DIVISION ONE
FILED: 10/16/2012
RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

JUAN VELAZQUEZ, Petitioner, v. THE DOUGLAS L. RAYES, Judge of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of MARICOPA, Respondent Judge, STATE OF ARIZONA, Real Party in Interest.	)	Court of Appeals Division One No. 1 CA-SA 12-0186 Maricopa County Superior Court CR 2001-014970 DEPARTMENT C **DECISION ORDER**

This special action came on regularly for conference on September 19, 2012 before Presiding Judge Philip Hall, Judge Peter Swann, and Judge Samuel Thumma.

Petitioner Juan Velazquez (Petitioner) was convicted in superior court of first-degree murder and seven counts of child abuse and sentenced to death for the murder. Petitioner's convictions were affirmed on direct appeal. *State v. Velazquez*, 216 Ariz. 300, 166 P.3d 91 (2007). After the mandate issued on his direct appeal, Petitioner filed a notice of post-conviction relief (PCR) in Maricopa County Superior Court. Attorney David

Alan Darby was appointed to represent Petitioner in the PCR and has done so for over two years. Petitioner has not yet filed a PCR petition, with the current filing deadline set for mid-December 2012.

Mr. Darby, on behalf of Petitioner, seeks relief from the Respondent Superior Court Judge Douglas Rayes' order denying his motion to withdraw as counsel for Petitioner in the PCR proceeding. The superior court's order is non-appealable and reviewable only via special action. *Haas v. Colosi*, 202 Ariz. 56, 57, ¶ 2, 40 P.3d 1249, 1250 (App. 2002); *Coconino County Pub. Defender v. Adams*, 184 Ariz. 273, 275, 908 P.2d 489, 491 (App. 1995). Therefore, we accept jurisdiction, but deny relief because the superior court did not abuse its discretion when denying Mr. Darby's motion to withdraw.

In moving to withdraw as counsel for Petitioner, Mr. Darby summarily cited "irreconcilable differences and the attendant circumstances." Judge Rayes held an *ex parte* hearing at which Petitioner listed complaints regarding Mr. Darby's representation. When Judge Rayes asked Mr. Darby to explain the basis of his motion to withdraw, Mr. Darby declined to do so citing confidentiality concerns under Arizona Rules of the Supreme Court 42, Ethical Rules (ER) 1.6 and 1.16. Instead, Mr. Darby repeated his avowal that there was an "irreconcilable

conflict" that prevents him from continuing to represent Petitioner. After identifying and weighing several factors to be considered in evaluating Mr. Darby's motion to withdraw, *see State v. Cromwell*, 211 Ariz. 181, 187, ¶ 31, 119 P.3d 448, 454 (2005), Judge Rayes denied the motion, concluding that there was a "disagreement over strategy" and "not irreconcilable conflict." *See id.* at 181, ¶ 30, 119 P.3d at 454 (citing *United States v. Hillsberg*, 812 F.2d 328, 333-34 (7th Cir. 1987) (holding that denial of a motion to substitute counsel is not reversible error "where defendant and counsel have 'personality conflicts and disagreements over trial strategy'")).

At a hearing held two weeks later to consider Petitioner's request to represent himself, Petitioner was warned of the consequences of self-representation, particularly in a capital case. Petitioner again expressed dissatisfaction with Mr. Darby, including that he had asked Mr. Darby "about getting co-counsel numerous times." After commenting that Mr. Darby "had put a lot of time and effort in your case," Judge Rayes asked Petitioner if he would be satisfied if the court appointed a second attorney as co-counsel to work "directly" with Petitioner so he would have "another set of eyes and ears" to review additional issues that Petitioner wanted raised in his PCR proceeding. Petitioner agreed to have a second attorney

appointed to represent him with the understanding that he could renew his motion to represent himself if he was dissatisfied with the second attorney. Judge Rayes then appointed an additional attorney to represent Petitioner. Therefore, he is now represented by two attorneys in the PCR proceeding.

At this second hearing, Mr. Darby asked the court to reconsider the denial of his motion to withdraw. After reminding Mr. Darby that he was not the judge that would preside over the PCR proceeding, Judge Rayes again offered Mr. Darby the opportunity for an *ex parte* hearing to "give me your reason that you haven't told me yet that creates the ethical conflict for you" and told Mr. Darby "if it's something I feel is the type of conflict that would require you to be off the case, I'll grant your motion." Citing his duty of confidentiality under ER 1.6, Mr. Darby responded: "I can't do that, Judge. The rules preclude me from doing that."[1] Judge Rayes denied the motion for

[1] Unlike information protected by the attorney-client privilege or work-product protection, ER 1.6 directs that confidential information may (and at times must) be disclosed by an attorney in various contexts, including mandatory disclosure to prevent certain types of harm; discretionary disclosure to prevent, mitigate or rectify other types of harm, fraud or crime and "to comply with other law or a final order of a court . . . directing the lawyer to disclose such information." ER 1.6(d)(5); *see also* ER 1.6 cmt. 3 (discussing difference between confidentiality and attorney-client privilege/work product protection). Although Judge Rayes did not "order" Mr. Darby to disclose any information, Mr. Darby does not contend that the lack of a final court order compelling disclosure is

reconsideration and, in doing so, provided the following additional explanation:

> THE COURT: Okay. You know, we had an ex parte hearing and you [Mr. Darby] did say that professional considerations required your termination, but you never told me what the issues were.
>
> . . . .
>
> You were in an ex parte hearing where you had a full opportunity to disclose that to me. I'm not the trial judge, I'm not the one who's going to [be] hearing this case and no one else was here but us.
>
> Nothing has been raised to me that gives me any information that suggested there are those problems, and I'm not going to change my mind. I'm denying the Motion to Reconsider. There's nothing in the record that tells me specifically of some sort of ethical dilemma that you're facing in this case.
>
> I know there's differences of opinion between you and your client about strategies and theories and things of that nature, and I'm finding that's not an irreconcilable conflict. And the information that was presented to me, I just don't have anything to cause me to change my mind.

Mr. Darby then filed this petition for special action.

"Decisions on motions to withdraw are left to the discretion of the trial court and will not be overturned absent

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significant. *See* State Bar of Ariz. Ethics Op. No. 00-11 (Nov. 2000) (concluding lawyer is ethically obligated to comply with a "final order rendered by a court . . . when ordered to disclose confidential information").

an abuse of that discretion." *State v. Sustaita*, 183 Ariz. 240, 241, 902 P.2d 1344, 1345 (App. 1995). In reviewing for an abuse of discretion, "[t]he question is not whether the judges of this court would have made an original like ruling, but whether a judicial mind, in view of the law and circumstances, could have made the ruling without exceeding the bounds of reason." *Associated Indem. Corp. v. Warner*, 143 Ariz. 567, 571, 694 P.2d 1181, 1185 (1985) (citation omitted). In exercising its discretion to permit or deny counsel to withdraw based on a claim of "irreconcilable conflict," the superior court evaluates "several factors designed specifically to balance the rights and interests of the defendant against the public interest in judicial economy, efficiency and fairness." *Cromwell*, 211 Ariz. at 187, ¶ 31, 119 P.3d at 454. These factors include:

> Whether an irreconcilable conflict exists between counsel and the accused, and whether new counsel would be confronted with the same conflict; the timing of the motion; inconvenience to witnesses; the time period already elapsed between the alleged offense and trial; the proclivity of the defendant to change counsel; and quality of counsel.

Id. (internal quotation omitted).

Mr. Darby claims he is required to withdraw from representation pursuant to ER 1.16(a)(1). Other than summarily stating "irreconcilable differences and the attendant circumstances," however, Mr. Darby provided no basis for this

claim even when provided the opportunity to do so ex parte before a Judge who will not be the trial judge.[2] We disagree with Mr. Darby's contention that a court must automatically grant an attorney's motion to withdraw whenever an attorney asserts without explanation that ethical considerations mandate that he withdraw from further representation.

ER 1.16(a)(1) provides in relevant part: "Except as stated in paragraph (c), a lawyer . . . shall withdraw from the representation of a client if the representation will result in violation of the Rules of Professional Conduct or other law." But the second sentence of paragraph (c) provides: "When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation." Thus, "ER 1.16 does not mandate withdrawal any time continued representation may result in a violation of an ethical rule or other law[.]" *State v. Hausner*, 230 Ariz. 60, 86, ¶ 125, 280 P.3d 604, 630 (2012).

Mr. Darby's reliance on *Maricopa County Public Defender's*

[2] The fact that Judge Rayes would not decide the merits of petitioner's case and ordered that any record of the *ex parte* portion of the proceedings be sealed further minimizes the disclosure concerns raised by Mr. Darby. *Cf. Holloway v. Arkansas*, 435 U.S. 475, 487 n.11 (1978) (commenting that the risk of compelled disclosure "creates significant risks of unfair prejudice, especially when the disclosure is to a judge who may be called upon to later impose sentences on the attorney's clients").

Office v. Superior Court, 187 Ariz. 162, 927 P.2d 822 (App. 1996), and commentary to ER 1.16 is not dispositive. It is true that *Maricopa County* states "counsel's avowal of an ethical conflict requiring withdrawal is entitled to great weight[.]" *Id*. at 166, 927 P.2d at 826. *Maricopa County* did not, however, declare that counsel's avowal was conclusive or invariably precluded further inquiry. It is equally true that comment 3 to ER 1.16 states: "The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation *ordinarily* should be accepted as sufficient." (Emphasis added). "Ordinarily," however, does not mean "always."

Mr. Darby has invested a substantial amount of time and effort over a two-year period in preparing Petitioner's PCR petition and the deadline for filing of the petition—although currently two months away—has already been extended. Given the terseness of the motion, it is unknown whether new counsel would be confronted with the same conflict. Moreover, Judge Rayes has indicated Mr. Darby is an able attorney. These factors properly may be viewed to weigh in favor of denying the motion to withdraw, and in any event, do not mandate the granting of the

motion. *See Cromwell*, 211 Ariz. at 187, ¶ 31, 119 P.3d at 454. Moreover, Mr. Darby has not cited (nor have we found) any case holding it was an abuse of discretion for a trial court to deny a motion to withdraw under circumstances similar to those here.

We cannot say that Judge Rayes abused his discretion when, after considering the relevant factors, he denied Mr. Darby's motion to withdraw. Accordingly,

IT IS ORDERED accepting jurisdiction of Petitioner's special action petition.

IT IS FURTHER ORDERED denying Petitioner's request for relief.

/s/
PHILIP HALL, Presiding Judge

_/s/_____
SAMUEL A. THUMMA, Judge

S W A N N, Judge

I respectfully dissent from the majority's denial of relief. Though I agree that courts are not bound in every case to defer to a lawyer's general avowal that professional considerations require him to withdraw, the circumstances of this case present an unusually lopsided balance between the

lawyer's stated need to withdraw and countervailing considerations.

My reasoning is guided by ER 1.16, comment 3, which provides:

> [C]ourt approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the withdrawal, while *the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient.* Lawyers should be mindful of their obligations to both clients and the court under ERs 1.6 and 3.3.

(Emphasis added.) The comment contemplates that, of necessity, facts presented in support of withdrawal may be incomplete or vague. Such is the case here. But in these circumstances, the comment directs a strong measure of deference to counsel's avowal of the existence of a conflict -- such avowals "ordinarily should be accepted as sufficient." *Id.* I would conclude that the record in this case makes counsel's avowal more than sufficient.

The majority relies heavily on the absence of specific disclosure by Mr. Darby of the grounds for his perceived need to withdraw. The trial court expressed similar reliance. It is

true that the trial court provided Mr. Darby the opportunity to provide additional detail in an ex parte setting. But there is nothing in the relevant rules or comments to suggest that a lawyer must, or even should, accept such an invitation. Indeed, the above comment to ER 1.16 expressly recognizes that the lawyer may be bound to keep such information confidential even in the face of an inquiry by the court. And though ER 1.6(d)(5) permits a lawyer to reveal confidential information in response to a final order of a court, no rule pertinent to withdrawal specifically authorizes the court to issue such an order. Indeed, comment 15 to ER 1.6 provides that a lawyer must resist such an order by asserting all non-frivolous claims that disclosure is prohibited by the rule and, in the face of an adverse order, must consult with the client about the possibility of appeal. Reading the rules and comments together, a prudent lawyer will be understandably loath to reveal confidential information even when such information would assist him in connection with a motion to withdraw.

Despite the strong bias against disclosure that the rules create, the majority correctly notes that the rules do not require the court to permit withdrawal on a generalized allegation of "irreconcilable differences" in every case. Though the lack of a bright line rule places lawyers and courts

alike in difficult situations, the factors set forth in *State v. Cromwell*, 211 Ariz. 181, 187, ¶ 31, 119 P.3d 448, 454 (2005), provide a guide for the court's exercise of discretion. An examination of those factors in this case reveals no substantial reason to prohibit withdrawal.

The first factor, "whether an irreconcilable conflict exists between counsel and the accused," should, for the reasons stated above, be addressed by Mr. Darby's avowal that such a conflict exists.

The second factor, "whether new counsel would be confronted with the same conflict," is, of course, difficult to evaluate in the absence of more specific facts. In this case, however, another lawyer has already been appointed, and the record reflects no similar assertion of a conflict by that attorney. Moreover, it is difficult to perceive the need for multiple counsel to represent the defendant in this case at the PCR stage. And if Mr. Darby were allowed to withdraw, he would be required by ER 1.16 to do so in a manner that facilitates the transition of representation.

The third factor, "the timing of the motion," raises no substantial concern. Mr. Darby has served as counsel for the defendant over a long period of time, but the case has reached a point at which timing is hardly critical. The only deadline

facing the defendant at the time of the filing of the special action was the deadline to file a petition for postconviction relief several months later. It is difficult to see how the interests of the court or any party would be prejudiced by permitting Mr. Darby's withdrawal and allowing successor counsel to proceed.

The fourth factor, "inconvenience to witnesses," provides no impediment to withdrawal. This is not a case in which a lawyer moves to withdraw on the eve of trial, potentially compromising the ability of the court to secure an optimal presentation of evidence by witnesses. Because the only remaining task is the preparation of the petition, no witness's schedule would be impacted by the withdrawal.

The fifth factor, "the time period already elapsed between the alleged offense and trial," similarly provides no compelling reason to prohibit withdrawal. Trial in this case is over. Indeed, the defendant's convictions were affirmed by the supreme court in 2007. There is simply no risk of prejudice by virtue of delay.

The sixth factor, "the proclivity of the defendant to change counsel," appears neutral. It is true that the defendant has expressed varying preferences for his representation in connection with the anticipated petition for postconviction

relief. But the record, at least at this juncture, suggests no gamesmanship or improper purpose underlying Mr. Darby's request for withdrawal. Though it is not inconceivable that this factor could come into play should there be similar requests from subsequent counsel, there is nothing to suggest that any undesirable proclivity of the defendant for changes of counsel should stand in the way of withdrawal here.

The final factor, "quality of counsel," likewise appears not to present an impediment to withdrawal. The trial court appears to view both Mr. Darby and newly appointed counsel as competent to handle the representation at this stage, and on the record before us there is no reason to question that assessment.

In view of these considerations, it is my view that any lingering uncertainty concerning the nature of Mr. Darby's conflict should not have prevented his withdrawal. I recognize, of course, that our standard of review is abuse of discretion. And I do not doubt the good faith of the trial court in its determination of this matter. Nor am I unaware of the importance of a healthy respect for a trial court's exercise of its discretion. But the "abuse of discretion" standard is not a unitary concept. "Abuse of discretion" may be defined as the "manifestly unreasonable" exercise of discretion. *See, e.g., State v. Woody*, 173 Ariz. 561, 563, 845 P.2d 487, 489 (App.

1992). But "abuse of discretion" also sweeps within its pejorative tone categories of error that do not involve any culpable "abuse" of the discretion entrusted to the court. *See State v. Chapple*, 135 Ariz. 281, 297 n.18, 660 P.2d 1208, 1228 n.18 (1983). In certain contexts, when the exercise of discretion is founded upon a mere error of law, that exercise of discretion may (unfortunately) be deemed "abusive." *Id.* Accordingly, the good faith misapplication of a rule should justify relief under the abuse of discretion standard even when the court's decision is not "manifestly unreasonable" or otherwise offensive to the proper function of the trial court. In a case such as this, where the trial court's exercise of its discretion is guided largely by its interpretation of its own powers and counsel's obligations under the ethical rules, I would hold that our review should fall at the less deferential end of the "abuse of discretion" spectrum.

Because I conclude that the court misapplied ER 1.16 in a manner that conflicts with comment 3, I would grant relief. For these reasons, I respectfully dissent.

_/s/_____
Peter B. Swann, Judge