

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Jasper County

Honorable Michael G. Nettles, Circuit Court Judge

RECEIVED

OCT 25 2016

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

NATHANIEL WRIGHT,

APPELLANT

APPELLATE CASE NO 2016-000272

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial judge err in refusing to relieve the public defender office from representing Appellant at his trial for murder because of a conflict of interest where the public defender's supervisor represented one of the State's witnesses and negotiated a reduction in sentence for the witnesses in exchange for his statement and testimony against Appellant and where the public defender also represented the deceased?
2. Did the trial judge err in refusing to grant a continuance to allow private counsel to prepare for trial when counsel had been retained and the public defender office operated under a conflict of interest?

STATEMENT OF THE CASE

In November of 2014, the Jasper County Grand Jury indicted Appellant Wright for murder, possession of a weapon during the commission of a violent crime and failure to stop for a blue light, indictments #2014-GS-27-540, 541, 542. On February 8, 2016, Appellant appeared before the Honorable Michael G. Nettles and pled guilty to failure to stop for a blue light and proceeded to jury trial on the murder and weapons charges. Stephanie Smart-Gittings and Jared Newman represented Appellant. Mary Jones prosecuted the case. The jury returned with a verdict of guilty of the lesser included offense of voluntary manslaughter and the weapon charge. Judge Nettles sentenced Appellant to twenty three (23) years for voluntary manslaughter, five (5) years concurrent for the weapons charge and three (3) years concurrent for failure to stop for a blue light. A timely notice of intent to appeal was filed on February 12, 2016. This appeal follows.

ARGUMENTS

1. **The trial judge erred in refusing to relieve the public defender office from representing Appellant at his trial for murder because of a conflict of interest where the public defender's supervisor represented one of the State's witnesses and negotiated a reduction in sentence for the witnesses in exchange for his statement and testimony against Appellant and where the public defender also represented the deceased.**

The jury found Appellant guilty of voluntary manslaughter in connection with the fatal shooting of Appellant's brother, Maurice Wright. Prior to trial the public defender appointed to represent Appellant, Stephanie Smart-Gittings, brought the conflict issue to the attention of the trial judge. (Tr. pp. 11-35). The State had not disclosed the identity of one of its witnesses until the week before trial. (Tr. pp. 11-12). When the witness's identity was disclosed, the public defender learned that the witness, Antoine Drake, was represented by her direct supervisor in the public defender office, Stephen Plexico. (Tr. p. 14, line 21 – p. 15, 16, 17 lines 1-20). The public defender told the judge, "Mr. Plexico brokered – negotiated a deal with the State regarding this particular confidential witness and Mr. Plexico's witness will be testifying against Mr. Wright [Appellant] during the course of this trial." (Tr. p. 15, lines 3-6).

The witness was initially tried in his absence and sentenced to two years for drug charges. (Tr. p. 353, lines 16-24). Mr. Plexico was successful in having the sentence reduced to probation in exchange for witness Drake's statement and testimony against Appellant. (Tr. p. 353, line 25 – p. 354, lines 1-15). Drake claimed to have witnessed the shooting but did not provide a statement to law enforcement until he was arrested on the unrelated charges. (Tr. p. 356, lines 18-21). Another witness, Sadie Robinson-Jackson, testified that the day after the shooting Drake

told her that he was high on drugs and alcohol and passed out at the time of the shooting. (Tr. p. 390, line 7 – p. 391, lines 1-4).

The judge asked the Chief Public Defender for the Fourteenth Circuit, Gene Hood, to address Rule 407, SCACR, Rules of Prof. Conduct, Rule 1.10(e). (Tr. p. 17, lines 21-25). Mr. Hood told the judge:

My understanding of this particular situation of a Chinese wall, which is basically what we're talking about here today, is that if you have an office that has two cases and one case is going to be perhaps testifying against the other case, that the attorneys can successfully build a Chinese wall to prevent any – any problems as far as one knowing things about the other one's case and things of that nature. As long as you keep them separated, you can proceed like that. The issue in this particular case comes down to a supervisor who is going to – his client is going to testify against Ms. Smart's client and, not only that, they were both in the same office.

(Tr. p. 18, lines 11-22).

Mr. Hood stated that he had attorneys in three different counties, Jasper, Hampton and Allendale, but that Ms. Smart-Gittings and Mr. Plexico were in the same office in Hampton County, shared the same investigator and Mr. Plexico was Ms. Smart-Gittings' supervisor. (Tr. p. 19, lines 5-20). Later Mr. Hood told the judge, "It's the – it's the appearance of impropriety perhaps that—that really makes this a bad – a bad situation to be in and one that I avoid under any circumstances. I have contract attorneys that could have taken this case and everything else had we known some time ago, but we just found out about it and, you know, now we're stuck with going forward." (Tr. p. 23, lines 10-16).

The judge heard testimony from Robert Hughes, the public defender in Jasper County who transferred Appellant's case to Ms. Smart-Gittings due to a conflict (Tr. p. 19, lines 12-17), and from Mr. Plexico. (Tr. pp. 20-21). Ms. Smart-Gittings told the judge she had discussed the conflict issue with her client. (Tr. p. 26, lines 16-18). The judge then asked, "Does he

understand that there conceivably could be a potential conflict, which I'm not so certain there is a conflict, but to the extent that there could be, what is your client's preference? Does he want you to represent him or not?" (Tr. p. 26, lines 19-23). Ms. Smart-Giddings answered, "He does not, Your Honor." (Tr. p. 26, line 24).

The judge referenced Rule 1.10(e) of the Rules of Professional Conduct and found no conflict. (Tr. pp. 27-29). The judge found that Ms. Smart-Giddings was not involved in the representation of State's witness, Drake, and that she had not received confidential or privileged information. (Tr. p. 27, line 15 – p. 28, lines 1-12). Ms. Smart-Giddings noted that the rule indicates that there is not a conflict if the lawyer is screened in a timely manner from access to confidential information relating to and from any participation in the representation of the other client. (Tr. p. 29, lines 19-23). She further noted that she sought and received legal advice about Appellant's case from her supervisor, Mr. Plexico. (Tr. p. 29, line 25, p. 30, p. 31, lines 1-11). The judge responded, "The distinguishing factor is whether or not you received confidential information, not whether or not y'all had scholarly discussions about the law." (Tr. p. 31, lines 12-14).

In addition to the conflict involving Mr. Plexico's representation of State's witness Drake, Ms. Smart-Giddings also told the judge that she represented the deceased brother on three counts of assault and battery first degree. (Tr. p. 33, line 11 – p. 34, lines 1-10). Ms. Smart-Giddings told the judge that the dual representation created a conflict because of the need to explore the reputation for violence of the deceased. (Tr. p. 34, lines 22-23). The judge stated that he would address admissibility of the reputation for violence of the deceased at the appropriate time. (Tr. p. 35, lines 11-12). The trial judge erred in refusing to relieve the public defender from representation of the Appellant based on conflicts of interests.

The public defender office's representation of witness Drake was directly adverse to the office's representation of Appellant. The present case is complicated by the fact that the State withheld the identity of the witness until the week before trial. The public defender office was unable to construct a "Chinese Wall" when the office was unaware that Drake was going to be a witness against Appellant until the week before trial.

Rule 1.7(a) of the South Carolina Rules of Professional Conduct provides:

Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

Rule 407, SCACR.

Rule 1.10(a) of the South Carolina Rules of Professional Conduct deals with the imputation of conflicts and provides:

While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

Rule 407, SCACR.

Rule 1.10(e) of the South Carolina Rules of Professional Conduct, however, provides an exception for public defender offices stating:

A lawyer representing a client of a public defender office, legal services association, or similar program serving indigent clients shall not be disqualified under this Rule because of the program's representation of another client in the same or a substantially related matter if:

- (1) the lawyer is screened in a timely manner from access to confidential information relating to and from any participation in the representation of the other client; and
- (2) the lawyer retains authority over the objectives of the representation pursuant to Rule 5.4(c).

Rule 407, SCACR.

Rule 1.0(n) of the South Carolina Rules of Professional Conduct defines screened as:

“Screened” denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

Rule 407, SCACR.

There was no screening or Chinese wall in the present case because the public defender office was unaware of the identity of witness Drake and unaware of the conflict. The chief public defender advised the judge that if he had known of the conflict, he would have assigned one of the cases to a contract attorney outside of the public defender office. (Tr. p. 23, lines 10-16).

The conflict in the public defender office constituted an actual conflict. An actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendants. Fuller v. State, 347 S.C. 630, 557 S.E.2d 664 (2001); See also Zuck v. State of Alabama, 588 F.2d 436, 439 (5th Cir.1979). Under the imputation of conflicts, the public defender office owed a duty to witness Drake that was adverse to Appellant. In order for this dual representation not to constitute an actual conflict, there needed to be proper screening, according to the ethical rules. The screening did not take place, as required, because the office was unaware of the identity of the witness and unaware of the conflict. The second comment to Rule 1.7 states that the first thing to do in the resolution of a conflict of interest problem is to

clearly identify the clients. The public defender in the present case identified the conflict a week before trial when the State disclosed the name of the witness. The public defender brought the conflict to the trial judge's attention prior to trial. The trial judge abused his discretion in refusing to relieve the public defender office based on the conflict created by the dual representation of both Appellant and witness Drake without proper screening.

“[A] motion to relieve counsel is addressed to the discretion of the trial judge and will not be disturbed absent an abuse of discretion.” State v. Graddick, 345 S.C. 383, 385, 548 S.E.2d 210, 211 (2001) (citation omitted). An abuse of discretion occurs when the court's decision is unsupported by the evidence or controlled by an error of law. State v. Black, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012). The trial judge's refusal to relieve the public defender office is controlled by an error of law. The Sixth Amendment right to effective assistance of counsel encompasses the right to representation by an attorney who does not owe conflicting duties to other defendants. Holloway v. Arkansas, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978). Where counsel is guaranteed, the client has the right to conflict-free representation. Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). Violation of this principle is grounds for reversal. Id. A defendant need not demonstrate prejudice if there is an actual conflict of interest. State v. Gregory, 364 S.C. 150, 153, 612 S.E.2d 449, 450 (2005). The trial judge's refusal to relieve the public defender office violated Appellant's Sixth Amendment right to conflict-free representation and the violation requires reversal.

The present case is distinguished from Duncan v. State, 281 S.C. 435, 315 S.E.2d 809 (1984). In Duncan the South Carolina Supreme Court wrote:

This is a case of concurrent representation. The Public Defender's Office represented both Duncan and Leroy Davis, a witness against Duncan. Steve

Henry, an Assistant Public Defender, made a conscious decision not to reveal the prior inconsistent statement of Davis to Duncan or his attorney. Henry, representing Davis on an unrelated murder charge, felt he had an ethical duty not to reveal the statement. Thus, Henry states that he acted under what he perceived to be a conflict of interest.

This court is unable to discern the conflict. Duncan and Henry have done no more than state in a conclusory fashion that there was a conflict of interest. There is no evidence in the record to support the conclusion. Revealing the statement could not have harmed Davis because the Solicitor had it already. Henry's proper action should have been to go to the trial judge and explain the situation to him and ask guidance.

Duncan v. State, 281 S.C. 435, 438–39, 315 S.E.2d 809, 811 (1984). In the present case the conflict was clear. The police did not have a statement from witness Drake until the public defender representing Drake negotiated a reduction in sentence in exchange for a statement and testimony against Appellant. When the public defender representing Appellant learned of the conflict, she did as the Court in Duncan suggested and brought the conflict to the trial judge's attention.

A second actual conflict existed as a result of the public defender's representation of both Appellant and the deceased. The deceased was a former client. Rule 1.9 of the South Carolina Rules of Professional Conduct provides:

A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

Rule 407, SCACR. Appellant's interests were materially adverse to the interests of the former deceased client, especially in light of the fact that Appellant argued self-defense and elicited testimony about the deceased's reputation for violence. (Tr. pp. 388-389). The trial judge abused his discretion in refusing to relieve the public defender based on the conflict created by the dual representation of both Appellant and the deceased.

The trial judge abused his discretion in refusing to relieve the public defender office. The public defender office operated under an actual conflict of interest in representing both Appellant and witness Drake without proper screening. Additionally, the public defender operated under an actual conflict of interest in representing Appellant and the deceased. The trial judge's failure to relieve the public defender office was an error of law because the failure violated Appellant's Sixth Amendment right to conflict-free representation. The failure to provide conflict-free representation requires reversal.

2. The trial judge erred in refusing to grant a continuance to allow private counsel to prepare for trial when counsel had been retained and the public defender office operated under a conflict of interest?

Prior to trial, private counsel Jared Newman advised the trial judge that a family member of Appellant contacted him about representation of Appellant the week before and that he was holding funds in trust as the family was able to retain him. (Tr. p. 31, line 19 – p. 32, line 1). Private counsel, however, indicated that due to the complicated nature of the case, he would not be able to immediately take over representation. (Tr. p. 32, lines 2-11). The judge then asked private counsel, "I question to you is what's your role in the case here today? We're going forward. What's your role?" (Tr. p. 32, lines 12-13). Private counsel indicated that he needed to talk with Appellant but suggested that he could possibly act as co-counsel. (Tr. p. 32, lines 14-19). After talking with Appellant, private counsel advised the judge that Appellant wanted private counsel only to represent him. (Tr. p. 32, lines 20-25). The judge then stated, "Well, that's not going to happen because --" (Tr. p. 33, line 1). The judge then stated, "Number one, you're not – you're not willing to do that and the public defender is indeed representing him by order of this Court and I found that the rules don't mandate that she be conflicted out. So once

again, I ask you, what do you want to do?" (Tr. p. 33, lines 3-7). The judge allowed private counsel to serve as co-counsel. (Tr. p. 33, lines 8-10). The judge erred in refusing to grant a continuance.

First, although private counsel did not specifically ask for a continuance on the record, the public defender moved for a continuance on other grounds (Tr. p. 10, line 22 – p. 11- 14) and the judge was aware of the conflict issues with the public defender office. Second, the record reflects that there was an earlier conference call making the judge aware that private counsel had just been hired but could not be prepared to try the murder case in one week of time. (Tr. p. 31, line 19 – p. 32, lines 1-9). The record also reflects that that the judge was not going to continue the case. The trial judge specifically stated to private counsel, "I question to you is what's your role in the case here today? **We're going forward.** What's your role?" (Tr. p. 32, lines 12-13) (emphasis added). It would have been futile for private counsel to move for a continuance. In State v. McDaniel, 320 S.C. 33, 37, 462 S.E.2d 882, 884 (Ct. App. 1995), the South Carolina Court of Appeals wrote, "So long as the judge had an opportunity to rule on an issue, and did so, it was "not incumbent upon defense counsel to harass the judge by parading the issue before him again." Dunn v. Coca-Cola Bottling Co., 311 S.C. 43, 46, 426 S.E.2d 756, 758 (1993); see also State v. Pace, 316 S.C. 71, 447 S.E.2d 186 (1994) (counsel's failure to object did not waive issue where trial judge's remarks were such that any objection would have been futile). The trial judge in the present case had the opportunity to grant a continuance but erroneously refused to do so. The issue is preserved for appellate review.

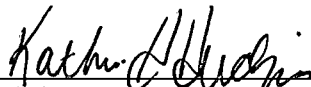
In State v. Williams, 321 S.C. 455, 459, 469 S.E.2d 49, 51–52 (1996), the South Carolina Supreme Court wrote:

The trial court's refusal of a motion for continuance in a criminal case will not be disturbed absent a clear abuse of discretion. State v. Tanner, 299 S.C. 459, 385 S.E.2d 832 (1989). Reversals of the refusal of a continuance are about as "rare as the proverbial hens' teeth." State v. Lytchfield, 230 S.C. 405, 409, 95 S.E.2d 857, 859 (1957). Where there is no showing that any other evidence on behalf of the appellant could have been produced, or that any other points could have **52 been raised had more time been granted for the purpose of preparing the case for trial, the denial of a motion for continuance is not an abuse of discretion. State v. Squires, 248 S.C. 239, 149 S.E.2d 601 (1966).

Again, an abuse of discretion occurs when the court's decision is unsupported by the evidence or controlled by an error of law. State v. Black, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012). As discussed in issue one, the trial judge's refusal to relieve the public defender office because of conflicts of interest constituted an error of law. If the public defender office had been properly relieved from representing Appellant, a continuance would have been necessary to allow new counsel to prepare for trial. This is not a case where Appellant simply waited until the last moment to hire counsel. Instead, as soon as Appellant learned of the conflicts within the public defender office, his family hired private counsel. The present case is the proverbial hen's tooth. The trial judge abused his discretion in not allowing a continuance so that private counsel could prepare when the public defender office operated under actual conflicts of interest.

CONCLUSION

Based on the above arguments this Court should reverse the convictions and sentences and remand for a new trial.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 25th day of October, 2016.

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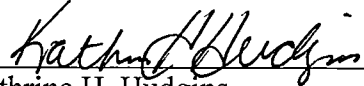
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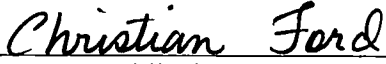
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Initial Brief of Appellant and Designation of Matter have been served on Nathaniel Wright, #345376, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 25th day of October, 2016.



Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 25th day of October, 2016.

 (L.S)
Notary Public for South Carolina
My Commission Expires: March 1, 2026