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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Edgefield County
The Honorable Eugene C. Griffith, Circuit Court Judge
Appellate Case No. 2017-000152

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SC Court of Appeals

The State,

Respondent,

v.

Timothy Wayne Wheeler,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The circuit court's pre-trial removal of Appellant's counsel as counsel for a co-defendant removed any actual or potential conflict of interest by dual representation, and nothing in the record indicates counsel's representation of Appellant at trial was in any way impacted by his prior representation of the co-defendant.

STATEMENT OF THE CASE

The State concurs with Appellant's procedural Statement of the Case.

STATEMENT OF FACTS

On March 30, 2016, the Edgefield County Grand Jury indicted Appellant Timothy Wayne Wheeler, and his co-defendant Heather Hall (“Hall”) on multiple charges, including trafficking methamphetamine, receiving stolen goods, possession of unlawful firearms, and possession with intent to distribute marijuana. The matter was called for a jury trial on January 17, 2017, before the Honorable Eugene C. Griffith, Jr., Circuit Court Judge.

Prior to trial, Appellant’s retained counsel (Thuss) moved to be relieved as counsel due to a potential conflict with representing both Appellant and Hall, and for a continuance. (Court’s Exhibit 1 (Memorandum in Support of Motion to be Relieved as Counsel and for a Continuance); Record on Appeal [R.], pp. 301-308). During a pre-trial chambers discussion about the motion, the circuit court inquired about any pending plea offers, and the solicitor indicated the State had offered Appellant a negotiated sentence of twenty-two years, and Hall a negotiated sentence of five years. Thuss informed the court Hall wanted to take the plea offer, but she was “tied” to Appellant, who did not want to accept the plea offer. The solicitor then indicated a stand-alone plea deal with Hall would be contingent on her testifying against Appellant at trial

The solicitor informed the court the State was ready to proceed with Appellant’s case alone if the court determined there was a dual representation conflict, and Hall’s testimony was not required for the trial to go forward. The court then asked Thuss if he was ready to proceed on Appellant’s case, and give Hall an opportunity to obtain independent counsel. Thuss stated he had discussed the situation with Appellant, but had been unable to communicate with Hall. He also stated he was not previously aware about the contingency with Hall’s plea offer, and he was concerned about Hall for several reasons, including her relationship with Appellant, and he

did not know “how well she can exercise judgment at her age.” (Trial Transcript [TT], pp. 8-13; R., pp. 8-13).

Based on the discussion, the court ultimately relieved Thuss as counsel for Hall, and stated Hall could either get a private attorney or a new attorney would be appointed for her. The court also gave Thuss an opportunity to talk to Appellant about whether he wanted to proceed with the trial. When court reconvened, Thuss did not indicate Appellant had any concerns about proceeding with the trial, and stated they were prepared to proceed. After jury selection, the court informed Hall, who was seated at the defense table with Appellant and Thuss, that Thuss had been relieved as her counsel, and she would have the opportunity to obtain another retained counsel, or the court would appoint one for her. (TT, pp. 12-17, 42-43; R., pp. 12-17, 42-43).

During his opening statement, Thuss stated Appellant did not live at the residence where the contraband (drugs and illegal weapons) was found, but he was present when law enforcement executed a search warrant and seized the contraband. He also stated Appellant was in a relationship with Hall, who lived at the residence with her step-father (David Coon), and Appellant was at the residence just to help Hall care for Coons, who had serious health issues.¹ (TT, pp. 65-68; R., pp. 65-68).

Brian Wade (“Wade”) testified he stole vehicles and traded them for drugs at the residence where Appellant, Hall and Hall’s step-father lived. He also testified he entered into an agreement with Appellant and Coon in December 2015 for them to front him methamphetamine, which he would sell and return the profit to them in exchange for increasing amounts of methamphetamine, and Appellant was the one who actually gave him the methamphetamine. He

¹Coon pled guilty to trafficking methamphetamine and various other charges the week before Appellant’s case was called for trial, and was sentenced to twenty-five years incarceration.

also saw multiple firearms at the residence, a surveillance system, and was told explosives were planted around the perimeter of the property in case anything happened. (TT, pp. 69-80, 85-90; R., pp. 69-80, 85-90). Thuss vigorously cross-examined Wade about the details of his testimony, as well as his own criminal conduct and his dealings with law enforcement in connection with the case. (TT, pp. 90-107; R., pp. 90-107).

Jennifer Dewitt ("Dewitt") testified she stayed at the residence with Appellant, Hall and Coon off and on over a period of months prior to December 2015, and was present when law enforcement executed the search warrant at the residence. During the time she stayed at the residence, she personally observed Appellant meeting with people who came to purchase drugs, and heard Appellant and Coon discussing the price of a kilo of drugs, as well as some bad drugs they had purchased. (TT, pp. 189-198; R., pp. 189-198). Thuss then vigorously cross-examined her about prior inconsistent statements she gave to law enforcement, her own criminal activities and her reasons for cooperating with law enforcement. (TT, pp. 199-203; R., pp. 199-203).

At the close of the State's case, Thuss moved for a directed verdict on all charges, arguing the State failed to prove Appellant ever had dominion and control over the firearms, drugs and stolen property found at the residence. The court denied the motion, finding there was sufficient evidence to submit the case to the jury. (TT, pp. 204-210; R., pp. 204-210).

Coon testified he was responsible for everything found in the residence, and Appellant and Hall had nothing to do with it. He admitted on cross-examination that he originally told law enforcement he had never seen the seized contraband or stolen property found at the residence, but if anyone was going to take the fall for it, he would because he had cancer and did not care. (TT, pp. 212-233; R., pp. 212-233).

The jury convicted Appellant of all charges, and the court sentenced him to twenty-five years incarceration on the trafficking conviction, with the sentences on all other charges to run concurrent to the trafficking sentence.. The court also denied Appellant's post-trial motion for a new trial. (TT, pp. 291-299; R., pp. 291-299). This appeal followed.

ARGUMENT

The circuit court's pre-trial removal of Appellant's counsel as counsel for a co-defendant removed any actual or potential conflict of interest by dual representation, and nothing in the record indicates counsel's representation of Appellant at trial was in any way impacted by his prior representation of the co-defendant.

Appellant contends the circuit court erred by failing to question him regarding any conflict of interest arising from Thuss' dual representation of Appellant and Hall. Appellant's contention is premised on mischaracterizations of the circuit court proceeding on the issue, and totally unrelated case law.

A. Standard of Review

"The general rule in this State is that the conduct of a criminal trial is left largely to the sound discretion of the presiding judge and this Court will not interfere unless it clearly appears that the rights of the complaining party were abused or prejudiced in some way." State v. Bridges, 278 S.C. 447, 498 S.E.2d 212, 212 (1982) (citations omitted). Therefore, in criminal cases, this Court will only review errors of law. State v. Commander, 396 S.C. 254, 721 S.E.2d 413, 417 (2011); State v. Baccus, 367 S.C. 41, 396 S.E.2d 216, 220 (2006)

An accused has a Sixth Amendment right to assistance of counsel, but is "circumscribed by the trial court's obligation to safeguard the integrity of the proceedings and ensure trials are conducted according to the ethical standards of the profession." State v. Cottrell, 412 S.C. 622, 809 S.E.2d 423, 430 (2017) (*quoting* State v. Sanders, 341 S.C. 386, 534 S.E.2d 696, 697 [2000]). A motion to relieve counsel is left to the discretion of the trial judge, and the trial judge's ruling will not be disturbed absent an abuse of discretion. *Id.* (*citing* State v. Justus, 392 S.C. 416, 709 S.E.2d 668, 670 [2011]).

B. Conflict of Interest

When determining whether to remove a defendant's counsel, the court must balance a defendant's right to choose his own counsel with maintaining the highest ethical standards of professional responsibility. *Id.* A trial judge must be allowed “substantial latitude” and broad discretion in disqualifying a defendant's chosen lawyer so the trial judge may “rule without fear that it is setting itself up for reversal on appeal.” *Id.* (quoting U.S. v. Howard, 115 F.3d 1151, 1155 [4th Cir. 1997]); see also Wheat v. United States, 486 U.S. 153 (1998) (the right to be represented by a preferred attorney is not absolute); United States v. Williams, 81 F.3d 1321, 1324 (4th Cir.1996) (right to be represented by preferred counsel is limited by the trial court's obligation to safeguard the integrity of the proceedings).

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, 551 S.E.2d 254, 256 (2001); Jackson v. State, 329 S.C. 345, 495 S.E.2d 768, 773 (1998) (citing Cuyler v. Sullivan, 446 U.S. 335 [1980]); Duncan v. State, 281 S.C. 435, 315 S.E.2d 809 (1984). An actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendant's. Thomas v. State, 346 S.C. 140, 551 S.E.2d 254, 256 (2001). “The mere possibility defense counsel may have a conflict of interest is insufficient to impugn a criminal conviction.” State v. Gregory, 364 S.C. 150, 612 S.E.2d 449, 450 (2005). Indeed, until defendant shows counsel actively represented conflicting interests, he has not established constitutional predicate for claim of ineffective assistance arising from multiple representation. Langford v. State, 310 S.C. 357, 426 S.E.2d 793, 795 (1993).

Contrary to Appellant's assert Thuss was "surprised" by the court's concern regarding the potential conflict of interest, Thuss filed a pre-trial motion to be relieved as counsel based on the potential conflict. During the chambers discussion about the motion, Thuss advised the court Appellant did not want to accept the offer, but Hall did, and stated "but they're tied." He also advised the court he had discussed the issue with Appellant, but had not been able to discuss it with Hall, and he was not aware Hall's offer was contingent on her testimony against Appellant until the solicitor said it in chambers. He expressed concern over Hall's state of mind, and her ability to exercise her judgment under the circumstances. (TT, pp. 10-13; R., pp. 10-13).

In the face of the potential conflict of interest due to the differing plea offers, the court relieved Thuss as counsel for Hall, and recessed the proceedings expressly to give Thuss an opportunity to meet with Appellant to determine if Appellant wanted to proceed with the trial. (TT, pp. 13-17, 42-43; R., pp. 13-17, 42-43). By removing Thuss as Hall's attorney, the court properly exercised its discretion by avoiding any actual, or even potential, conflict of interest regarding Thuss' representation of Appellant, and Appellant obviously chose to proceed with Thuss' representation.

Subsequently, the court advised Hall in open court, and in front of Appellant, that Thuss was no longer her attorney and she could retain another private attorney or one would be appointed for her. When the court asked Hall if she understood the court's decision, she replied "yes, sir." (TT, pp. 42-43; R., pp. 42-43).

Even assuming there was a conflict of interest, which the State vigorously disputes, Appellant cannot show Thuss' representation of him at trial was adversely impacted by Thuss' prior representation of both Appellant and Hall. It appears from the record that Appellant and Hall intended to pursue the same defense of placing responsibility for all criminal activities on

Coon. After he was relieved as Hall's counsel, Thuss vigorously represented Appellant throughout the trial, pursuing the exact defense strategy Appellant always intended to present. He challenged the State's witnesses on cross-examination, including two co-defendants, and presented Coon as a defense witness, who testified he was solely responsible for the contraband and stolen property found at the residence. Thuss also made two directed verdict motions, and moved for a new trial after the verdict. (TT, pp. 69-241, 293-294; R., pp. 69-241, 293-294). Therefore, Appellant cannot show Thuss actively represented conflicting interests while presenting Appellant's defense.

The circuit court's exercise of discretion removed any actual or potential conflict of interest arising from Thuss' representation of Appellant and Hall prior to trial, and Appellant was not prejudiced in any way by Thuss' continued representation of him at trial. There was no abuse of discretion, and Appellant's convictions should be affirmed.

CONCLUSION

Based on the foregoing, Respondent respectfully submits Appellant's convictions and sentences should be affirmed.

Respectfully submitted,

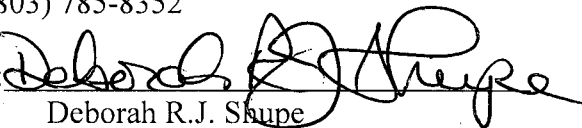
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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled, "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

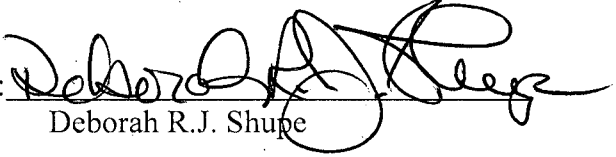
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