



Prosecuting the prosecutor: The makings of the Michael Morton Act



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ARTICLE INFO

Article history:

Received 1 April 2014

Received in revised form 29 May 2014

Accepted 29 May 2014

Available online 28 June 2014

Keywords:

Misconduct

Wrongful convictions

Legal precedents

ABSTRACT

Prosecutorial misconduct is not a rare event, but it often goes undetected, unreported, or no action is taken by the criminal justice system. However, when one Texas prosecutor, Ken Anderson, served jail time for wrongfully prosecuting an innocent man, Michael Morton, for murdering his wife, he made history. Anderson withheld exculpatory evidence leading to Morton wrongfully serving 25 years before being released with new DNA evidence. However, Anderson only served a five-day sentence and \$500 fine. We discuss the case in the context of inequality and legal realism in the criminal justice system. Also, we look at the implications and new legal action taken by the state of Texas to try and combat this problem, along with looking at these secretive occupational subcultures.

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1. Introduction

In 1986, a Texas judge convicted Michael Morton of murdering his wife in their Williamson County home. Morton spent 24 years in prison before new DNA testing demonstrated that he had been wrongly convicted of the crime (Lindell, 2013). Since then, the state accused the lead prosecutor during Morton's trial, District Attorney Ken Anderson, of withholding evidence from Morton's defense attorneys and the court that would have shown Morton's innocence. The State of Texas charged Anderson with criminal contempt of court, tampering with or fabricating physical evidence, and tampering with government records ("Simple Justice", 2013). In other words, the courts charged Anderson with deliberately convicting an innocent

man. Anderson accepted a plea and made history by being the first prosecutor ever jailed for withholding evidence in a murder case (Hennessy-Fiske, 2013). Upon closer inspection, this unprecedented justice may only serve to reinforce notions that our legal system is biased. The former D.A. received a mere slap on wrist, serving only nine days in jail, paying a \$500 fine, and surrendering his law license for falsely imprisoning Morton for nearly 25 years. Anderson's case highlights the inconsistencies in the criminal justice and legal system that bases its legitimacy on equality and justice but in reality, produces and reinforces disparities.

The evidence Anderson allegedly withheld includes: (1) A memo to Don Wood, sheriff's deputy and lead investigator in the case, regarding a telephone tip about a check made out to Morton's wife that was cashed nine days after her murder, (2) a telephone message to Wood informing him that Mrs. Morton's credit card had been recovered in a San Antonio store, (3) a Sheriff's Deputy report stating that neighbors had described seeing a man park a green van on the street behind the Morton home on several occasions prior to the murder, (4) a transcript of a taped interview between Wood and Mrs. Morton's mother, Rita

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Kirkpatrick, wherein Kirkpatrick disclosed that the Morton's three-year-old son had told her that he witnessed the murder, had given details of the murder, and had told her that his father was not home at the time of the murder, and (5) a report from Wood containing a condensed version of the transcript referenced above (Godeau, 2012). In addition, during Morton's trial, Anderson replied in the negative when the judge asked him if he possessed any evidence that would be favorable to Morton (Lindell, 2013).

In a hearing in a court of inquiry held on April 19, 2013, District Judge Louis Sturns found probable cause that Anderson broke the provisions of Texas Penal Code §§ 37.09 and 37.10 and committed criminal contempt of court for lying to the trial judge during the Morton case (Lindell, 2013). Judge Sturns subsequently signed a warrant for Anderson's arrest, and booked Anderson into jail for a short period of time (Lindell, 2013). Anderson appealed this decision claiming that the court exceeded its authority and that the statute of limitations bars both charges under the Texas Penal Code. Ultimately, the state charged Anderson with criminal contempt for withholding exculpatory evidence, agreed to serve nine days in jail, surrender his law license and resigned from the bench (Hennessy-Fiske, 2013).

2. Civil causes of action against prosecutors

In *Imbler v. Pachtman*, 424 U.S. 409 (1976), the United States Supreme Court held that prosecutors are absolutely immune from civil suits for violation of a defendant's constitutional rights so long as the prosecutor's actions are within the scope of his or her duties and intimately associated with the judicial phase of the criminal process. United States Code § 1983 provides the most common, and often only available, statute for civil rights lawsuits against prosecutors. United States Code § 1983 states in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom, or jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable (42 U.S.C.A, 1983).

The defendant in *Imbler* sued the prosecutor under this statute for loss of liberty allegedly caused by unlawful prosecution due to the prosecutor's knowing use of false testimony and suppression of material evidence at trial. In holding that the prosecutor was absolutely immune from suit for these actions, the Supreme Court stated that this statute is to be read in harmony with general principles of tort immunities and defenses rather than in derogation of them (*Imbler v Pachtman*, 1976). Thus, there is little, if any, room for civil liability of prosecutors under this statute if the prosecutor's actions are within the scope of his or her duties and intimately associated with the judicial phase of the criminal process. However, the court left open the possibility that a prosecutor could be sued in his capacity as an

administrator or an investigative officer rather than that of an advocate (*Imbler v Pachtman*, 1976).

Many civil rights suits brought post-*Imbler* have been to no avail. Some courts have afforded absolute immunity in situations where the prosecutor has been accused of destroying evidence (*Gradle v. Oklahoma*, 2006), and where other courts did not afford absolute immunity for destroying evidence, they afforded qualified immunity (*Henderson v Fisher*, 1980). Courts have also afforded absolute immunity to prosecutors accused of using false or tainted evidence or perjured testimony against a defendant (*Henzel v Gerstein*, 1979).

2.1. Standards of conduct for prosecutors

The American Bar Association's Model Rules of Professional Conduct outline the Special Responsibilities of a Prosecutor in Rule 3.8 (1983). In relevant part, this rules states:

The prosecutor in a criminal case shall make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.

For the ABA model rules to carry any weight, the state must adopt the rules in order for them to be enforced. The State Bar of Texas has adopted Model Rule 3.8 verbatim in its Disciplinary Rules of Professional Conduct. Violators of this rule are subject to discipline by the State Bar of Texas for professional misconduct under Texas Disciplinary Rule of Professional Conduct 8.04. Punishment may include private or public reprimands, suspension, or disbarment (University of Houston Law Center, 2013).

On October 4, 2012, the State Bar of Texas filed a disciplinary petition against Ken Anderson claiming that Anderson's withholding of evidence was in violation of Disciplinary Rule of Professional Conduct 3.09(d). This filing was a big step for the State Bar considering that it rarely disciplines prosecutors for their mistakes (Grissom, 2012).

2.2. *Brady v. Maryland*

In *Brady v. Maryland* (1963), the Supreme Court of the United States set guidelines for prosecutors to determine what evidence must be turned over to the defense. In *Brady*, one co-defendant in a murder trial admitted in extrajudicial statements that he actually effectuated the murder while the other co-defendant watched. The defense withheld this information. The court held that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution (*Brady v Maryland*, 1963).

With this holding, the court coined the term "*Brady* materials." Upon request, prosecutors must turn over

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