STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GARY GOINES,

Defendant-Appellant.

UNPUBLISHED
September 20, 2002

No. 240475
Recorder's Court
LC No. 90-001521

Before: Cooper, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

In 1990, defendant was convicted, following a bench trial, of first-degree criminal sexual conduct, MCL 750.520b(1)(d), and sentenced to a term of eight to twenty-five years' imprisonment. He now appeals his conviction pursuant to this Court's April 4, 2002, order, which was issued in compliance with a March 22, 2002, federal district court order conditionally granting defendant habeas corpus relief after defendant successfully argued that he had been unconstitutionally deprived of his appeal by right. We affirm.

Defendant first argues that his conviction must be reversed because his right to a speedy appeal was violated. This issue presents a constitutional question, which this Court reviews de novo. See *People v Mackle*, 241 Mich App 583, 602; 617 NW2d 339 (2000); *United States v Smith*, 94 F3d 204 (CA 6, 1996).

The federal district court already has considered this issue. Applying federal law, the court concluded that the appropriate remedy for this constitutional violation is appellate review by this Court. We reach this same conclusion under state law. This Court's consideration of the merits of defendant's issues on appeal negates any claim of prejudice arising from the delay. *People v Missouri*, 100 Mich App 310, 324-325; 299 NW2d 346 (1980). See also *People v Gorka*, 381 Mich 515, 520; 164 NW2d 30 (1969), *People v McNamee*, 67 Mich App 198, 205; 240 NW2d 758 (1976), and *People v Lorraine*, 34 Mich App 121, 122; 190 NW2d 746 (1971). Defendant also claims, but we find without merit, that the record is insufficient to provide a meaningful review of his claim of ineffective assistance of counsel. Even though we agree with defendant that had this appeal proceeded without delay, the record may have included transcripts of certain proceedings that can no longer be produced, we are satisfied that the present record is sufficient for purposes of affording defendant meaningful review.

Defendant next argues that reversal is required because he was denied the effective assistance of counsel at trial due to a conflict of interest by retained trial counsel, who jointly represented both defendant and his codefendant wife. We disagree.

To prevail on this claim, defendant "'must establish that an actual conflict of interest adversely affected his lawyer's performance.'" *People v Smith*, 456 Mich 543, 556; 581 NW2d 654 (1998), quoting *Cuyler v Sullivan*, 446 US 335, 350; 100 S Ct 1708; 64 L Ed 2d 333 (1980). If defendant demonstrates that counsel actively represented conflicting interests and an actual conflict of interest adversely affected his lawyer's performance, prejudice is presumed. *Smith, supra* at 557. As the United States Supreme Court recently explained, the standard set forth in *Sullivan* does not require separate inquiries into the existence of an "actual conflict" and the "adverse effect." Rather, "[a]n 'actual conflict,' for Sixth Amendment purposes, is a conflict of interest that adversely affects counsel's performance." *Mickens v Taylor*, 535 US ___; 122 S Ct 1237, 1244 n 5; 152 L Ed 2d 291 (2002). Further, an actual conflict must be distinguished from a hypothetical conflict:

> "We will not find an actual conflict unless appellants can point to 'specific instances in the record to suggest an actual conflict or impairment of their interests.' . . . Appellants must make a factual showing of inconsistent interests and must demonstrate that the attorney 'made a choice between possible alternative courses of action, such as eliciting (or failing to elicit) evidence helpful to one client but harmful to the other. If he did not make such a choice, the conflict remained hypothetical.' . . . There is no violation where the conflict is 'irrelevant or merely hypothetical'; there must be an 'actual significant conflict.'" [*Thomas v Foltz*, 818 F2d 476, 481 (CA 6, 1987), quoting *United States v Mers*, 701 F2d 1321, 1328 (CA 11, 1983).]

Here, defendant suggests two ways in which the alleged conflict adversely affected counsel's performance.

First, he argues that the joint representation led to the admission of improper "bad man evidence." Defendant does not identify specific instances in which such evidence allegedly was admitted, but seems to be referring to the complainant's testimony that defendant "beat" her aunt and defendant's wife, and other testimony tending to show that a defense witness was testifying on defendant's behalf due to her fear of defendant.

Contrary to defendant's assertions, an examination of the record reveals that the above evidence was not admitted to further a duress defense for defendant's wife. Rather, the complainant's testimony concerning her knowledge of defendant's violence toward others was relevant to an understanding of her reasons for allegedly complying with the requested sexual activity and for not disclosing the activity sooner. Evidence concerning the defense witness' fear of defendant was relevant to her possible bias. Defendant has not shown that trial counsel's performance with respect to this evidence was affected by a conflicting interest of presenting evidence in support of a duress defense for defendant's wife. Indeed, the record discloses that counsel repeatedly objected to the admission of this evidence.

Defendant points to counsel's closing argument as indicative of a second way in which a conflict affected counsel's performance. The trials of defendant and his wife were severed

before closing argument. On behalf of defendant, defense counsel argued that the prosecution failed to establish the elements of first-degree criminal sexual conduct. Specifically, in her closing argument, counsel stated:

> There is no evidence of any aiding and abetting.
>
> I believe [the complainant]'s testimony, she testified that [defendant's wife] told her to go in there, because [defendant's wife] was frightened. That was not aider and abettor. That's someone who behaves or acted under duress. If you believe her testimony, there is nothing to indicate she's an aider or abettor, whatsoever, in this case; since complainant indicates that she did consent; since the complainant was never frightened; threatened; and since the complainant continuously visited the house after this alleged act, where she was supposed to be frightened of the people.
>
> I think that the only verdict the [c]ourt can come up with in this case is not guilty, due to the fact there is reasonable doubt as to guilt.

Examined in context, it is apparent that the statement, "I believe [the complainant]'s testimony" was intended as an expression of what counsel believed the complainant's testimony to be. Counsel was not stating that she agreed with the complainant's version of events, nor did counsel concede defendant's guilt in furtherance of a duress defense for defendant's wife. Further, counsel was arguing that even if the complainant's version of the incident was true, the prosecution still had not established that defendant was "aided or abetted by 1 or more other persons[.]" MCL 750.520b(1)(d).

Because defendant has not shown a conflict of interest that adversely affected counsel's performance, he has failed to establish that he was denied the effective assistance of counsel due to the joint representation.

Defendant also argues that when the issue of counsel's joint representation was raised before trial and then again after severance of the trials by another judge, the trial court failed to conduct the requisite inquiry regarding a potential conflict of interest, contrary to MCR 6.005(F) and (G).

The record before this Court does not show that the trial court complied with these court rules. Specifically, there is no indication that, when the issue was raised before trial, defendant and his wife stated on the record that they desired to proceed with the same lawyer. MCR 6.005(F)(2). Additionally, when the issue of a potential conflict was raised during trial and the trials were severed because of the possibility of antagonistic defenses, there is no indication that either defendant was afforded an opportunity to retain separate counsel. MCR 6.005(G).

Despite the apparent noncompliance with these court rules, defendant is not entitled to relief. Reversal is not required where there is "no showing of a conflict of interest actually affecting the adequacy of representation." *People v Kirk*, 119 Mich App 599, 603; 326 NW2d 145 (1982); see also *People v Lafay*, 182 Mich App 528, 531; 452 NW2d 852 (1990). Similarly, the United States Supreme Court has rejected the proposition that reversal is automatically required where a trial court fails to inquire about a potential conflict of interest about which the

court knew or reasonably should have known. *Mickens, supra* at 122 S Ct 1240-1245. The trial court's failure does not reduce defendant's burden to establish that the asserted conflict of interest adversely affected counsel's performance. *Id*. at 1245. In light of our previous conclusion that defendant has failed to make this showing, we conclude that the trial court's apparent failure to comply with MCR 6.005(F) and (G) does not afford a basis for relief.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Jane E. Markey