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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Sumter County
Howard P. King, Circuit Court Judge

Appellate Case No. 2018-000715

THE STATE,

Respondent,

vs.

FAVIAN ALPHONZO HAYES,

Petitioner.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

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STATEMENT OF ISSUE ON APPEAL

The plea court did not err in finding counsel did not have a conflict of interest in representing Petitioner. Because Petitioner never requested the trial court to substitute new counsel, nor did he ever complain a conflict existed because his counsel represented a potential prosecution witness, the argument is not preserved for review. Further, no actual conflict existed as the record indicates counsel no longer represented the potential witness who never testified due to Petitioner accepting the guilty plea. Petitioner failed to show any adverse action or inaction by counsel as a result of the purported conflict

STATEMENT OF THE CASE

This case comes to this Court under unusual circumstances, but it is best described as a belated appeal. Petitioner Favian Hayes was indicted for two counts of armed robbery, conspiracy, possession with intent to distribute cocaine base, and possession with intent to distribute cocaine base within a half mile of a school.

Hayes pled guilty before the Honorable Howard P. King to one count of armed robbery (of Young's Market), conspiracy, and possession of cocaine base, second offense on June 1, 2009. Hayes was represented by David Sullivan, Esquire. Hayes declined to plead guilty to the second count of armed robbery (of Kangaroo Mart). The plea court accepted his plea of guilty and sentenced Hayes to twenty-five years imprisonment for armed robbery and concurrent sentences of five years imprisonment for the two other charges for an aggregate twenty-five years imprisonment. Hayes' counsel filed a notice of appeal but did not submit an explanation of issues to be raised on appeal pursuant to Rule 203(d)(1)(B)(iv), SCACR. This Court subsequently dismissed the appeal.

Hayes filed an application for post-conviction relief, which was denied. He appealed the denial of his PCR. His petition for writ of certiorari to the Supreme Court was transferred to this Court. This Court denied his petition on July 3, 2014, and the remittitur was issued on June 23, 2014.

Hayes filed a petition for habeas corpus. On May 28, 2015, the Honorable Magistrate Judge Thomas E. Rogers, III, issued a report and recommendation to deny the State's motion for summary judgment unless the State allowed Hayes leave to appeal his guilty plea conviction out of time, and recommended the remaining claims be dismissed. The Honorable Richard Girgel, United States District Judge, entered a conditional order granting the writ of habeas corpus and directing the State to restore Petitioner's direct appeal rights. On motion by the State, this Court issued an order for the Court of Appeals to recall the remittitur in the direct appeal and reinstate the appeal. After the Court of Appeals recalled the remittitur, Hayes submitted an explanation pursuant to Rule 203(d)(1)(B)(iv), SCACR. The Court of Appeals ordered the appeal to proceed on June 16, 2016.

Following briefs from appellate defender John P. Strom, Esquire, and undersigned counsel, the Court of Appeals affirmed in a per curiam, unpublished opinion. State v. Favian Hayes, 2018-UP-025 (S.C. Ct. App. filed January 17, 2018). Petitioner's subsequent petition for rehearing was denied. Petitioner filed a petition for writ of certiorari. The State's return follows.

STATEMENT OF FACTS

Hayes pled guilty on June 1, 2009. Hayes admitted he was guilty, but he was willing to take a trial, except he felt the "odds" were "stacked" against him. R. p. 19. Hayes complained he only received his discovery in February. R. p. 19. Hayes complained about what he termed a "conflict of

interest” when another client, Stacy Rhodes, grabbed some pictures from Hayes’ plea counsel, David Sullivan, Esquire, a public defender. R. p. 20-21.

Sullivan explained what happened to the plea court as follows:

This past court term [the prosecutor] gave me part of Mr. Hayes’ discovery. I was talking to another client of mine, named Stacy Rhodes and I had part of Mr. Hayes’ [discovery] in my hand and some of the photos that I had were of Mr. Rhodes and they were incriminating pictures of Mr. Rhodes and Mr. Rhodes reached over, who, like I said is my client, **or was my client**, reached over and grabbed those photos out of my hand and basically told me that I wasn’t getting them back and I went and got a [correctional officer] to get those photos from Mr. Rhodes and Mr. Hayes has told me on numerous occasions how upset he is that Mr. Rhodes was able to get some discovery that was in his file.

R. p. 22, lines 8-19 (emphasis added). Sullivan assured the plea court the incident did not prejudice Hayes’ case. R. p. 22, lines 20-22. When the plea court asked Hayes how he was prejudiced, Hayes gave a rambling, incoherent explanation that failed to explain any real prejudice. R. p. 25.

The prosecutor explained the picture showed Rhodes and three other individuals with guns, money, and drugs. Hayes was not in the photograph, but Hayes apparently was with Rhodes and the others in the hotel room that night. A gun in the picture matched the description of the one used in the robbery. Hayes and his co-defendant let Rhodes and the others use the room. Rhodes and another person in the hotel room confirmed the guns belonged to Hayes. The prosecutor advised the plea court that Rhodes was a possible witness, but she had not discussed testifying with Rhodes. She intended to bring him back to testify, but expected “he may lie.” R. p. 27, lines 6-21; pp. 38-39; p. 52, lines 24-25.

When the plea court asked if there were any charges against Rhodes, the prosecutor began to

explain Rhodes pled to unrelated charges but before the prosecutor finished this explanation, the plea court asked the prosecutor if Rhodes was entitled to the discovery. The prosecutor explained he was not charged for the armed robbery, although he was charged for interfering with police in relation to the incident at the hotel room. R. pp. 27-28.

The plea court asked Hayes to explain the “conflict of interest.” Hayes claimed Sullivan lacked interest in his case and once again talked about writing the Lawyer’s Conduct Board and the Chief Public Defender. R. pp. 28-30. The plea court patiently tried to ascertain Hayes’ complaint, commenting:

Well you’re pleading guilty to the charge so, you know, do you still, do you not want to plead guilty because you think he’s ineffective? Tell me what you’re talking with kind of a split tongue here Mr. Hayes. You tell me that you’re guilty and that you want to plead guilty, but at the same time you’re telling me that you want Mr. Sullivan to do some other things, so I don’t understand.

R. p. 30, lines 16-23.

Although Hayes did not ask for new counsel, the plea court volunteered that it would not appoint new counsel and Hayes could decide to plead guilty or go to trial. Hayes chose to plead. R. pp. 31-32. He admitted the charges in the Young’s food store robbery and the drug charge were both true. R. p. 32, lines 15-23.

The plea court asked Sullivan to address the following:

In the meantime, Mr. Sullivan, before I make a decision to accept the pleas after having heard the factual basis, I want to address this issue regarding Mr. Hayes’ alleged conflict and I’m not sure what he’s alleging was the conflict, unless it was the representation by you of both Mr. Hayes and of Mr. Rhodes. Do you foresee that as a conflict and if so, if not, why not?

R. p. 43, line 23 – p. 44, line 5.

Sullivan did not believe a conflict existed in representing Hayes and representing Rhodes on the unrelated case. He did not recall Rhodes imparting any information about Hayes' case. He did not ask Rhodes anything about the case. Sullivan confirmed the charge was completely unrelated to the present charges: "No sir. That charge was completely unrelated and I didn't see a conflict." R. p. 44, lines 6-24.

Hayes claimed he was accepting responsibility when he addressed the plea court as follows:

Well as far as Detective Richburg had speak upon, you know, as far as me accepting responsibility, you know, as a man you know and I wish she was here, you know, and I would sincerely apologize in which, but I never really intended to hurt nobody and in which the whole MO, hiding, like but I understand when you say the hand of one is the hands of all, I know and understand that but how the whole MO started as far as codefendant went in with a gun, and you know, moments later or minutes later then I come in and I grabbed money and run out of the store, things of that nature, but you know, I know and understand you know, like I laid off of work and I do sell drugs . .

R. p. 50, line 15 – p. 51, line 2.

The plea court found the following:

I also find that there was no conflict of interest. Mr. Rhodes, as far as this matter was concerned, was nothing more than a witness whom Mr. Sullivan would have had the right to talk to, to learn what he knew about this matter and the fact that Mr. Sullivan represented him on a completely unrelated matter is no conflict of interest whatsoever and I could find that in my view that there was no conflict of interest.

R. p. 54, line 20 - p. 55, line 3.

ARGUMENT

I.

The plea court did not err in finding counsel did not have a conflict of interest in representing Petitioner. Because Petitioner never requested the trial court to substitute new counsel, nor did he ever complain a conflict existed because his counsel represented a potential prosecution witness, the argument is not preserved for review. Further, no actual conflict existed as the record indicates counsel no longer represented the potential witness who never testified due to Petitioner accepting the guilty plea. Petitioner failed to show any adverse action or inaction by counsel as a result of the purported conflict.

Petitioner Hayes begins his discussion with the claim, “[P]etitioner raised defense counsel’s conflict of interest with the plea court prior to court accepting petitioner’s guilty plea.” Pet. p. 9. This is true to the extent Hayes claimed a “conflict of interest.” However, Hayes did not claim a conflict of interest because counsel previously represented Rhodes on an unrelated charge. Instead, the “conflict” Hayes complained about at the plea was the incident where Rhodes stole the photographs, which were recovered by a correctional officer at Sullivan’s request. Hayes also claimed Sullivan was not interested in his case. He claimed the odds were stacked against him because he was at risk of being convicted for the robbery he committed.¹ Hayes never articulated what more he wanted his plea counsel to do for him. Notably, Hayes never asked for substitute counsel.

The Court of Appeals, recognizing the fallacy behind Hayes’ assertion that he raised the issue asserted on appeal, found the issue unpreserved, observing:

¹ See generally Satterwhite v. State, 325 S.C. 254, 259, 481 S.E.2d 709, 712 (1997), (Satterwhite’s “*belief* that counsel was unprepared for trial [when Satterwhite pled guilty] is not evidence that

During the plea hearing, Hayes's argument focused on plea counsel's carelessness in allowing a third party to temporarily obtain possession of photographs from Hayes's discovery materials. Hayes also made vague assertions that plea counsel lacked interest in his case. However, on appeal, Hayes's argument that plea counsel had a conflict to interest focuses on plea counsel's **former representation** of that third party who was a potential witness for the State against Hayes. At no time during the plea hearing did Hayes argue plea counsel had a conflict of interest due to his **former representation** of the third party. Thus, because Hayes makes a different argument on appeal than he made during the plea hearing, his appellate argument is unpreserved.

Hayes, supra (emphasis added). The ground raised in support of a claim of error on appeal must be the same ground offered in support of the objection at trial. State v. Smith, 337 S.C. 27, 34, 522 S.E.2d 598, 601 (1999). As the Court of Appeals noted, Hayes did not complain about counsel formerly representing a potential witness. Instead, Hayes perseverated on an event completely different from the argument now made on appeal. Accordingly, the Court of Appeals correctly determined the issue was not preserved for review.

Further, the record reveals counsel no longer represented Rhodes on the unrelated charge. Accordingly, Rhodes was no longer an active client at the time of Hayes' plea and Sullivan did not represent Rhodes in the present case. R. p. 22, lines 8-19. Therefore, Hayes' claim in his brief that Sullivan would owe a duty to explain Rhodes his Fifth Amendment rights if he testified is incorrect. Sullivan owed no duty to Rhodes, no conflict existed.

“[A]t least after the trial has begun, a mere disagreement between a defendant and his counsel as to a matter of trial tactics is not sufficient cause, in itself, to require the trial court to replace or to offer to replace court appointed counsel with another attorney at that time.” State v. Jones, 270 S.C.

counsel was, in fact, not prepared.”) (emphasis in original).

587, 243 S.E.2d 461, 462 (1978). A trial judge has discretion to decline appointment of substitute counsel for a defendant who no longer desires assistance of his court-appointed counsel. See also State v. Graddick, 345 S.C. 383, 548 S.E.2d 210 (2001) (finding the trial court did not err in denying defendant's motion to relieve counsel even though defendant alleged counsel was not representing his interests, was not fully prepared for the case, and the defendant claimed he was not comfortable going to court with counsel as his lawyer). A reviewing court will not interfere with the trial court's decision regarding a request for substitute counsel absent an abuse of discretion. State v. Marshall, 273 S.C. 552, 257 S.E.2d 740 (1979). Of course, Hayes never asked for substitute counsel, the issue is not preserved for review.²

The Supreme Court noted in a pre-Strickland case:

The quality of the service rendered by counsel meets all requirements of due process when counsel is a member in good standing of the Bar, gives his client his complete loyalty, serves him in good faith to the best of his ability, and, his service is of such character as to preserve the essential integrity of the proceedings as a trial in a court of justice. He is not required to be infallible, nor to do the impossible, since the defendant is entitled to a fair trial and not a perfect one or a perfect result.

State v. Lewis, 255 S.C. 466, 471, 179 S.E.2d 616, 618 (1971).

Contrary to Hayes' claim on appeal, Hayes had Sullivan's complete loyalty and no conflict existed. "[A]n attorney's overlapping representation of two clients can compromise the Sixth Amendment guarantee of effective assistance of counsel when it creates an actual conflict of

² "[T]he trial court's mentioning the issue does not preserve it for appeal." State v. Fletcher, 363 S.C. 221, 258, 609 S.E.2d 572, 591 (Ct. App. 2005) *rev'd on other grounds by State v Fletcher*, 379 SC 17, 664 S.E.2d 480 (2008). Mere observations by the trial court do not enlarge the grounds upon which the motion is made. Mize v. Blue Ridge Ry. Co., 219 S.C. 119, 64 S.E.2d 253 (1951).

interest.” United States v. Taft, 221 Fed.Appx. 277, 279 (4th Cir. 2007) (citing United States v. Tatum, 943 F.2d 370, 375 (4th Cir. 1991)). The defendant must show “some real conflict of interest resulting from the representation.” Id. (quoting United States v. Atkinson, 565 F.2d 1283, 1284 (4th Cir. 1977)) (additional citation and internal quotation marks omitted). “The mere possibility defense counsel may have a conflict of interest is insufficient to impugn a criminal conviction.” Jordan v. State, 406 S.C. 443, 752 S.E.2d 538 (2013). Contrary to Hayes’ claim, Hayes failed to show an actual conflict existed.

Further, counsel rejected any contention that a conflict existed. An objection raised by counsel of a conflict of interest may be persuasive evidence of a Sixth Amendment violation because: (1) defense counsel is best positioned to evaluate a potential conflict of interest; (2) defense counsel is obligated to report conflicts of interest to the court; and (3) defense counsel are officers of the court held to ethical obligations to be forthright with the court. Mickens v. Taylor, 240 F.3d 348, 357 (4th Cir. 2001). The lack of objection by counsel in the instant case is persuasive in this direct appeal setting. The Court of Appeals observed that counsel conceded no conflict existed due to his past representation of Rhodes and Petitioner did not object to counsel’s concession. Hayes, supra.

Accordingly, the plea court did not err in declining to appoint substitute counsel, especially since Hayes did not ask for new counsel. In Taft, the Fourth Circuit found no actual conflict, noting, “The overlapping representation lasted for a brief period of time, during which neither individual was involved in the same proceeding or implicated in the same criminal conduct.” Taft, at 279. In the instant case, Hayes and Rhodes were not involved in the same proceeding or the same criminal conduct, no actual conflict existed.

Further, to the extent a possible conflict existed if Rhodes testified at Hayes' trial, the alleged possible conflict never materialized. Even if establishing the existence of an actual conflict of interest, a defendant still must establish an adverse effect caused by the conflict. Cuyler v. Sullivan, 446 U.S. 335 (1980); Mickens at 360-61. In the instant case, it is uncertain if the case was tried, the prosecution would have even called Rhodes as a witness. The prosecutor noted she had not spoken with Rhodes and her comments reflect she did not hold high hopes about his credibility or cooperation. R. p. 27, lines 17-21. Hayes claims in his petition that Rhodes offered to testify (Pet. p. 6), but his citation to the transcript (R. p. 28, lines 6-22) does not support that claim, and no mention was made during the plea hearing that Rhodes did in fact offer to testify for the State. More to the point, Hayes fails to articulate any action or inaction by Sullivan as a result of the supposed conflict. Mickens at 360 ("A defendant has established an adverse effect if he proves that his attorney took action on behalf of one client that was necessarily adverse to the defense of another or failed to take action on behalf of one because it would adversely affect another.").

In Langford v. State, 310 S.C. 357, 426 S.E.2d 793 (1993), Langford and his co-defendant, Howard, were represented by the same attorney. Langford complained a conflict arose because Howard pled guilty and would have testified against Langford. This Court found no actual conflict, explaining the following:

Trial counsel accepted the alibi given by Langford and Howard and viewed their defenses as interdependent and co-equal, thereby eliminating any concern that a conflict of interest would arise. The possible conflict that developed when Howard decided to plead guilty never ripened into an actual conflict, however, because Langford, fearing that Howard would testify against him, also decided to plead guilty. There is no evidence in the record from which it may be inferred that trial counsel advised either co-defendant to plead guilty

in order to obtain more favorable consideration for the other. The mere fact that Howard would be available to testify against Langford does not establish an actual conflict of interest.

Id. at 359-60, 426 S.E.2d at 795 (citations omitted); see also Hornick v. United States, 891 F.Supp. 72, 74 (N.D.N.Y. 1995) (“Simply because an attorney previously represented a possible co-conspirator or a potential witness creates no conflict in and of itself.”); Mickens (finding petitioner failed to show an adverse effect from any actual conflict where petitioner’s lead counsel represented murder victim on a juvenile charge that was pending at the time of victim’s murder).

In the instant case, no possible conflict existed and no actual conflict materialized because Rhodes was not a current client and Sullivan owed no duty to Rhodes, nor was his duty to Hayes compromised. Accordingly, the trial court did not err in accepting the guilty plea or declining to appoint substitute counsel.

CONCLUSION

For all of the foregoing reasons, this Court should deny the petition for writ of certiorari. Should this Court see fit to grant the petition, Respondent respectfully requests permission to more fully brief the issues herein.


Respectfully submitted,

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PROOF OF SERVICE

I, Anne Mueller, certify that I have served the within Return to Petition for Writ of Certiorari on Appellant by delivering two copies of the same to Lara M. Caudy, Esquire, S.C. Commission on Indigent Defense, Division of Appellate Defense, Post Office Box 11589, Columbia, South Carolina 29211-1589.

I further certify that all parties required by Rule to be served have been served.
This 24th day of April, 2018.

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