STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

SHAWN DEON HUTCHINSON,

Defendant-Appellee.

UNPUBLISHED
August 23, 2002

No. 238027
Wayne Circuit Court
LC No. 94-001010

Before: Murray, P.J., and Fitzgerald and O'Connell, JJ.

PER CURIAM.

Defendant was originally charged with possession with intent to deliver 650 grams or more of cocaine, MCL 333.7401(2)(a)(i). Following a bench trial, defendant was convicted of possession of 650 grams or more of cocaine, MCL 333.7403(2)(a)(i). However, at the sentencing hearing that took place more than ten months after the trial due to several adjournments at defendant's request, the trial court sua sponte concluded that it had intended to convict defendant of attempted possession of 650 grams or more of cocaine, rather than actual possession. Accordingly, the trial court sentenced defendant to a term of forty to sixty months' imprisonment.

The prosecutor appealed, and this Court reversed and remanded for reinstatement of the original verdict of guilty of possession of 650 grams or more of cocaine and for resentencing.[1] On remand to the trial court, defendant filed a motion for a new trial. The trial court granted the motion on the basis that a miscarriage of justice had occurred. The prosecutor appealed, and this Court again reversed and remanded for reinstatement of the original verdict of guilty of possession of 650 grams or more of cocaine. However, resentencing was ordered to be before a different circuit court judge.[2]

On remand, the case was reassigned to a different judge and defendant filed an amended motion for a new trial, this time on the basis of (1) ineffective assistance of trial counsel on the grounds of conflict of interest, and (2) newly discovered evidence related to a post-trial statement

[1] *People v Hutchinson*, 224 Mich App 603; 569 NW2d 858 (1997).

[2] *People v Hutchinson*, unpublished opinion per curiam of the Court of Appeals, issued July 13, 1999 (Docket No. 213289).

allegedly made by defendant's employer. After an evidentiary hearing, the circuit court granted the motion in a written opinion and order. From this order, the prosecutor was granted leave to appeal. We affirm in part, reverse in part, and remand for a new trial.

I. Ineffective Assistance of Counsel[3]

The prosecutor first argues that the circuit court incorrectly concluded that an actual conflict of interest on the part of defendant's trial counsel adversely affected his performance. Specifically, the prosecutor argues that defendant's assertion the he was denied the effective assistance of counsel when his lawyer failed to approach the prosecutor to attempt plea negotiations is without merit because there was nothing to show that such a plea offer was plausible under the facts of this case. We disagree.

This case presents an unusual factual situation because the asserted conflict of interest does not arise out of the joint representation of multiple defendants in a criminal case, as is typically the claim. See *People v Gallagher*, 116 Mich App 283, 292-293; 323 NW2d 366 (1982). Rather, it involves a claim that a conflict of interest existed due to the representation of a client who was not a defendant in the instant case, but who is purportedly involved in the instant case. Nevertheless, this Court has held that the legal question presented in the instant case, whether the resulting conflict of interest served to deprive defendant of the effective assistance of counsel, is the same regardless whether the facts involved the representation of clients in different litigations. *Id*. at 293. In either situation, the inquiry is whether the defendant received the undivided loyalty of his counsel. *Id*.

The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id.* To prove a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that the representation so prejudiced the defendant as to deny him a fair trial. *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994), citing *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

However, when claiming ineffective assistance due to defense counsel's conflict of interest, a defendant must show that an actual conflict of interest adversely affected his lawyer's performance. *People v Smith*, 456 Mich 543, 556; 581 NW2d 654 (1998). In other words, the defendant bears the burden of demonstrating "that counsel 'actively represented conflicting interests' and that an actual conflict of interest adversely affected his lawyer's performance." *Id*. at 557, quoting *Cuyler v Sullivan*, 446 US 335, 348-350; 110 S Ct 1708; 64 L Ed 2d 333 (1980).

[3] Initially, we note that the prosecution briefly raises the argument that because defendant failed to raise the conflict of interest in his first motion for a new trial, his present motion for a new trial should have been denied. However, the prosecution has not properly presented this issue in its statement of questions presented, nor has it been properly briefed having been given cursory treatment with little citation to supporting authority. *People v Miller*, 238 Mich App 168, 172; 604 NW2d 781 (1999); *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Therefore, we decline to address the issue.

Although this heightened standard is not a rule of prejudice per se, an actual conflict of interest that adversely affects the adequacy of a lawyer's performance is presumptively prejudicial. *Cuyler, supra*; *Smith, supra* at 556-557.

A. Active Representation of Conflicting Interests

"An attorney has an actual, as opposed to a potential, conflict of interest when, during the course of the representation, the attorney's and defendant's interests 'diverge with respect to a material factual or legal issue or to a course of action.'" *Winkler v Keane*, 7 F3d 304, 307 (CA 2, 1993), quoting *Cuyler*, 446 US at 356 n 3. We conclude, from our review of the record, that an actual conflict of interest existed in this case.

Defendant was represented by attorney Thaddeus Dean from the time of his arraignment in January 1994 through the time of sentencing in April 1996. Dean also represented defendant's employer, Michael Williams, and the record suggests that Dean had an ongoing attorney-client relationship with Williams' that began several years before defendant's arrest in this case. In fact, Dean continued to represent Williams through the evidentiary hearing held in this case on March 30, 2001.[4] Defendant worked at Williams' car wash, where he washed cars and ran various errands for Williams. On the day of his arrest, defendant was allegedly running an errand for Williams, driving a car provided by Williams, used by car wash employees, and kept at the car wash, when he was stopped by police for a traffic violation.[5] During a search of the car, the police found over 650 grams of cocaine under the passenger seat.

Importantly, it was Williams who retained Dean, Williams' own personal lawyer, to represent defendant. At some point after defendant's arrest, Williams informed Dean that he was the subject of a federal investigation involving drug trafficking. About one year after defendant's arrest and approximately four months prior to defendant's trial, Williams was arrested by federal agents on drug charges, stemming from a search of Williams' car wash and apartment that resulted in the seizure of 2.5 kilograms of cocaine and $175,000 cash. Dean represented Williams in the federal prosecution that ensued and which was resolved by way of a plea bargain. Williams' plea bargain occurred before the commencement of defendant's trial.

These facts as found by the circuit court establish that Dean had a vested interest in protecting Williams while he was also representing defendant. Because Williams' was also Dean's client, Dean had an interest in protecting Williams from being implicated in any further drug charges. See *United States v Christakis*, 238 F3d 1164, 1169 (CA 9, 2001) (active conflict found where attorney continued to represent an unindicted co-conspirator during the representation of the defendant for conspiracy to distribute cocaine). Indeed, Dean admitted that a conflict of interest existed during the pretrial proceedings of defendant's case due to his loyalty to Williams. Thus, the nature of the conflict was acknowledged by Dean himself, who as the attorney for defendant, is "perhaps the best judge of whether a conflict existed." *Baty v*

[4] At the evidentiary hearing, Williams was called by the defense to testify, but upon the advice of Dean, who was next to him at the hearing, Williams invoked his Fifth Amendment right against self-incrimination for each substantive question asked.

[5] The car was registered in the name of Williams' girlfriend.

Balkcom, 661 F2d 391, 397 (CA 5, 1981). In fact, an attorney representing two defendants in criminal matters is in the best position professionally and ethically to determine when a conflict of interests exists or will develop. *Id.* at 397 n 11 (citations omitted). Accordingly, we find the circuit court did not clearly err in determining that Dean actively represented conflicting interests during the pretrial phase of this case.

B. Adverse Effect

With that established, the critical question becomes whether this conflict of interest adversely affected Dean's performance. To establish that a conflict of interest adversely affected counsel's performance, a defendant "need only show that some effect on counsel's handling of particular aspects of the trial was 'likely.'" *Christakis, supra* at 1170 (citations omitted). A defendant must demonstrate that some plausible alternative defense strategy or tactic *might have been pursued*, and that the alternative strategy was inherently in conflict with or not undertaken due to the attorney's other loyalties. *Perillo v Johnson*, 79 F3d 441, 448-450 (CA 5, 1996); *United States v Malpiedi*, 62 F3d 465, 469 (CA 2, 1995); *Winkler, supra* at 309. Under this test, the "defendant need not show that the defense [or foregone tactic] would necessarily have been successful if it had been used, but that it possessed sufficient substance to be a viable alternative." *Id.*

Contrary to the prosecution's argument, this test does not require defendant to show that the alternative tactic not pursued by conflicted counsel was reasonable or that it affected the outcome of the trial. *Malpiedi, supra;* see also *Perillo, supra.* A showing of prejudice is simply not required. *Christakis, supra* at 1170. See also *Cuyler, supra.* Rather, in cases of joint representation of conflicting interests, the evil is in what the attorney finds himself compelled to refrain from doing, not only at trial but also as to pretrial plea negotiations. *Christakis, supra*, quoting *Holloway v Arkansas*, 435 US 475, 490; 98 S Ct 1173; 55 L Ed 2d 426 (1978). Indeed, "[p]lea bargains are perhaps the most obvious example of the manifest effects of a conflict of interest at pretrial proceedings." *Baty, supra* at 397 n 12.

With these principles in mind, we find that defendant established that seeking a plea bargain in exchange for defendant's cooperation was a plausible alternative tactic that was not pursued due to Dean's admitted conflict of interest. Defendant testified that he would have done anything to save himself.[6] In light of defendant's testimony, and the fact that defendant was facing a mandatory life sentence if convicted, we believe that defendant established that he at least might have pursued plea negotiations had Dean raised the issue. Again, while we cannot predict whether such a tactic would have been successful, the outcome is not determinative. *Perillo, supra* at 449.

Second, we find that the trial court's factual finding that Dean's actual conflict influenced his decision not to advise defendant to consider plea negotiations was not a clear error. During the evidentiary hearing, Dean testified that he believed his simultaneous representation of

[6] Although there was no evidence that defendant asked Dean to pursue plea negotiations or even raised the issue with him before or during the trial, defendant did testify during the evidentiary hearing that he relied on Dean in handling the case.

Williams and defendant undermined his representation of defendant during pretrial proceedings in that Dean did not suggest to defendant that he consider cooperating with the authorities as an informant to gain information against Williams in exchange for a reduced plea, nor did Dean pursue such an option with the prosecution. Dean expressly admitted that his representation of Williams adversely affected his representation of defendant in that regard. The trial court was in a superior position to judge Dean's credibility and found his testimony credible with regard to whether Dean's advocacy of defendant was adversely affected by Dean's representation of Williams. We are satisfied that a plea offer might have been pursued in this case, but was not undertaken due to Dean's loyalties to Williams. See *Malpiedi, supra.* Ultimately, Dean's simultaneous representation of defendant and Williams foreclosed viable options, and as a result, defendant was adversely affected. Therefore, we hold that Dean's failure to explore the possibility of plea negotiations on behalf of defendant due to his loyalty to Williams denied defendant the Sixth Amendment right to the effective assistance of counsel.[7]

II. Newly Discovered Evidence

Although our decision on the Sixth Amendment issue already entitles defendant to a new trial, we address the prosecution's other argument as it may be helpful for purposes of the new trial. The prosecutor argues that the circuit court abused its discretion when it found that an alleged post-trial statement by Williams was newly discovered evidence that required a new trial. We agree. "This Court reviews a trial court's postconviction ruling granting or denying a new trial based on newly discovered evidence for an abuse of discretion." *People v Lester*, 232 Mich App 262, 271; 591 NW2d 267 (1998). An abuse of discretion exists when an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification or excuse for the ruling made. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

"A motion for a new trial based on newly discovered evidence may be granted upon a showing that (1) the evidence itself, not merely its materiality, is newly discovered, (2) the evidence is not merely cumulative, (3) the evidence is such as to render a different result probable on retrial, and (4) the defendant could not with reasonable diligence have produced it at trial." *Lester, supra*. Here, defendant's first appellate counsel, Glenn McCandliss, confronted Williams five years after defendant's conviction, and obtained from Williams an oral statement in which Williams allegedly admitted that he owned the cocaine that was found in the car that defendant was driving, and that defendant had no knowledge of it being in the car. We conclude, from our review of the record, that the statement fails to meet the third prong of the test. We are not persuaded that Williams' statement would render a different result probable on retrial. *Id.* Contrary to defendant's assertion that he lacked knowledge of the cocaine and denied that he was involved in drug dealing, the evidence at trial showed that defendant not only knew about the

[7] Our holding in this case is consistent with numerous federal circuit court decisions on this issue. See *Christakis, supra*; *Lipson v United States*, 233 F3d 942, 945-948 (CA 7, 2000); *Perillo, supra*; *Malpiedi, supra*. We are also cognizant that defendant was convicted following what appears to have been a fair trial. However, we further recognize that pretrial proceedings are a critical phase of the criminal process and a conflict of interest that adversely affects a defendant during this stage of the proceedings may warrant a new trial. See *Baty, supra* at 397.

cocaine in the car, but also played a role in the drug trafficking scheme. "Moreover, possession need not be exclusive and may be joint, with more than one person actually or constructively possessing a controlled substance." *People v Konrad*, 449 Mich 263, 271; 536 NW2d 517 (1995). The essential question is whether defendant had dominion and control over the controlled substance. *Id*. Here, we find that the evidence was sufficient to support a reasonable conclusion that defendant exercised dominion and control over the cocaine. See *id.* at 271-273; *People v Wolfe*, 440 Mich 508, 520-521; 489 NW2d 748, amended 441 Mich 1201 (1992). Accordingly, the statement fails to meet the test for newly discovered evidence. As such, the trial court abused its discretion in granting defendant's motion for a new trial based on newly discovered evidence.

We affirm in part, reverse in part, and remand for a new trial. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ E. Thomas Fitzgerald
/s/ Peter D. O'Connell