court's disposition of this case is twice flawed: first, there is no jurisdiction to vacate the judgment on the federal constitutional ground upon which the Court rests; second, the record does not sustain the factual inferences required to support the Court's judgment.

I

The petition for certiorari presented a single federal question: does the Equal Protection Clause of the Fourteenth Amendment permit a State to revoke an indigent's probation because he has failed to make regular payments toward the satisfaction of a fine? This issue was properly presented to and ruled upon by the Georgia courts. No other federal constitutional issue was presented there or brought here. The Court, however, disposes of this case on another ground, but a ground that also involves a constitutional issue: the possibly divided loyalties of petitioners' counsel may have deprived petitioners of due process and their constitutional right to counsel. Thus, we are to avoid one constitutional issue in favor of another, which was not raised by petitioners either here or below. I do not believe that this Court has jurisdiction even to reach this question, nor do I see why we should prefer one constitutional issue to another, even if we had the jurisdiction.

The Court, ante, at n. 20, suggests that the conflict of interest issue was presented here by respondent, the State of
WOOD v. GEORGIA

Georgia. But the State merely argued that petitioners' attorney was also the attorney for petitioners' employer who had agreed to pay the fine and who was now seeking to avoid payment by arguing petitioners' indigency. Neither here nor in the trial court has the State ever suggested that petitioner was deprived of due process or raised any other federal constitutional issue. The State has surely not confessed error or given any other indication that it is seeking anything but an affirmance of the decision below—hardly an appropriate disposition if the State is suggesting that petitioners were denied their constitutional right to counsel. Moreover, nowhere in the passage of the response cited by the Court are the terms "conflict of interest" used, nor is there even a clear suggestion made that counsel was acting other than in the interests of petitioners in arguing that an indigent's probation cannot be revoked for failure to pay a fine.

However the State's argument here is to be characterized, this case comes to us on writ of certiorari to a state court. Our jurisdiction, therefore, arises under 28 U. S. C. § 1257 (3) and is limited here to federal rights and privileges that have been "specially set up or claimed," and upon which there has been a final decision by the highest state court in which a decision could be had. The right to counsel claim was never raised in the state court, nor did the state court ever render a decision on the issue: There is, thus, a jurisdictional bar to our reaching the issue. Moore v. Illinois, 408 U. S. 786, 799 (1972); Hill v. California, 401 U. S. 797, 805 (1971); Cardinale v. Louisiana, 394 U. S. 437 (1969), and cases cited there.

It is as clear as could be that no federal constitutional claim of any kind was made in the state courts with respect to a conflict of interest and the adequacy of petitioners' counsel. At the revocation hearing, petitioners testified that they were without funds to pay the fines, and their counsel urged that to incarcerate them would violate the Equal Protection Clause of the Fourteenth Amendment. On cross-examination, peti-
petitioners indicated that they had been assured by their employer that the employer would pay employee fines if they were convicted in cases such as this. The State's attorney then asserted several times that there was a conflict of interest because petitioners' counsel also represented petitioners' corporate employer and was being paid by that concern to represent petitioners. 1 But far from suggesting that the

1 The following colloquy, similar to others, took place at one point in the revocation hearing:

"MR. RHODES: Your Honor, I submit that actually what we have here is a conflict of interest on Mr. Zell's part. He's representing the company and he's trying to get out of paying this money that these people expect that company to pay that money. Mr. Zell is here purporting to represent her while he legally represents a company that has promised to pay all these expenses and fines for these people. And I would ask the Court to look into that and make a determination of that, and if necessary, see that these people have Counsel to enforce that agreement between that company and these people.

"THE COURT: State that again now.

"MR. RHODES: Mr. Zell is here representing Mrs. Allen. Now, Mrs. Allen contends that that company promised to pay all this so that she wouldn't have to go through all of this.

"Now they have not done it.

"And I submit that Mr. Zell represents that company. That he is, his first allegiance is to that company, and not to Mrs. Allen.

"And that there's a conflict of interest, and that this ought to be looked into by this Court.

"THE COURT: You wish to respond?

"MR. ZELL: I don't think it makes any sense what he's saying but I will if the Court wants me to. I don't think I'm required to.

"THE COURT: I don't know whether there's anything the Court could look into. What specifically do you want the Court to look into?

"MR. RHODES: Mr. Zell is here supposedly representing Mrs. Allen. He at the same time represents the people who promised to take care of these things and to pay these fines.

"Now those people are not doing it. And they apparently have reneged on it at this point. I think if you sent these people out to the jail for a while I think they would pay it because they don't want the other employees to know that they are not taking care of these things when they
alleged conflict was a ground of relief for petitioners, the State suggested that petitioners and their counsel had misled the court into thinking that the employer would pay the fines, and that the employer's undertaking should be enforced by sending petitioners "out to jail for a while," rather than permit the employer to renege and free petitioners on equal protection grounds. This would convince the employer to pay because it would not want other employees to know that they would not be taken care of in the event trouble arose. In the course of these arguments, the State never mentioned the Federal Constitution.

Petitioners' attorney in turn responded that although there had been an advance arrangement between petitioners and their employer that fines would be paid by the latter, the employer had not paid, and the only issue was whether petitioners should go to jail when they were without funds themselves to pay the fines. He urged that jailing them would violate the Equal Protection Clause. He also suggested that come up." Transcript of Revocation Hearing (Tr.) 14-15. The transcript is an appendix to the response of respondent.

Other discussions appear at Tr. 25-27 and Tr. 27-28.

2 Tr. 15.

3 The State's position in this regard is clear from its response to the petition for certiorari:

"In fact, Respondent believes that the Petitioners have no intention whatsoever in paying these fines, as their testimony indicates that they are of the opinion that their employers should have paid these fines. The Petitioners are thus holding the enforcement of fines as a recognized sentencing tool a hostage because of their beliefs that others should pay their fines for them. By arguing at this time that they are indigent they are using this as a shield to hide behind their responsibility to pay a fine, which they earlier agreed to pay by virtue of their silence which led the sentencing court to conclude that they were able to pay these fines."

Response of Respondent 10.

Elsewhere, the State suggested "that they be put out there in jail and start serving—that's the only way really I know to enforce the sentence at this point." Tr. 74.

4 Tr. 16-20.
if the asserted conflict of interest raised an ethical problem in the mind of the State’s attorney, a complaint should be filed with the state bar.  

The judge, apparently rejecting the equal protection claim, revoked petitioners’ probation, although petitioners have remained free on bond pending appeal. The sole issue in the Georgia Court of Appeals was whether petitioners had been denied the equal protection of the laws. That claim was rejected, the judgment of revocation was affirmed and the Georgia Supreme Court denied further review. The equal protection issue, as I have said, is the only federal constitutional issue that has been presented here.

The Court apparently believes that under Cuyler v. Sullivan the possibility of a conflict of interest of constitutional dimensions should have prompted further inquiry by the trial judge. But Cuyler v. Sullivan did not purport to give this Court jurisdiction over a claim otherwise beyond its reach. Cuyler held only that if a trial court “reasonably should know that a particular conflict exists,” then a failure to initiate an inquiry may constitute a Sixth Amendment violation. If this is the case here, then petitioners remain free to seek collateral relief in the lower courts.

A majority of the Court, however, proceeds on the basis that it has jurisdiction to address the due process-adequacy of counsel issue. Accordingly, I proceed on that assumption.

II

As I see it, the Court’s disposition of the case rests upon critical factual assumptions that are not supported by the

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* Tr. 27: “I would suggest Mr. Rhodes report this to the State Bar of Georgia and be glad at a hearing to testify if there is any impropriety and submit to any questions before the State Bar.”

* Rule 34, the plain error rule, gives us no authority to set aside a state court judgment by dealing with a constitutional issue neither raised nor decided in the state courts. Where an issue has been properly raised and decided in state litigation but not raised here, Rule 34 would permit us to reach that issue though not presented by the parties here,
Certainly the mere fact that petitioners' counsel was paid by their employer does not in itself constitute a conflict of interest of constitutional dimension. Indeed, one would expect that in the normal course of things the interests of petitioners and of their employer would have corresponded throughout the proceedings. It would have been just as much in the employer's as in the employees' interest to have had the employees adjudged innocent. Similarly, assuming that the employer had promised to pay whatever fines might be levied against the employees, it was in the employer's interest, just as it was in their interest, to have these fines set at the lowest possible amount. The conflict of interests, therefore, only emerges by assuming that the employer, the owner of an adult bookstore and a movie theater, set out to construct a constitutional test case and the petitioners' counsel represented the employer in this regard. Not even a decision to pursue a test case, however, would in itself create a conflict of interest. One must assume further that it was for the sake of this interest that the employer decided not to pay the fines and for the sake of this interest of the employer that petitioners' attorney did not object to the size of the fines or move in timely fashion for a modification of the conditions of probation.

I recognize that the Court's conclusion relies only upon the "possibility" of this scenario, but I find these assumptions implausible and would require a much stronger showing than this record reveals before I would speculate on the likelihood of such a motive of the employer and the knowing cooperation of counsel to this end, let alone dispose of the case on that basis. First, since the only submission of petitioners was

Although petitioners' counsel admitted at oral argument that he had been paid by petitioners' employer at the time of trial, he indicated that the payments from the employer ended at the time petitioners were put on probation. Tr. 13-16.

Petitioners' attorney also said that "I want the court to know, and
that they should not go to jail for failure to pay their fines, even if the court sustained their position, their liability on the fine would remain—as would that of the employer if it had an enforceable obligation to pay. It is, therefore, difficult to find any interest that the employer might have in litigating a test case on this issue through the Georgia courts and to this Court. Second, the record suggests two much more plausible explanations of the employer's failure to pay the fines, neither of which implies a conflict of interest: The employer may have reneged on its promise to pay fines because petitioners were no longer working for the employer, or it may have reneged because ownership of the establishments changed hands. The fact that the employer may have continued to meet some of the expenses, but did not pay the substantial fines, does not indicate to me that the employer manipulated the situation to create a test case; more likely, the employer reneged on his promise because, given the change in circumstances of both the employer and the petitioners, the expense was simply greater than that which the employer was willing to bear at this point.

Mr. Rhodes to know that I've attempted at least was asked, to get the fines paid. And of course, you can see the result of it.

I told the three defendants I would represent them to the best of my ability, and I've explained this to the defendants, and I would like to make an explanation to the court.” Tr. p. 68.

Interesting also is the following exchange from the cross-examination of one of the petitioners:

"Q. Did you select Mr. Zell as your attorney?
"A. Yes, sir. I've known him a long time and I trust him. And he's the only lawyer I've ever had to have in my life, and yes, sir, I selected him."

As far as this record reveals, none of the petitioners to this date has complained about the legal representation.

There is no indication in the record that the employer owned other "adult" establishments. If, as counsel suggested at oral argument, ownership has in fact changed hands, then it seems unlikely that the ex-employer would continue to be interested in creating and litigating a test case in a matter with which he is no longer concerned.
WOOD v. GEORGIA

If the employer was simply unwilling to pay the fines, then the arguments advanced by the attorney may very well have been the best and only arguments available to petitioners. Indeed, the employer having failed to pay, counsel would have been derelict not to press the equal protection claim on behalf of his indigent clients. Obviously, success on this ground would have advantaged petitioners; and I fail to see, as apparently the trial court failed to see, Tr. 15, 28, how petitioners will be constitutionally deprived by assertion of the equal protection claim. The fact that petitioners did move, although belatedly, for a modification of the conditions of parole further indicates that the employer was more interested in cutting his costs than creating a test case. On this record, therefore, I believe it necessary to reach the substantive question that we granted certiorari to resolve.

III

Although I think that there are circumstances in which a State may impose a suitable jail term in lieu of a fine when the defendant cannot or will not pay the fine, there are circumstances

10 Note that petitioners argue in their response that the trial court was fully aware of their financial situation. Response for Petitioners, at 2. This is amply supported by the record. Petitioners' attorney conceded that a defendant who has been fined and who himself could pay the fine could not hide behind the promise of another that the latter would pay. The point was, however, that these petitioners were indigent and could not themselves pay. Tr. 69.

11 The fact that this motion was made and rejected suggests that a remand to the trial court to reconsider this issue is not likely to lead to a different result.

12 Even this statement asserts more than the evidence of record supports: other than the assertions of the State's attorney in a colloquy with the judge at the revocation hearing, there is no suggestion in this record that the employer directed this litigation in any way. The fact that counsel was paid for some period by the employer, does not support an inference that counsel was representing the interests of the employer rather than those of petitioners. See ABA Model Code of Professional Responsibility, D, R. 5-107 (B).
stitutional limits on those circumstances, and the State of Georgia has exceeded the limits in this case.

In *Williams v. Illinois*, 399 U. S. 235 (1970), Williams, convicted of petty theft, received the maximum sentence of one-year's imprisonment and a $500 fine (plus $5 in court costs). As permitted by Illinois statute, the judgment provided that if, when the one-year sentence expired, Williams did not immediately pay the fine and court costs, he was to remain in jail a length of time sufficient to satisfy the total debt, calculated at the rate of $5 per day. We held that "the Equal Protection Clause of the Fourteenth Amendment requires that the statutory ceiling placed on imprisonment for any substantive offense be the same for all defendants irrespective of their economic status." 399 U. S., at 244. Therefore, the Illinois statute as applied to Williams, who was too poor to pay the fine, violated the Equal Protection Clause.

*Tate v. Short*, 401 U. S. 395 (1971), involved an indigent defendant incarcerated for nonpayment of fines imposed for violating traffic ordinances. Under Texas law, traffic offenses were punishable only by fines, not imprisonment. When Tate could not pay $425 in fines imposed for nine traffic convictions, he was jailed pursuant to the provisions of another Texas statute and a municipal ordinance that required him to remain in jail a sufficient time to satisfy the fines, again calculated at the rate of $5 per day. We reversed on the authority of *Williams v. Illinois*, saying: "Since Texas has legislated a fines only policy for traffic offenses, that statutory ceiling cannot, consistently with the Equal Protection Clause, limit the punishment to payment of the fine if one is able to pay it, yet convert the fine into a prison term for an indigent defendant without the means to pay his fine." 401 U. S., at 399. The Court, however, was careful to repeat what it had said in *Williams*: "[T]he state is not powerless to enforce judgments against those financially unable to pay a fine" and is free to choose other means to effectuate this end. *Ibid.*
In *Williams v. Illinois*, 399 U. S., at 243, the Court emphasized that its holding “does not deal with a judgment of confinement for non-payment of a fine in the familiar pattern of alternative sentence of $30 or 30 days.” In neither *Williams* nor *Tate* did it appear that “jail [was] a rational and necessary trade-off to punish the individual who possesses no accumulated assets—since the substitute sentence provision, phrased in terms of a judgment collection statute, [did] not impose a discretionary jail term as an alternative sentence, but rather equate[d] days in jail with a fixed sum.” *Williams v. Illinois*, supra, 399 U. S., at 265 (Harlan, J., concurring in the result). As both the Court and Justice Harlan implied, if the Court had confronted a legislative scheme that imposed alternative sentences, the analysis would have been different.

Indigency does not insulate those who have violated the criminal law from any punishment whatsoever. As I see it, if an indigent cannot pay a fine, even in installments, the Equal Protection Clause does not bar the State from specifying other punishment, even a jail term, in lieu of the fine. To comply with the Equal Protection Clause, however, the State must make clear that the specified jail term in such circumstances is essentially a substitute for the fine and serves the same purpose of enforcing the particular statute that the defendant violated. In both *Williams* and *Tate* the State violated this principle by speaking inconsistently: In each case, the legislature declared its interest in penalizing a particular offense to be satisfied by a specified jail term (in *Tate*, no jail

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13 In imposing an alternative sentence the state focuses on the penalty appropriate for the particular offense and structures two punishments, each tailored to meet the State's ends in responding to the offense committed. Such tailoring may consider the financial situation of the defendant, *Williams v. New York*, supra, 337 U. S., at 246–250, but it does so only in the context of structuring a penalty appropriate to the offense committed.
term at all) and at the same time subjected the indigent offender to a greater term of punishment.

The incarceration of the petitioners in this case cannot be distinguished from that which we found to be unconstitutional in Williams and Tate. Here, the State imposed probated prison terms and fines, but made installment payment of the fines a condition of probation: Had the fines been paid in full and other conditions of probation satisfied, there would have been no time in jail at all. Thus, the ends of the State's criminal justice system did not call for any loss of liberty except that incident to probation.

Under these circumstances, the State's only interest in incarcerating these petitioners for not paying their fines was to impose a loss of liberty that would be as efficacious as the fines in satisfying the State's interests in enforcing the criminal law involved. However, no calculation like that was made here. Upon nonpayment, probation was automatically revoked and petitioners were sentenced to their full prison terms. There was no attempt to provide, in addition to the jail terms for which they were given probation, a term of imprisonment that would be a proper substitute for the fines. In fact, even at the conclusion of their prison terms, petitioners will apparently be liable for the unpaid fines. This is little more than imprisonment for failure to pay a fine, without regard to the goals of the criminal justice system. As in Williams and Tate, the State is speaking inconsistently concerning the necessity of imprisonment to meet its penal objectives; imprisonment of an indigent under these circumstances is constitutionally impermissible.

This case falls well within the limits of what we meant to prohibit when we announced in Tate v. Short, 401 U. S. 395 11 As the majority opinion makes clear, the fines were quite heavy, perhaps in anticipation of payment by the employer. There was no expectation that these defendants, if they performed well on probation, would serve any time in jail, let alone a long term.
(1971), that the “Constitution prohibits the State from imposing a fine as a sentence and then automatically converting it into a jail term solely because the defendant is indigent.” Accordingly, I would reverse the judgment.