

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

ORIGINAL

THE STATE,

RESPONDENT,

V.

NATHANIEL WRIGHT,

PETITIONER

APPELLATE CASE NO 2016-000272

RECEIVED

Appeal from Jasper County

AUG 16 2018

Honorable Michael G. Nettles, Circuit Court Judge

SC Court of Appeals

Opinion No. 5579

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, counsel for Nathaniel Wright petitions the Court for rehearing and respectfully submits that this Court misapprehended Rule 1.10(e), RPC, Rule 407, SCACR, in finding that the Rule does not require any specific procedures to ensure the absence of a conflict. Rule 1.10(e), RPC, provides that, "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. The rule requires a screening mechanism and no screening mechanism existed in the present case because the State failed to disclose to Petitioner's attorney the identity of a State's witness until a week before trial.

The Hampton County Public Defender Office had an actual imputed conflict of interest in representing both Petitioner and a State's witness who testified against Petitioner at trial. Respectfully, counsel submits that this Court overlooked the fact that a finding that no confidential information was exchanged does not cure the violation of Petitioner's Sixth Amendment right to conflict-free representation. 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. When there is an actual conflict of interest a defendant need not demonstrate prejudice. State v. Gregory, 364 S.C. 150, 153, 612 S.E.2d 449, 450 (2005). Petitioner did not have to demonstrate that confidential information was exchanged in order to prevail on the conflict claim because an actual conflict of interest existed and Petitioner was not required to demonstrate prejudice.

Counsel also respectfully submits that this Court overlooked the testimony from the Chief Public Defender for the Fourteenth Circuit that if the State had revealed the identity of the witness to Petitioner's trial counsel prior to a week before trial, he would have assigned the case to a contract attorney outside of the public defender office. It appears that despite the exception provided in the ethical rules for public defender offices, the Fourteenth Circuit would have conflicted the case to outside counsel had the chief been aware of the conflict. By relieving the public defender and

granting a continuance to allow either appointed outside counsel or retained counsel time to adequately prepare, as requested, the trial judge would have ensured Petitioner's Sixth Amendment right to conflict-free counsel. Petitioner's constitutional right to conflict-free representation was violated by the judge's refusal to relieve the public defender.

Additionally, counsel respectfully submits that the Court overlooked the second actual conflict of interest involving Public Defender Stephanie Smart-Gittings' representation of both Petitioner and the deceased brother. Counsel submits that upon rehearing this Court should find that the trial judge erred in refusing to relieve the public defender based on two actual conflicts of interest and erred in refusing to grant a continuance to allow newly retained private counsel to adequately prepare for trial.

Conflict of Interest 1.

The jury found Petitioner guilty of voluntary manslaughter in connection with the fatal shooting of Petitioner's brother, Maurice Wright. The Hampton County Public Defender Office represented both Petitioner Wright and purported eye-witness to the shooting, Antoine Drake. Public Defender Stephanie Smart-Gittings represented Petitioner 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 Petitioner. (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).

Prior to trial the public defender appointed to represent Petitioner, Stephanie Smart-Gittings, brought the conflict issue to the attention of the trial judge. (R. pp. 11-35). 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 [Petitioner] during the course of this trial.” (R. p. 15, lines 3-6).

The judge asked the Chief Public Defender for the Fourteenth Circuit, Gene Hood, to address Rule 1.10(e), RPC, Rule 407, SCACR. (R. 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.

(R. 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. (R. 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.” (R. p. 23, lines 10-16).

The judge heard testimony from Robert Hughes, the public defender in Jasper County who transferred Petitioner's case to Ms. Smart-Gittings due to a conflict (R. p. 19, lines 12-17), and from Mr. Plexico. (R. pp. 20-21). Ms. Smart-Gittings told the judge she had discussed the conflict issue with her client. (R. 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?" (R. p. 26, lines 19-23). Ms. Smart-Giddings answered, "He does not, Your Honor." (R. p. 26, line 24).

The judge referenced Rule 1.10(e), RPC, Rule 407, SCACR, and found no conflict. (R. pp. 27-29). The judge found that Ms. Smart-Gittings was not involved in the representation of State's witness, Drake, and that she had not received confidential or privileged information. (R. p. 27, line 15 – p. 28, lines 1-12). Ms. Smart-Gittings noted that the rule indicates that the ethical rule provides that the lawyer be screened in a timely manner from access to confidential information relating to and from any participation in the representation of the other client. (R. p. 29, lines 19-23). She further noted that she sought and received legal advice about Petitioner's case from her supervisor, Mr. Plexico. (R. 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." (R. p. 31, lines 12-14).

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 screening mechanism when the office was unaware that Drake was going to be a witness against Appellant until the week before trial. Pursuant to South Carolina ethical

rules, 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, however, constituted an actual conflict of interest in violation of Petitioner's Sixth Amendment right to conflict free representation. The conflict required that the judge relieve the public defender office.

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:

(2) 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 mechanism 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. (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 Petitioner. In this situation Rule 1.10(e) of the ethical rules required a screening mechanism. 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 Petitioner and witness Drake.

"[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 Petitioner's Sixth Amendment right to conflict-free representation and the violation requires reversal.

In affirming the trial judge's refusal to relieve the public defender based on the conflict, this Court wrote:

The situation presented in this case is exactly the circumstances Rule 1.10(e) seeks to avoid. In fact, the Chief Public Defender for the Fourteenth Circuit testified "I have contract attorneys that could have taken this case and everything else had we known some time ago." However, the State did not disclose the witness' identity until the week prior to trial. As a result of this late notice, the public defender's office could not contract with outside counsel or create an adequate screening mechanism to ensure against a possible conflict of interest. While we agree with Wright that an explicit screening mechanism or addition of

outside counsel would be the best remedy for this situation, we do not agree that the absence of an explicit screening mechanism creates an incurable conflict of interest such that the public defender's office should have been removed from handling his case.

We read Rule 1.10(e) as providing a way to ensure the public defender's office is not conflicted out, but **we do not read it as requiring any specific procedures to ensure the absence of a conflict.** The trial court took sworn testimony from both the Chief Public Defender as well as the attorney supervising Wright's counsel. They each testified they did not discuss any particulars of Wright's case with his attorney and they did not discuss anything that would give Wright's attorney any advantage or disadvantage in this case. While we are troubled by the situation, we are confident in the trial court's attempt to ensure no actual conflict existed. Rule 1.10(e) provides a public defender may continue representing a client, even with an imputed conflict of interest, if there is proper screening to prevent the exchange of confidential information. We find the trial court adequately determined no confidential information was disseminated or received by Wright's attorney. Thus, while no member of the office explicitly communicated the need to create a screening mechanism, the testimony indicates such a wall existed in this case. Accordingly, the public defender's office accomplished the purpose of the rule and Wright's attorney did not have to be relieved.

State v. Wright, Op. No. 5579 (S.C. Ct. App. filed August 1, 2018)(emphasis added).

Respectfully, counsel submits that this Court misapprehended the screening mechanism requirements of Rule 1.10(e). Additionally, counsel respectfully submits that this Court overlooked the fact that a finding that no confidential information was exchanged does not cure the violation of Petitioner's Sixth Amendment right to conflict -free representation. 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. When there is an actual conflict of interest a defendant need not demonstrate prejudice. State v. Gregory, 364 S.C. 150, 153, 612 S.E.2d 449, 450 (2005). Petitioner did not have to demonstrate that confidential information was exchanged in order to prevail on the conflict claim because an actual conflict of interest existed and Petitioner was not required to demonstrate prejudice. The trial judge erred, as a matter of law, in refusing to relieve the public defender.

Conflict 2.

A second actual conflict existed as a result of the public defender's representation of both Petitioner and the deceased. In addition to the conflict involving Mr. Plexico's representation of State's witness Drake, Ms. Smart-Gittings also told the judge that she represented the deceased brother on three counts of assault and battery first degree. (R. p. 33, line 11 – p. 34, lines 1-10). Ms. Smart-Gittings told the judge that the dual representation created a conflict because of the need to explore the reputation for violence of the deceased. (R. 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. (R. p. 35, lines 11-12). 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.

Petitioner's interests were materially adverse to the interests of the former deceased client, especially in light of the fact that Petitioner 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 Petitioner and the deceased. Respectfully, this Court overlooked the second conflict of interest requiring the judge to relieve the public defender.

Continuance

As discussed above, the actual conflicts of interest required the judge to relieve the public defender office. Private retained counsel, however, was ready to represent Petitioner if he was given adequate time to prepare for trial. Prior to trial, private counsel Jared Newman advised

the trial judge that a family member of Petitioner contacted him about representation of Petitioner the week before and that he was holding funds in trust as the family was able to retain him. (R. 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. (R. 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?” (R. p. 32, lines 12-13). Private counsel indicated that he needed to talk with Petitioner but suggested that he could possibly act as co-counsel. (R. p. 32, lines 14-19). After talking with Petitioner, private counsel advised the judge that Petitioner 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). The judge allowed private counsel to serve as co-counsel. (R. p. 33, lines 8-10). The judge erred in refusing to grant a continuance.

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 Petitioner could have been produced, or that any other points could have 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 above, 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 Petitioner, a continuance would have been necessary to allow new counsel to prepare for trial. This is not a case where Petitioner simply waited until the last moment to hire counsel. Instead, as soon as Petitioner 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.

Addressing the request for a continuance, this Court wrote, "Wright asserts the trial court erred in failing to grant him a continuance based on his argument the public defender's office should have been conflicted out. As we have already discussed, the trial court properly declined to release the public defender's office, and no continuance was necessary because Wright's attorney had been given adequate time to prepare his defense. Therefore, we can discern no clear abuse of discretion by the trial court to warrant reversal." State v. Wright, Op. No. 5579 (S.C. Ct. App. filed August 1, 2018).

The continuance motion challenged on appeal depends on a proper finding by this Court on rehearing that the trial judge erred, as a matter of law, in refusing to relieve the public defender based on conflicts of interest. Based on the above arguments, Petitioner seeks rehearing and a reversal based on the trial judge's refusal to relieve the public defender due to actual conflicts of interest which violated Petitioner's Sixth Amendment constitutional right to

conflict-free representation and violated the Rule 1.10(e), RPC, Rule 407, SCACR, because the lawyer was not screened in a timely manner.

Respectfully Submitted,



KATHRINE H. HUDGINS
Appellate Defender

This 16th day of August, 2018.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Jasper County

Honorable Michael G. Nettles, Circuit Court Judge

RECEIVED

AUG 16 2018

SC Court of Appeals

THE STATE,

RESPONDENT,

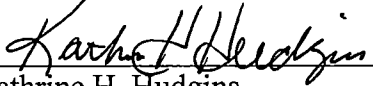
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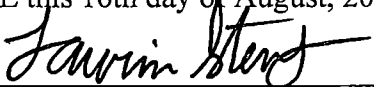
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon Megan Harrigan Jameson, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Nathaniel Wright, #345376, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 16th day of August, 2018.



Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO BEFORE
ME this 16th day of August, 2018.



(L.S)
Notary Public for South Carolina
My Commission Expires: July 5, 2027.