

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

 ORIGINAL

Appeal from Jasper County

Honorable Michael G. Nettles, Circuit Court Judge

RECEIVED

MAY 08 2017

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

NATHANIEL WRIGHT,

APPELLANT

APPELLATE CASE NO 2016-000272

FINAL REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ii

ARGUMENTS IN REPLY.....3

CONCLUSION.....10

TABLE OF AUTHORITIES

Cases

Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980)..... 7

Duncan v. State, 281 S.C. 435, 315 S.E.2d 809 (1984)..... 5

Dunn v. Coca-Cola Bottling Co., 311 S.C. 43, 426 S.E.2d 756 (1993)..... 8

Fuller v. State, 347 S.C. 630, 557 S.E.2d 664 (2001)..... 4

Holloway v. Arkansas, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978)..... 7

State v. Gregory, 364 S.C. 150, 612 S.E.2d 449 (2005)..... 7

State v. McDaniel, 320 S.C. 33, 462 S.E.2d 882 (Ct. App. 1995)..... 8

State v. Pace, 316 S.C. 71, 447 S.E.2d 186 (1994)..... 8

Zuck v. State of Alabama, 588 F.2d 436 (5th Cir.1979) 4

Rules

Rule 407, SCACR..... 4, 6

Rule 1.10(a), RPC, Rule 407, SCACR 3

Rule 1.10(e), RPC, Rule 407, SCACR 3

Rule 1.0(n), RPC, Rule 407, SCACR..... 4

Rule 1.9, RPC, Rule 407, SCACR..... 6

Rule 5.4(c), RPC, Rule 407, SCACR 4

Constitutional Provisions

Sixth Amendment 6, 7

ARGUMENTS IN REPLY

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. The Hampton County Public Defender Office represented both Appellant Wright and purported eye-witness to the shooting, Antoine Drake. Public Defender Stephanie Smart-Gittings represented Appellant Wright. Her direct supervisor, Public Defender Stephen Plexico, represented witness Drake on a separate unrelated drug charge. The State was allowed to withhold Drake's identification as a witness until the week before trial. (R. p. 11, lines 20 – p. 12, lines 1-17). Drake was initially tried in his absence and sentenced to two years for the drug charges. (R. p. 323, 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. (R. p. 323, line 25 – p. 324, lines 1-15). Drake claimed to have witnessed the shooting but did not provide a statement to law enforcement until he was arrested on a pistol charge. (R. p. 326, 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. (R. p. 360, line 7 – p. 361, lines 1-4).

Although clients of public defender offices do not enjoy the same protection against conflicts as clients of other offices, (compare Rule 1.10(a), RPC, Rule 407, SCACR to Rule 1.10(e), RPC, Rule 407, SCACR), the conflict in the present case constituted an actual conflict of interest requiring the judge to relieve the public defender office. Rule 1.10(e), RPC, provides:

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. 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. (R. 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 Public Defender Stephanie Smart-Gittings was unaware of the identity of the witness and unaware of the conflict until the week before trial.

Respondent argues that the present case is similar to Duncan v. State, 281 S.C. 435, 315 S.E.2d 809 (1984) in that, “Appellant’s claims are no more than a conclusory statement of perceived conflicts of interest without any evidence in the record to support such a conclusion.” (IBOR p. 15). The present case is clearly distinguished from Duncan. In the Duncan case Leroy Davis was called as a witness by the State in Duncan’s murder case. Attorneys from the same public defender office represented Duncan and represented Davis in an unrelated murder case. Davis had given police a prior inconsistent statement in regard to the chain of custody of a pistol. The public defender representing Davis did not disclose the inconsistent statement to Duncan’s other public defenders. In finding no conflict the Court wrote:

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 regard to the State’s failure to provide the defense with the prior inconsistent statement of Davis, the Court wrote, “In light of the evidence adduced at the trial and PCR hearing, the disclosure of this statement would not have effected [sic] the outcome of the trial. There was ample evidence to establish the chain of custody of the pistol. Furthermore, Davis was not a key government witness.” Duncan, 281 S.C. at 439, 315 S.E.2d at 811.

In contrast, the present case did not involve a prior inconsistent statement. Instead, Drake was a purported eye-witness to the murder and the conflict was clear. Unlike in Duncan, the police did not have a statement from witness Drake until the public defender representing Drake negotiated a reduction in sentence in exchange for the statement and testimony against

Appellant. The public defender representing Drake owed a duty to Drake and Drake's interest in testifying against Appellant in exchange for a reduction in sentence was clearly adverse to Appellant. An actual conflict existed and screening procedures were not in place in the Hampton County Public Defender Office.

A second actual conflict existed as a result of Public Defender Stephanie Smart-Gittings' 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. (R. pp. 358-359). 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.

Respondent notes that, "Appellant was also represented by counsel from the private bar, Jared Newman, who had no relationship whatsoever to the public defender office. Newman handled the vast majority of Appellant's trial, including a vigorous cross-examination of Drake and the introduction of numerous instances of decedent's reputation for violence." (IBOR p. 17). The co-representation by private counsel, hired less than a week before trial when the public defender learned of the conflict, does not cure the conflict.

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.

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?

While private counsel did not specifically move for a continuance in order to have more time to prepare, having only been retained less than a week before trial when Appellant became aware of the conflict, it is clear from his statements to the judge that he was seeking a continuance in order to have more time to prepare due to the complicated nature of the case.

Private counsel told the judge:

If it pleases the Court, my name is Jared, J-A-R-E-D, Newman. I have been contacted by Mr. Wright's family. I still maintain that Mr. Wright is indigent, but I had a family member who has contacted me mid last week. I think the Court was aware of that because we had a conference call with the solicitor and the Court and myself. I am holding funds in trust. I am able to be retained by Mr. Wright.

I told you my concern. I don't think that I could represent anybody here that I can come into a fairly complicated —it's complicated due to the fact of the number of witnesses and conflicting testimony and things like that—case. I don't think I could do a proper investigation of the case or get up to speed in a couple of days. I have reviewed materials. I have talked with the public defender, but I would not feel that I would be able to —

(R. p. 31, line 19 – p. 32, lines 1-9). The judge responded, "All right." (R. p. 32, line 10).

Counsel then finished his statement, "— take over a murder case immediately." (R. p. 32, line

11). The judge then asked private counsel, "I [sic] question to you is what's your role in the case here today? We're going forward. What's your role?" (R. p. 32, lines 12-13). Based on the above exchange it is clear that private counsel was seeking more time to prepare for trial. The judge's comment, "**We're going forward**" is a clear indication that the judge was not going to allow more time for private counsel to prepare. It would have been futile for private counsel to continue to move for a continuance at this point.

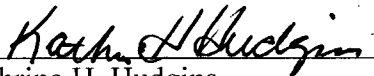
Private counsel asked to serve as co-counsel only after it became clear that the trial judge was not going to continue the case. Private counsel indicated that he needed to talk with Appellant but suggested that he could possibly act as co-counsel. (R. p. 32, lines 14-19). After talking with Appellant, private counsel advised the judge that Appellant wanted private counsel only to represent him. (R. p. 32, lines 20-25). The judge then stated, "Well, that's not going to happen because --" (R. 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?" (R. p. 33, lines 3-7).

Again, it would have been futile for private counsel to move for a continuance at this point. 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 trial judge ruled on the continuance motion by proceeding with trial rather than granting the continuance motion. The judge erred in denying the motion for continuance to allow private counsel time to prepare. The issue is preserved for appellate review.

CONCLUSION

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



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This 8th day of May, 2017.