

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

ORIGINAL

Appeal from Edgefield County

Honorable Eugene C. Griffith, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TIMOTHY WAYNE WHEELER,

APPELLANT

APPELLATE CASE NO 2017-000152

FINAL BRIEF OF APPELLANT

RECEIVED
JUN 26 2018
SC Court of Appeals

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STATEMENT OF ISSUE ON APPEAL

The trial court reversibly erred by failing to hold an on-the-record colloquy with Appellant to determine whether Appellant knowing, intelligently, and freely waived his right to conflict free representation where Appellant and his co-defendant were represented by the same retained attorney.

STATEMENT OF THE CASE

On March 30, 2016, the Edgefield County Grand Jury indicted Appellant Timothy Wheeler for one count of trafficking over four hundred grams of methamphetamine, one count of possession with intent to distribute Alprazolam (generic Xanax), one count possession with intent to distribute marijuana, three counts of possession of an unlawful firearm, and five counts of receiving stolen goods. R. 309-324; R. 291, l. 20 – R. 292, l. 11.

On January 17-18, 2017, Appellant proceeded to trial before the Honorable Eugene C. Griffith, Jr., and a jury. Robert R. Thuss represented Appellant, and Assistant Solicitors Ervin Maye and Douglas J. Fender, II, represented the State. The jury found Appellant guilty as charged. R. 291, l. 20 – R. 292, l. 11. The trial court sentenced Appellant to twenty-five years imprisonment. R. 298, l. 1 – R. 299, l. 15.

ARGUMENT

The trial court reversibly erred by failing to hold an on-the-record colloquy with Appellant to determine whether Appellant knowing, intelligently, and freely waived his right to conflict free representation where Appellant and his co-defendant were represented by the same privately retained attorney.

Introduction

Appellant was arrested following the execution of a search warrant at the Edgefield County trailer where his girlfriend's father, David Coon, lived. R. 116, l. 3 – R. 120, l. 22. Appellant's girlfriend, Heather Hall, had a room at the trailer where she and Appellant occasionally stayed. R. 217, l. 2 – R. 224, l. 16. The search warrant for the trailer was the result of information given to law enforcement by Walter Brian Wade following his arrest for car theft. R. 75, l. 13 – R. 89, l. 19.

Wade claimed that Coon and Appellant dealt methamphetamine and other drugs from Coon's trailer. *Id.* Wade stated that he stole cars and routinely exchanged them for drugs from Coon and Appellant. *Id.* Wade further alleged that Coon and Wheeler had a number of "sawed off" shot guns and had video surveillance for security. *Id.* Wade also alleged that the area surrounding Coon's trailer was planted with C-4 explosives. *Id.*

Perhaps out of concern for Wade's claim about C-4, Aiken County enlisted the help of Bureau of Alcohol Tobacco and Firearms during the raid. R. 176, l. 7 – R. 181, l. 22. Unsurprisingly, no C-4 was discovered in the yard. *Id.* Coon, Hall, and Appellant were all at Coon's trailer during the police raid and were all arrested. A fourth person, Jennifer Dewitt was also present at the trailer during the raid and was also arrested. R. 189, l. 12 – R. 195, l. 22.

During the search of Coon's trailer Law enforcement found 717 grams of methamphetamine in Coon's spare bedroom. R. 160, l. 8 – R. 163, l. 6. Police also discovered Xanax and 29.5 grams of marijuana in Coon's spare bedroom. *Id.*; *see also* R. 171, l. 6 – R. 173,

l. 25. In addition to the drugs there were four shotguns found in the trailer, three of which had been modified with an illegally short barrel. Furthermore, there was a stolen R.V. camper on Coon's premises, a stolen truck, and two stolen motorcycles. R. 213, l. 4 – R. 214, l. 13.

The issue at trial was whether Appellant was involved in drug dealing and related thefts, or merely present at the trailer because of his relationship with Heather Hall, Coon's daughter. Appellant had clothes and other personal items – including a wallet with a large amount of cash in it – in Hall's bedroom, but several of Appellant's bills listed a different address than Coon's trailer. R. 125, l. 4 – R. 129, l. 9. The methamphetamine and Xanax were found in a green tool box located in Coon's spare bedroom. R. 225, ll. 1-20. However, Wade and Dewitt, who also cooperated with the State following her arrest, claimed that Appellant and Coon both sold drugs out of the green tool box. R. 75, l. 13 – R. 80, l. 19; R. 193, l. 7 – R. 197, l. 25.

Coon stood trial prior to Appellant. During his trial, Coon pled guilty to the same drug and property crime charges that Appellant was facing. Coon was sentenced to twenty-five years imprisonment. R. 213, l. 2 – R. 217, l. 25. Coon testified at Appellant's trial that all of the drugs, guns, and stolen vehicles were his. According to Coon, Hall and Appellant only stayed at his trailer sporadically and were not involved with Coon's illegal activities. *Id.*

Prior to this conviction, Appellant had no prior drug arrests. In fact, his criminal record at the time of trial consisted of, a 1987 arrest for possession of marijuana, a DUI, a conviction for driving a truck without a CDL, and a 2014 charge for unlawful carry of a pistol. R. 264, ll. 10-25.

Defense Counsel's Conflict of Interest

Appellant retained Robert Thuss (hereinafter "defense counsel") to represent him. Defense counsel was also retained to represent Hall on her charges arising out of the same incident. R. 10, l. 20 – R. 17, l. 3. Prior to trial, the State offered Appellant and Hall a joint guilty plea offer of twenty-two years for Appellant and five years for Hall. Both Hall and Appellant had to accept the offer as a condition of the State agreeing to it. *Id.*

When Appellant's case was called for trial, defense counsel informed the court that Appellant was not interested in the State's offer, but that Hall wanted to accept the offer. *Id.* The State reiterated that it would not to allow Hall to plead guilty and receive five years without Appellant also pleading guilty and receiving twenty-two years. *Id.* However, the State would only accept Hall's offer to plead guilty without Appellant also pleading guilty if, "she was gonna testify against [Appellant], which I don't think she'll do." R. 11, ll. 7-11.

Faced with an obvious conflict of interest, the trial court encouraged defense counsel to fire Hall as a client. R. 11, l. 14 – R. 17, l. 3. Defense counsel seemed surprised by the trial court's concern about his conflict of interest and appeared unwilling to fire Hall as a client. *Id.* More generally, defense counsel gave the impression he was unprepared to address the conflict of interest:

I don't know. I have to – I mean, I would have to sit down with them and talk through it. All this has happened – they're out there kind of communicating some, but **they're still in the dark.** . . .

I talked with Wheeler about it on – I came down and talked to Wheeler Thursday and Friday . . . I tried to talk to . . . Hall about, but my ability to speak with her, she's out on bond, is – is not the same. I'm a little more concerned about her because of her youthfulness and – and emotional ties. She just saw her dad convicted and now she's got this other fellow, who's her boyfriend, who they're in a relationship that's sort of being

maintained, but I don't know how – how well she can exercise judgment at her age. . . .

R. 11, l. 14 – R. 12, l. 7 (*emphasis added*). Defense counsel belatedly acknowledged that his joint representation of Appellant and Hall caused a number of problems, among them that it prevented Hall and Appellant from independently considering the State's guilty plea offer. R. 12, ll. 11-24.

When pressed by the trial court to decide whether to continue to represent Appellant, in light of the joint guilty plea offer, and now the alternative offer to have Hall testify against Appellant, defense counsel demurred:

Well, I mean, I don't know. It's just – it's been hard for her to make a decision whether - -whether she would. But, I mean, it's – that's kind of the ambiguities I've been dealing with knowing what it is she could do or not do. I mean, this last offer was contingent upon what he did, but I just heard that, you know, they'd give her five if she would testify against [Appellant]. I don't know.

R. 13, ll. 9-23. Further complicating matters, the State alleged that Hall was threatening Dewitt for cooperating with the State and testifying against Appellant and Hall. R. 12, l. 17 – 13, l. 16. In response to these purported threats, the State moved to revoke Hall's bail pending her trial.

In light of defense counsel's paralysis, the trial court – without ever questioning either Appellant or Hall – terminated defense counsel's representation of Hall. The trial court ordered that Hall be appointed a new attorney. "I mean, there's no way we're gonna remove that conflict. [Hall's] not gonna get an opportunity. **She can say what she wants to, but I'm not gonna – I'm goona get [defense counsel] out that box.**" R. 15, ll. 13 – R. 17, l. 3 (*emphasis added*). The trial court did not relieve defense counsel of his representation of Appellant.

The trial court never questioned Hall or Appellant on their understanding of defense counsel's conflict of interest. There was never a court led, on-the-record colloquy with either

Appellant or Hall to ensure that they understood the severity of the conflict of interest and either knowingly consented to the joint representation or knowingly consented to one of them seeking new representation.

Appellant's input was simply not sought during the conflict of interest discussion. With defense counsel's representation of Hall terminated, Appellant's case proceeded to trial where he was convicted on all counts. R. 11, l. 14 – R. 17, l. 3.

Discussion

Defense counsel's joint representation of Appellant and Hall deprived Appellant of his right to conflict free representation under the Sixth and Fourteenth Amendments of federal constitution and Article I, Section Fourteen of the South Carolina constitution. The trial court's failure to conduct an on-the-record colloquy with Appellant to determine that Appellant understood the conflict of interest and either had the opportunity to secure conflict free counsel or knowingly waive the conflict requires that Appellant's convictions be reversed and his case be remanded to the Edgefield County Court of General Sessions.

Our courts have long recognized that a litigant may knowingly waive a constitutional or statutory right. *Sanford v. S.C. State Ethics Comm'n*, 385 S.C. 483, 495, 685 S.E.2d 600, 607, *opinion clarified*, 386 S.C. 274, 688 S.E.2d 120 (2009) (holding that the Governor knowingly waived statutory his right to keep secret Ethics Commission's investigatory papers and other documents related to ethics complaint against Governor); *see also State v. Torrence*, 317 S.C. 45, 46, 451 S.E.2d 883, 883 (1994) (a capital defendant, who is competent, may waive his right to appeal if the decision to do so is knowing, intelligent, and voluntary.).

Regardless of the right being waived, a waiver must always be an intentional and voluntary relinquishment of a known right. *Maxwell v. Genez*, 350 S.C. 563, 571, 567, S.E.2d

496, 500 (Ct. App. 2002); *Huckaby v. State*, 305 S.C. 331, 408 S.E.2d 242 (1991) (*abrogated on other grounds by*, *Turner v. State*, 384 S.C. 451, 682 S.E.2d 792 (2009)) (permitting defendant to waive his right to counsel in probation revocation hearings); *see also*, *In re Christopher H.*, 359 S.C. 161, 166, 596 S.E.2d 500, 503 (Ct. App. 2004) (holding that record did not show that juvenile knowingly waived constitutional right to counsel); *see also*, *Sanders v. State*, 412 S.C. 611, 773 S.E.2d 580, n. 2 (2015) (holding that a defendant who waives statutory right to collateral review is entitled to challenge whether advice received in agreeing to waiver was constitutionally defective and cautioning against guilty pleas that require defendant to waive ineffective assistance of counsel claims); *Cf.* *State v. Barnes*, 407 S.C. 27, 753 S.E.2d 545 (2014) (declining to adopt a higher competency standard for waiver of right to counsel than that of competency to stand trial).

“[I]t is the responsibility of the trial judge to determine whether there has been an intelligent and competent waiver.” *State v. Bateman*, 296 S.C. 367, 369, 373 S.E.2d 470, 471 (1998) (*citations omitted*); *see also* *Boykin*, 324 S.C. 552, 478 S.E.2d 689 (a trial judge must determine if the waiver is the product of a knowing, voluntary, and intelligent decision). “Courts indulge every reasonable presumption against waiver of fundamental rights, and do not presume acquiescence in the loss of fundamental rights.” *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938).

Beyond question, defense counsel had an active, actual conflict of interest by virtue of his joint representation of Appellant and Hall. “An actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendant’s interests.” *Duncan v. State*, 281 S.C. 435, 315 S.E.2d 809 (1984) (holding that the interests of other client and defendant are sufficiently adverse if it is shown that the attorney owes a duty to the other client

to take some action that could be detrimental to defendant); *see also Edgemon v. State*, 318 S.C. 3, 455 S.E.2d 500 (1995) (finding actual conflict of interest where counsel convinced solicitor that defendant's co-client was less culpable than defendant).

The existence of a conflict of interest arising from an attorney's simultaneous representation of co-defendants in a criminal prosecution is a well-known, seemingly inevitable, risk. For instance, in *Thomas v. State*, the Supreme Court held that an actual conflict of interest arose when the solicitor offered to dismiss the charges against one spouse provided that the other spouse plead guilty to possessing the entire amount of cocaine. 346 S.C. 140, 551 S.E.2d 254 (2001). Both spouses were represented by the same privately retained attorney.

Unlike Appellant and Hall, the spouses in *Thomas* had executed a waiver of any conflict of interest. *Id.* at 142, 551 S.E.2d at 262. Nevertheless, the Court found that, "at the moment the solicitor made the plea offer, Thomas' and her husband's interests became adverse to one another and counsel should have advised them accordingly." *Id.* at 144, 551 S.E.2d at 265.

South Carolina is a strict error preservation state. However, a notable exception to the general rule requiring a contemporaneous objection is found when the record does not reveal a knowing and intelligent waiver of the right to counsel. Simply put, a *pro se* defendant cannot be expected to raise this issue without the aid of counsel. *State v. Rocheville*, 310 S.C. 20, 24, 425 S.E.2d 32, 35 (1993); *see also State v. Cash*, 304 S. C. 223, 403 S. E. 2d 632 (1991). "[T]he trial judge has the responsibility to make sure that the defendant is informed of the dangers and disadvantages of self-representation, and that he makes a knowing and intelligent waiver of his right to counsel." *State v. Reed*, 332 S.C. 35, 41, 503 S.E.2d 747, 750 (1998).

This exception to the requirements of error preservation should apply with equal to force when, as in Appellant's case, defense counsel has an active – and likely disabling – conflict of

interest. From a practical standpoint, a defense counsel may have a financial or reputational interest in avoiding or delaying discussing the conflict of interest with the affected clients. *Gonzales v. State*, 419 S.C. 2, 795 S.E.2d 835 (2017) (holding defense counsel's simultaneous representation of juvenile defendant and defendant's mother's boyfriend for other drug-related charges created an actual conflict of interest prior to defendant's trial regardless of defense counsel's purported failure to recognize the conflict).

The trial court is best positioned to fairly judge whether a defendant knowingly, intelligently, and voluntarily waived his or her right to conflict free counsel. *Farretta v. California*, 422 U.S. 806, 95 S.Ct. 2525 (1976) (holding that “the trial judge is not simply an automaton who insures that technical rules are adhered to . . . [but] charged with the duty of insuring that justice, in the broadest sense of that term, is achieved in every criminal trial”); *see also Boykin*, 324 S.C. at 556, 478 S.E.2d at 690 (a trial judge must determine if the waiver is the product of a knowing, voluntary, and intelligent decision).

In Petitioner's case, defense counsel either failed to recognize or ignored the conflict of interest arising from his joint representation of Appellant and Hall. R. 11, l. 14 – R. 17, l. 3. Regardless of the reason, defense counsel's failure address the conflict of interest prior to Appellant's trial was inexcusable. The trial court then compounded defense counsel's poor judgment and erred by not conducting an on-the-record colloquy to determine whether Appellant and Hall knowingly and intelligently waived the right to conflict free representation. *Jordan v. State*, 406 S.C. 443, 752 S.E.2d 538 (2013) (holding that active conflict of interest existed with defense counsel's simultaneous representation of defendant and his girlfriend and that defendant did not waive any potential conflict of interest).

Defense counsel's conflict of interest in Appellant's case was disabling and actively undermined counsel's role with respect to both Appellant and Hall. The State offered Appellant and Hall a joint deal with vastly different term of years sentences for their roles in the same criminal enterprise. R. 11, l. 14 – R. 17, l. 3. In addition, the State offered – on the eve of Appellant's trial – to let Hall plead guilty and receive a five year sentence provided she testified against Appellant. *Id.* Since the trial court did not conduct a colloquy with either Hall or Appellant, there is no evidence in the record indicating that either Appellant or Hall was aware of the fundamental conflict of interest caused by defense counsel's joint representation. *See Thomas*, 346 S.C. at 154, 551 S.E.2d at 265.

Defense counsel was – at best – surprised by the trial court's conflict of interest concerns and did not move to address the problem prior to Appellant's trial. R. 11, l. 14 – R. 17, l. 3; *Gonzales*, 419 S.C. at 12, 795 S.E.2d at 840. Once Appellant's case was called for trial, the trial court's failure to question Appellant's understanding of defense counsel's conflict of interest deprived Appellant of the ability to knowingly, intelligently, and freely exercise his fundamental right to a conflict free counsel of his choice. *Bateman*, 296 S.C. at 369, 373 S.E.2d at 471.

Under these circumstances, the failure to secure an on-the-record waiver of Appellant's right to conflict free counsel constituted reversible error. Accordingly, Appellant's conviction and sentence should be vacated and his case remanded for a new trial.

CONCLUSION

By reason for the foregoing arguments, Petitioner Timothy Wheeler respectfully requests this Court to reverse the trial court's order of dismissal and remand his case for a new trial.

A handwritten signature in black ink, appearing to read 'Taylor D. Gilliam', is written over a horizontal line.

Taylor D. Gilliam
Appellate Defender

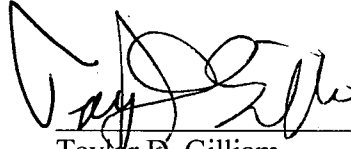
ATTORNEY FOR APPELLANT

This 26th day of June, 2018.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant 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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