

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Darlington County

Honorable Michael G. Nettles, Circuit Court Judge

REGINALD A. DUDLEY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2021-001255

PETITION FOR WRIT OF CERTIORARI

JESSICA M. SAXON
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

RECEIVED

Jul 18 2022

S.C. SUPREME COURT

INDEX

INDEXi

ISSUE PRESENTED.....1

STATEMENT OF THE CASE2

ARGUMENT

The PCR Court erred in denying Petitioner relief where Counsel Stucks, shortly after being retained by Petitioner, became the city judge for the City of Darlington creating an actual conflict that adversely impacted his representation of Petitioner.6

CONCLUSION.....13

ISSUE PRESENTED

Whether the PCR Court erred in denying Petitioner relief where Counsel Stucks, shortly after being retained by Petitioner, became the city judge for the City of Darlington creating an actual conflict that adversely impacted his representation of Petitioner?

STATEMENT OF THE CASE

On March 17, 2017, a surveillance video captured Petitioner and an unnamed co-defendant exiting a vehicle at the Darlington Motel, located within the city limits of Darlington, South Carolina. The two men approached a third, identified as William Steen, Jr., and followed him into a motel room. As the three men entered the motel room, the unnamed co-defendant struck¹ Steen who fell forward into the room. A third unnamed co-defendant was in the room and willing to testify that both Petitioner and the second co-defendant repeatedly struck Steen about the head and body causing injury. App. 8, l. 20-App. 9, l. 16.

Based on the video, Petitioner was in the room for approximately one minute. App. 10, ll. 24-25. The State alleged Steen suffered a rib fracture, skull fracture, spinal cord injury, spinal fracture, splenic laceration, and subdural and epidermal hematomas from the incident. App. 8, l. 23-App. 9, l. 1. According to Steen's family, he was unconscious and on a ventilator for four weeks after the incident, and at the time of the plea he required nearly around-the-clock care. App. 13, l. 20-App. 14, l. 7.

A Darlington County grand jury indicted Petitioner for one count of assault and battery of a high and aggravated nature (ABHAN) in July 2017. App. 102-103. Petitioner appeared before the Honorable Paul M. Burch on October 16, 2019, to plead guilty as indicted. Petitioner was represented by retained counsel Robert Stucks. The State was represented by Glenn Bell. App. 1. The plea took place in Chesterfield County, and Petitioner waived venue on the record. App. 5, ll. 1-12. The State recommended a sentence of twelve years incarceration. App. 4, ll. 9-10. Counsel Stucks requested the plea court sentence Petitioner to either probation or a split sentence

¹ The order of dismissal incorrectly states that Petitioner struck Steen at the door of the motel. App. 87. However, the solicitor made clear in the factual recitation that it was the co-defendant who is seen striking Steen on the motel surveillance video. App. 8, ll. 8-10.

due to his lack of a criminal record and “limited role” in the assault upon Steen. App. 10, l. 17-App. 11, l. 22. Petitioner was ultimately sentenced to fifteen years in the department of corrections, provided that upon the service of ten years the remaining five years would be served on probation. Petitioner was also ordered to pay restitution in the amount of \$10,000 to Steen. App. 16, l. 20-App. 17, l. 4.

Petitioner did not appeal his guilty plea or sentence. On October 9, 2020, Petitioner filed an application for post-conviction relief alleging, *inter alia*, that Counsel Stucks developed a conflict of interest during his representation of Petitioner. App. 19-27. The State filed its return on March 19, 2021, requesting an evidentiary hearing. App. 28-34. A hearing was convened on August 23, 2021, before the Honorable Michael Nettles. App. 35. The State was represented by Chelsey Marto. Petitioner was represented by Steven Fowler. App. 35.

Petitioner testified that approximately a month before the plea, he had hired² a new attorney, Kevin Etheridge, to represent him on the ABHAN charge because he was unhappy with Counsel Stucks’ work on his case. App. 41, l. 1-App. 42, l. 13. According to Petitioner, Counsel Stucks did not want to prepare for or talk about a trial. Counsel Stucks was only ever interested in resolving the case with a guilty plea. App. 47, ll. 1-App. 48, l. 1. Petitioner further testified that he told Counsel Stucks “the whole time” that he did not want to take a plea. He had already turned down the same plea offer he eventually plead to during a term of court in Darlington the prior month. App. 51, ll. 20-24.

In response to Petitioner stating he did not want to plead, Counsel Stucks told him there was another warrant that the State planned to serve on him that day if he did not plead guilty. At

² This claim was found to be unsubstantiated. There was nothing produced during the PCR hearing that proved Counsel Stucks had been replaced by Counsel Etheridge as counsel of record in this matter. App. 81, ll. 1-16.

that point, Petitioner felt he had no choice but to plead guilty. App. 51, l. 18-App. 52, l. 52; App. 59, ll. 2-5; App, 67, ll. 8-12. Petitioner testified he had wanted to go to trial, but Counsel Stucks was telling him “not to go to trial and he’s supposed to be the on representing me at the end of the day what am I supposed to do.” App. 62, ll. 1-13,

At the hearing, Petitioner testified that a conflict of interest arose between himself and Counsel Stucks when he learned that Counsel Stucks had become a judge with the City of Darlington. Petitioner went to retain Counsel Stucks on new charges that originated in the City of Darlington. Petitioner was informed by Counsel Stucks that because he had been appointed as a city judge, he could not represent Petitioner on the new charges. App. 45, l. 22-App.46, l. 18.

During cross-examination, the PCR court asked whether Petitioner’s ABHAN charge was from the county or the city of Darlington. Both Petitioner and Counsel Stucks informed the PCR court that the charge was brought by Darlington City Police. When the PCR Court asked Counsel Stucks if he was a city judge, Counsel Stucks replied

Well, when he was arrested I took this case before I became the city judge. He was arrested in March of 2017. I didn’t become city – I didn’t take – I didn’t take that role until July of 2017. That’s why when he said, I told him, I couldn’t represent him on subsequent charges, I was a city judge then.

Counsel Stucks stated he was sworn into judicial office in June 2017 and actively serving as city judge in July 2017. App. 60, l.22-App. 61, l. 16.

Counsel Stucks testified that he represented Petitioner from March 2017 until his plea in October 2019. App. 69, ll. 3-7. Counsel Stucks maintained that Petitioner knew he had become a city judge because he had told Petitioner that he could not represent him on the new charges because of his judgeship with Darlington City. App. 69, ll. 14-20. Counsel Stucks testified he discussed trial as an option and that Petitioner advised him that he did not want to go to trial. App. 71, ll. 9-15.

At the end of the hearing, the PCR court directed the parties to draft orders addressing the potential conflict of interest issue. The court denied all of Petitioner's other PCR claims. App. 77-84. An order of dismissal was filed on October 7, 2021. App. 86-101. The order found that Petitioner was aware that Counsel Stucks was a Darlington City Judge and "seemingly waive this potential conflict" by continuing with the representation and entering a guilty plea. The order further found that even if the conflict was not waived, Petitioner had failed to show any prejudice due to the conflict. App. 100.

ARGUMENT

The PCR Court erred in denying Petitioner relief where Counsel Stucks, shortly after being retained by Petitioner, became the city judge for the City of Darlington creating an actual conflict that adversely impacted his representation of Petitioner.

Petitioner retained Counsel Stucks in March of 2017. App. 69, ll. 5-7. Counsel Stucks was sworn in as the Municipal Judge for the City of Darlington in June 2017. App. 61, ll. 6-16. Once Counsel Stucks ascended to the bench, he could not represent Petitioner on the ABHAN charge because it arose from the municipality of Darlington, Counsel Stucks' employer. However, Counsel Stucks did not inform Petitioner of the conflict of interest as to the ABHAN charge, and he continued representing Petitioner for over two years until his guilty plea. The multiple and varying competing interests that existed during this period resulted in an actual conflict that adversely impacted Counsel Stucks' ability to effectively and zealously represent Petitioner.

The South Carolina Code of Judicial Conduct clearly states that “[a] judge³ shall not practice law.” Canon 4(G), CJC, Rule 501, SCACR. The prohibition against a judge practicing law “becomes effective immediately upon taking the oath of office and applies *to any case in the judge’s former practice that was not completed when judicial duties were assumed.*” *Id.* (emphasis added). “A person to whom this Code becomes applicable *shall comply immediately* with all provisions of this Code...and shall comply with these Sections *as soon as reasonably*

³ A judge is defined as “[a]nyone, whether or not a lawyer, who is an officer of the unified judicial system and who performs judicial functions, including an officer such as a magistrate, master-in-equity or special referee.” Application, CJC, Rule 501, SCACR. All judges must comply with the Code. Canon 5, CJC, Rule 501, SCACR.

possible and shall do so in any event within the period of one year.” Application F, CJC, Rule 501, SCACR (emphasis added).

There are limited exceptions to the prohibition against judges practicing law. Continuing part-time, periodic part-time, and *pro tempore* part-time judges are not required to comply with Canon 4(G). Application C(1)(b), D(1)(b), E(1)(b), CJC, Rule 501, SCACR. However, even a part time judge “shall not practice law in the court on which the judge serves or in any court subject to the appellate jurisdiction of the court on which the judge serves and shall not act as a lawyer in a proceeding in which the judge has served as a judge or in any other proceeding related thereto.” Application C(2), D(2), E(2), CJC, Rule 501, SCACR.

An individual who becomes a judge is tasked with upholding the integrity and independence of the judiciary. Canon 1, CJC, Rule 501, SCACR. “Public confidence in the impartiality of the judiciary is maintained by the adherence of each judge to this [the law and Judicial Code] responsibility.” Comment to Canon 1, CJC, Rule 501, SCACR. “A violation of the Code diminishes public confidence in the judiciary and thereby does injury to the system of government under the law.” Id. A judge must avoid impropriety and the appearance of impropriety in all the judge’s actives. Canon 2, CJC, Rule 501, SCACR. Actual improprieties include violations of law, court rules, or provisions of the Code. Comment to Canon 2(A), CJC, Rule 501, SCACR. “The judicial duties of a judge take precedence over all the judge’s other actives.” Canon 3(A), CJC, Rule 501, SCACR.

Several opinions from the Advisory Committee on Standards of Judicial Conduct address the propriety of a judge practicing law. In Opinion 3-1981, the committee determined that a part-time magistrate could practice in magistrates’ court in a different county. Conversely, in opinion 4-1997, the committee determined that a part-time magistrate could not act as defense

counsel in a case in municipal court because the arrest took place in a municipality in the same county in which the magistrate presided. In Opinion 5-1987, the committee found that a part-time municipal judge could practice law in General Sessions Court in the county in which the judge presided, *provided that the matter did not arise out of the municipality in which the judge presided.* (emphasis added). See Also Opinion 2-2013, (A part-time magistrate can represent a defendant in General Sessions Court in a county different than the one in which the judge served).

The record in Petitioner's case does not reveal whether Counsel Stucks was employed as a full-time or part-time⁴ judge. If Counsel Stucks was a full-time municipal judge, then the prohibition on the practice of law applied to him without exception. Upon taking the oath of office on June 19, 2017, he would have been prohibited from practicing law. Admittedly, the Code provides that a newly appointed judge has up to a year to wind down their prior legal practice, but Counsel Stucks represented Petitioner for over two years after ascending to the bench.

If Counsel Stucks were employed as a part-time municipal judge, he still was unable to represent Petitioner pursuant to the Code and the ethical opinions issued by the Advisory Committee on Standards of Judicial Conduct. Petitioner's charges arose out of Darlington City, the same city that Counsel Stucks presided in. Opinion 5-1987 by the Advisory Committee expressly stated that a part-time municipal judge could *only* practice law in General Sessions court in the county where they presided *if the matter did not arise out of the municipality in*

⁴ The article Petitioner included with his PCR application states that Counsel Stucks was sworn in as "the Municipal Judge for the City of Darlington," indicating he would be the sole judge in that position. App. 26-27.

which they presided. Regardless of his employment status as full or part-time, it was a violation of the Judicial Code of Conduct for Counsel Stucks to represent Petitioner.

The fact that the plea was heard in Chesterfield County has no bearing on this matter because the charges arose in Darlington City. Counsel Stucks, as the municipal judge of Darlington City, had duties and responsibilities to the city that created a conflict of interest with his duties and responsibilities to Petitioner.

“The Sixth Amendment right to counsel attaches upon initiation of adversarial judicial proceedings and at all critical stages of a criminal trial.” State v. Sterling, 377 S.C. 475, 479, 661 S.E.2d 99, 101 (2008). “To establish a violation of the Sixth Amendment right to effective counsel due to a conflict of interest arising from multiple representation, a defendant who did not object at trial must show an actual conflict of interest adversely affected his attorney's performance.” Thomas v. State, 346 S.C. 140, 143, 551 S.E.2d 254, 256 (2001). “An actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendant's.” Staggs v. State, 372 S.C. 549, 551, 643 S.E.2d 690, 692 (2007). This Court has further stated that an actual conflict of interest occurs:

when a defense attorney places himself in a situation inherently conducive to divided loyalties.... If a defense attorney owes duties to a party whose interests are adverse to those of the defendant, then an actual conflict exists. The interests of the other client and the defendant are sufficiently adverse if it is shown that the attorney owes a duty to the defendant to take some action that could be detrimental to his other client.

Duncan v. State, 281 S.C. 435, 438, 315 S.E.2d 809, 811 (1984) (quoting Zuck v. State of Alabama, 588 F.2d 436, 439 (5th Cir.1979)). “A defendant who shows that a conflict of interest actually affected the adequacy of his representation *need not demonstrate prejudice to obtain relief.*” Staggs at 551-52, 643 S.E.2d 692 (emphasis added). ““But until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional

predicate for his claim of ineffective assistance.” Duncan at 438, 315 S.E.2d at 811 (quoting Cuyler v. Sullivan, 446 U.S. 335, 350 (1980)).

A defendant can waive a conflict of interest. However, “[t]o be valid, a waiver of a conflict of interest must not only be voluntary, it must be done knowingly and intelligently.” United States v. Swartz, 975 F.2d 1042, 1048–49 (4th Cir.1992); Hoffman v. Leeke, 903 F.2d 280, 289 (4th Cir.1990). A waiver is not knowing, intelligent, and voluntary unless the defendant knows the precise form of the conflict of interest that eventually results. Swartz at 1049-50.

Once Counsel Stucks ascended to bench as the Municipal Judge of Darlington City, his representation of Petitioner became untenable. As a judge, Counsel Stucks had a duty to avoid both impropriety and the appearance of impropriety. He was to act as a neutral and impartial arbiter of the law in cases that arose from Darlington City. His judicial duties took precedent over all his other activities, including any duty he had to current clients. Further, Counsel Stucks had a pecuniary interest in his employment with the City of Darlington. All of these interests would have been adverse to Petitioner.

As Municipal Judge of the City of Darlington, Counsel Stucks was employed by the same entity, the City of Darlington, that brought the charges against Petitioner. While Counsel Stucks owed Petitioner a duty to zealously defend him against the charges, he could not do that while also maintaining the impartiality and integrity of the judiciary as he was required. Further, Counsel Stucks was receiving payment from Petitioner to represent him in the case while simultaneously receiving payment from the City of Darlington, which was the prosecuting agency. The conflicts of interest in this matter were manifest.

It is critically important to note that Counsel Stucks recognized the conflict of interest, as he advised Petitioner that he could not represent him on the new charges brought by the City of Darlington as he was now a sitting Municipal court judge. However, he never explained that his continued representation of Petitioner on the ABHAN charge was also a conflict of interest necessitating his removal from the case.

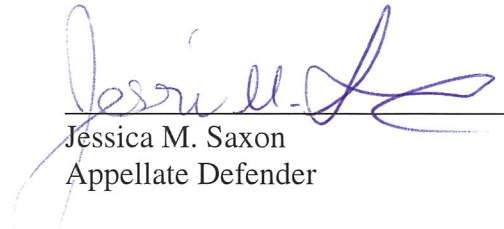
The PCR court found that Petitioner “seemingly waived” any conflict of interest because Counsel Stucks informed him he could not represent him on his subsequent Darlington City charges. This was incorrect, as there was no testimony that reflected that Counsel Stucks advised Petitioner of the precise form of conflict that arose as to the ABHAN charge. Petitioner did not have the requisite knowledge of the type of conflict that could arise to have knowingly, voluntarily, and intelligently waived it.

The PCR court next found that, even if a conflict of interest existed, Petitioner could not show any prejudicial effect because “[t]here has been no showing that the potential conflict impacted Counsel’s performance or Applicant’s decision to plead.” Petitioner was not required to show prejudice. Petitioner need only show that Counsel Stucks actively represented one or more conflicting interest which adversely impacted his ability to represent Petitioner. Duncan at 438, 315 S.E.2d at 811 (quoting Cuyler v. Sullivan, 446 U.S. 335, 350 (1980)); Thomas v. State, 346 S.C. 140, 143, 551 S.E.2d 254, 256 (2001). Counsel Stucks had conflicting duties to the City of Darlington, to the judicial bench, and to Petitioner that could not be reconciled. These created an actual conflict that adversely impacted Petitioner, as Counsel Stucks could not zealously advocate on Petitioner’s behalf without violation his duty to the judicial bench and the City of Darlington. Counsel Stucks also could not have taken Petitioner’s case to trial without violating the rules of the Code and subjecting himself to various sanctions.

Counsel Stucks had a duty to inform Petitioner of the conflict of interest regarding the ABHAN charge that arose when he ascended to the judicial bench. He did not inform Petitioner of the conflict but instead continued to represent Petitioner for over two years after becoming a judge. During that time Counsel Stucks was not a zealous and effective advocate for Petitioner. Petitioner has shown that Counsel Stucks had an actual conflict of interest that adversely impacted his ability to represent Petitioner and is therefore entitled to relief.

CONCLUSION

For the foregoing reasons, Petitioner respectfully request that this Court should grant the writ of certiorari to allow full briefing on this issue.



Jessica M. Saxon
Appellate Defender
ATTORNEY FOR PETITIONER

This 18th day of July, 2022.