IN THE COURT OF APPEALS OF IOWA

No. 1-817 / 11-0175
Filed December 7, 2011

COURTNEY DOSS,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Linn County, Douglas S. Russell, Judge.

Courtney Doss appeals the district court's denial of her application for postconviction relief. **AFFIRMED.**

Wallace L. Taylor, Cedar Rapids, for appellant.

Thomas J. Miller, Attorney General, Kyle P. Hanson, Assistant Attorney General, Jerry Vander Sanden, County Attorney, and Robert A. Hruska, Assistant County Attorney, for appellee State.

Considered by Vaitheswaran, P.J., and Doyle and Danilson, JJ. Tabor, J., takes no part.

VAITHESWARAN, P.J.

An informant named Daniel Ray assisted Cedar Rapids police in a controlled drug purchase. Ray, who was fitted with a recording device, gave a man money for the drugs. A woman, later identified as Courtney Doss, handed Ray the drugs.

Doss was charged with and found guilty of delivery of a controlled substance. She appealed her judgment and sentence, but the appeal was dismissed as frivolous under what is now Iowa Rule of Appellate Procedure 6.1005.

Doss filed an application for postconviction relief, raising several grounds for relief, including the following: (1) her trial attorney was ineffective in advising Doss not to testify and (2) her appellate attorney was ineffective in failing to challenge the court's removal of her first trial attorney based on a conflict of interest. Following a hearing, the district court denied the application.

Doss appeals, raising the same two issues. To prevail, she must show trial counsel (1) breached an essential duty and (2) prejudice resulted. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984).

I. Right to Testify

At the hearing on Doss's postconviction relief application, Doss testified that her trial attorney told her she "shouldn't testify." She stated that if she had testified at trial, she would have told the jury, "I did not do it. I am not a drug dealer."

Doss's trial attorney did not remember the substance of her meetings with Doss but testified to her general practice in conferring with clients. She was then asked:

> Q. Have you ever prevented any—a client of yours who wanted to testify at trial from testifying? A. No. I can't ethically do that and I would not do that.
> Q. Do you make a recommendation to your clients as to whether they should testify at trial? A. I certainly do.
> Q. What do you base that recommendation on? A. There's a lot of different factors. And, again, it depends on the individual case. One factor that is given consideration is their past criminal history. . . . Just the way they present themselves and how well they may or may not testify at trial, inconsistencies there may have been between what they said previously, say, in interviews with the police and what they would be testifying to. . . .
> Q. And what if a client doesn't accept your assessment of the wisdom of their testifying or not? A. Then if that person wants to testify, they get to testify.

The postconviction court found credible the attorney's statement that she would have allowed Doss to testify if she had wished to. The court determined the attorney's performance was "well within the normal range of competency" and, accordingly, rejected this ineffective-assistance-of-counsel claim.

On our review of this ruling, we examine the record de novo, but give weight to the district court's credibility finding. *See Taylor v. State*, 352 N.W.2d 683, 687 (Iowa 1984). While Doss's trial attorney did not remember the specifics of her conversations with Doss, she unequivocally stated that she would not prevent a client from testifying. Doss did not refute this testimony. She simply stated that her attorney told her she "shouldn't testify." This advice was consistent with the attorney's obligation to leave the ultimate decision about testifying to the defendant. *Ledezma v. State*, 626 N.W.2d 134, 146–47 (Iowa

2001). We find no breach of essential duty. *Id.* at 147 ("Generally, the advice provided by counsel is a matter of trial strategy and will not support a claim of ineffective assistance absent exceptional circumstances.").

We also discern no prejudice, as Doss's version of events was presented to the jury through a police officer, who recounted Doss's denial of her involvement in the drug transaction. *See, e.g.*, *Fryer v. State*, 325 N.W.2d 400, 413 (Iowa 1982) (rejecting defendant's claim that trial counsel was ineffective in failing to contest admissibility of statements to officers where "'by allowing Fryer's statement . . . to be admitted in evidence, defense counsel had Fryer's largely exculpatory version of the affair before the jury without Fryer being required to take the stand and [be] subjected to cross-examination'" (citations omitted)). Significantly, Doss did not specifically recall the drug transaction and, for that reason, her proposed trial testimony did not contain relevant details beyond a general denial. Her testimony, therefore, would have added little to what was already in the record.

We conclude Doss's trial attorney was not ineffective in advising Doss not to testify at trial.

II. Removal of Attorney—Conflict of Interest

An attorney from the public defender's office was initially appointed to represent Doss. Several months after the appointment, the State learned the public defender's office also represented the police informant, Daniel Ray, on pending and past criminal charges. The State moved to have the district court determine whether a conflict of interest existed.

At a hearing on the motion, Doss was questioned as to whether she wished to waive any potential conflict of interest created by the public defender's office's dual representation. She agreed to a waiver. Nonetheless, the district court removed the public defender's office from its representation of Doss, reasoning as follows:

> [T]he previous representation of Mr. Ray and the simultaneous representation of Mr. Ray and Ms. Doss by the Public Defender results in an actual conflict of interest within the meaning of *State v. Watson*, 620 N.W.2d 233 (Iowa 2000). Accordingly, new counsel should be appointed for Ms. Doss and the Linn County Public Defender should withdraw from representing her. Ms. Doss's Sixth Amendment right to counsel with undivided loyalties mandates this result.

Doss contends the removal of the public defender's office violated her "right to counsel of one's choice," and her appellate attorney was ineffective in failing to challenge the removal. We disagree.

An element of the constitutional right to counsel "'is the right of a defendant *who does not require appointed counsel* to choose who will represent him.'" *State v. Smith*, 761 N.W.2d 63, 69 (Iowa 2009) (emphasis added) (quoting *United States v. Gonzalez-Lopez*, 548 U.S. 140, 144, 126 S. Ct. 2557, 2561, 165 L. Ed. 2d 409, 416 (2006)). "[T]he right to counsel of choice does not extend to defendants who require counsel to be appointed for them." *Gonzalez-Lopez*, 548 U.S. at 151, 126 S. Ct. at 2565, 165 L. Ed. 2d at 421. Doss had appointed counsel. Accordingly, she did not have a right to choose who would represent her. *Id.*; *see also Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 624, 109 S. Ct. 2646, 2652, 105 L. Ed. 2d 528, 541 (1989) ("The Amendment guarantees defendants in criminal cases the right to adequate representation, but

those who do not have the means to hire their own lawyers have no cognizable complaint so long as they are adequately represented by attorneys appointed by the courts.").

But, even if Doss did possess such a right, the right to choose an attorney is not absolute. *Gonzalez-Lopez*, 548 U.S. at 144, 126 S. Ct. at 2561, 165 L. Ed. 2d at 416; *see also State v. Vanover*, 559 N.W.2d 618, 626 (Iowa 1997); *State v. Williams*, 285 N.W.2d 248, 254 (Iowa 1979). The court is not required to tolerate representation by conflicted counsel because such

> "representation not only constitutes a breach of professional ethics and invites disrespect for the integrity of the court, but it is also detrimental to the independent interest of the trial judge to be free from future attacks over the adequacy of the waiver or the fairness of the proceedings in his own court and the subtle problems implicating the defendant's comprehension of the waiver."

Vanover, 559 N.W.2d at 627 (quoting *Wheat v. United States*, 486 U.S. 153, 162, 108 S. Ct. 1692, 1699, 100 L. Ed. 2d 140, 151 (1988)). And, the court has

> substantial latitude in refusing waivers of conflicts of interest not only in those rare cases where an actual conflict may be demonstrated before trial, but in the more common cases where a potential for conflict exists which may or may not burgeon into an actual conflict as the trial progresses.

Wheat, 486 U.S. at 163, 108 S. Ct. at 1699, 100 L. Ed. 2d at 151.

We believe the district court acted appropriately in requiring the public defender's office to withdraw, notwithstanding Doss's waiver of the conflict. The conflict here was clear and direct: the office for which Doss's first attorney worked also represented Ray, the man who implicated Doss in the drug buy. *See State v. Watson*, 620 N.W.2d 233, 239 (Iowa 2000) ("[I]n the case of dual representation of the defendant and an adverse witness, there is no benefit to

common representation. To the contrary, the potential for less zealous representation of the defendant is obvious."). Additionally, Doss's first attorney conceded his defense strategy was to impugn Ray's credibility. Therefore, had he continued to represent Doss through trial, he would have been placed in the untenable position of having to zealously represent Doss by vigorously cross-examining Ray while at the same time taking care not to divulge Ray's confidential information garnered through his employment with the public defender's office. *See id*. at 240 (noting attorney's ethical duties to zealously represent one client while also maintaining the confidences of the other). As the court in *Watson* explained:

> "The defendant's interest and the witness's interest diverged with respect to the attorney's cross-examination of the witness. The attorney had an obligation to the defendant to use all the information at his disposal to impeach the witness's credibility. Yet, the attorney also had an obligation to the witness to maintain the confidentiality of the witness's communications with the Defender Association. Given these inconsistent duties, counsel was forced to make a 'Hobson's choice.'
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> . . . [T]he importance of maintaining client confidences cannot be lightly disregarded. Any statements made by the witness to the Defender Association in connection with his legal representation were covered by the attorney-client privilege. Moreover, a heightened concern for protecting confidences is particularly appropriate where a lawyer is called upon to cross-examine an individual whom his office represents."

Id. at 239 (quoting *In re Saladin*, 518 A.2d 1258, 1261–62 (Pa. Super. Ct. 1986)).

We recognize that Doss's first attorney did not have any direct attorney-client contact with Ray and had not reviewed any of Ray's files. However, there was no unconflicted co-counsel in the wings, should issues have arisen involving the public defender's separate representation of Ray. *Cf. Smith*, 761 N.W.2d at 72 (finding the presence of co-counsel from an outside firm significantly mitigated

the risk the defendant would receive inadequate representation). Additionally, Doss's attorney could no longer vitiate the conflict by relying on a "Chinese wall" to screen himself off from the rest of his office. *Id.* at 73 n.10 ("[U]nder the current version of [our rules of professional conduct], screening will not prevent the imputation of conflicts of interest to other firm members in the practice of law."). Nor could he cite the "Chinese wall" as a mitigating factor, as was done in *Smith*, given the absence of unconflicted co-counsel to assist in the trial, and the presence of a direct conflict of interest. *Id.* at 74 (noting that unlike *Watson*, where "the testimony of the concurrently represented witness was directly adverse to the interests of the defendant," the testimony of the concurrently represented witness in *Smith* "was merely foundational").

We conclude Doss's appellate attorney did not breach an essential duty and, accordingly, was not ineffective in failing to challenge the district court's removal of the public defender's office as Doss's trial counsel.

III. Conclusion

We affirm the denial of Doss's application for postconviction relief.

AFFIRMED.