

5/15/01

SUPREME COURT OF LOUISIANA

No. 00-KA-2864

STATE OF LOUISIANA

Versus

ROBERT J. O'REILLY

consolidated with

No. 00-KA-2865

STATE OF LOUISIANA

Versus

SCOTT BREWSTER

LEMMON, J., Dissenting in Part

I dissent from the majority's failure to reverse the convictions of the two defendants.

In City of Baton Rouge v. Cooley, 418 So. 2d 1321 (La. 1982), the defendant, prior to trial, challenged the legality of a non-elected judge's exercising judicial powers.¹ This court, in a four-to-three decision, allowed a conviction under this unconstitutional procedure to stand, on the basis of the de facto officer doctrine. The Cooley decision, in effect, prevented a citizen accused of a misdemeanor in city court from directly challenging the unconstitutional exercise of judicial power (which could cause the citizen to be imprisoned for several months) and required the citizen to hire

¹The Constitution was amended in 1987 to allow appointment of certain non-elected judges in courts of limited jurisdiction. See La. Const. art. V, §5(A).

a lawyer to bring a civil action challenging the clearly unconstitutional appointment of the presiding judge. See Cooley at 1325 (Lemmon, J., dissenting).

While Cooley involved a challenge to a judge who was illegally exercising the powers of a constitutional office, the present case involves a challenge to an unconstitutionally created office, which is a much more significant situation.

In both Cooley and the present case, the defendant had standing to challenge directly, in the criminal proceeding rather than a separate civil proceeding, the validity of the appointment of the judge who was to decide issues affecting his freedom and his property. In Cooley, the defendant exercised that right to challenge prior to trial, and this court should have declared the invalidity of the appointment. The present case is more difficult because each defendant went to trial without objection and arguably waived the right to challenge. However, this is not a collateral post-conviction attack; the cases are still on direct review, and I would uphold the defendant's right to challenge the appointment.