IN THE SUPREME COURT OF THE STATE OF DELAWARE

JAMES W. RILEY,	§	
	§	
Defendant Below-Appellant,	§	No. 259, 2003
	§	
	§	Court Below---Superior Court
v.	§	of the State of Delaware,
	§	in and for Kent County
STATE OF DELAWARE,	§	Cr. A. Nos. IK82-05-0060; 0061;
	§	IK82-06-0838
Plaintiff Below-Appellee.	§	
	§	

Submitted: June 18, 2004
Decided: September 13, 2004
Upon Rehearing: October 20, 2004[1]

Before **HOLLAND**, **BERGER** and **JACOBS**, Justices (constituting the qualified and available members of the Court *en Banc*)[2]

O R D E R

This 20th day of October 2004, upon consideration of the briefs on appeal and the record below, it appears to the Court that:

(1) The defendant-appellant, James W. Riley, has filed a pro se direct appeal from his convictions and sentences in the Superior Court.[3] On April 11,

[1] Based on the arguments made in the appellant's motion for rehearing en banc, the Court's September 13, 2004 order has been re-issued with a new panel. The instant order replaces and supersedes the Court's previous order. The appellant's motion for rehearing en banc is otherwise denied.

[2] Supr. Ct. R. 4.

[3] Following Riley's request to proceed pro se in this appeal, the matter was remanded to the Superior Court for a fact-finding hearing. After receiving the Superior Court's report on remand, which found that Riley had voluntarily waived his right to counsel on appeal, this Court granted Riley's request to proceed pro se. *Riley v. State*, Del. Supr., No. 259, 2003, Berger, J. (Dec. 9,

2003, a Superior Court jury, on retrial, found Riley guilty of Murder in the First Degree, Robbery in the First Degree and Possession of a Deadly Weapon During the Commission of a Felony. Riley was sentenced to life imprisonment on the murder conviction and to a total of 25 years incarceration at Level V on the remaining two convictions.

(2) Riley previously was convicted in 1982 of two counts of Murder in the First Degree, Robbery in the First Degree, Conspiracy in the Second Degree and Possession of a Deadly Weapon During the Commission of a Felony and was sentenced to death. His convictions and sentences were affirmed by this Court on direct appeal.[4] After unsuccessfully pursuing a state postconviction motion, Riley sought federal habeas corpus relief. In 2001, the United States Court of Appeals for the Third Circuit reversed Riley's convictions and ordered a new trial,[5] resulting in the convictions and sentences from which he now appeals.

(3) In this appeal, Riley claims that, by failing to conduct an appropriate inquiry into his allegation of a disqualifying conflict of interest on the part of his appointed counsel and denying his motion to extend the time for filing a motion for a new trial on that ground, the trial judge constructively denied him his right to

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2003). Riley was given the opportunity to request that his standby trial counsel continue as standby counsel in this appeal, but chose not to do so.

[4] *Riley v. State*, 496 A.2d 997 (Del. 1985).

[5] *Riley v. Taylor*, 277 F.3d 261 (3d Cir. 2001).

conflict-free counsel under the Sixth Amendment of the United States Constitution.[6]

(4) The factual background for Riley's claim is as follows. After Riley's convictions and sentences were overturned and his case returned to the Superior Court for re-trial, two attorneys were appointed by the Superior Court to represent him. On several occasions, Riley complained to the Superior Court judge about his court-appointed counsel. In February 2003, Riley complained that his counsel improperly refused to file a writ of certiorari in the United States Supreme Court. Also in February 2003, Riley complained that his counsel refused to have certain fingerprint evidence examined and requested leave to proceed pro se. He later withdrew this request. In March 2003, however, Riley complained that his counsel had failed to provide him with discovery material and again asserted his right to proceed pro se. In a letter dated March 18, 2003, Riley's counsel notified the Superior Court judge that Riley intended to represent himself at trial if he decided not to accept the State's plea offer. Subsequently, Riley decided not to accept the State's plea offer and, on March 19, 2003, the Superior Court judge held a hearing on Riley's request to proceed pro se at trial.

[6] At the August 12, 2003 fact-finding hearing following remand, Riley confirmed that this was the only issue he wished to raise in his direct appeal.

(5) At the hearing, which was attended by Riley, Riley's two court-appointed defense attorneys, and two prosecutors, the judge conducted a colloquy with Riley concerning the reasons why he wanted to represent himself. Riley responded that the reasons, which involved "differences of opinions" between himself and his counsel, should not be stated in open court, but should be explored in a "private meeting" with his counsel and the judge. The judge asked if the reasons had to do with differences regarding how his case should be handled. Riley answered, "Right, yes." The judge then asked Riley if he felt competent to represent himself. Riley responded that this would be his "first time" representing himself, but that he would try and was "pretty sure" that he could handle it. He also stated that he would rather represent himself "if I had to chose (sic) between poor representation and self representation."

(6) The judge then reviewed the charges and possible sentences with Riley and reminded Riley that he was responsible for becoming familiar with the rules of procedure and the rules of evidence. The judge pointedly told Riley that it was a mistake to represent himself, listing a number of pitfalls of self-representation. Acknowledging these admonitions, Riley replied: ". . . if you knew the facts as far as why I request to represent myself, then maybe you wouldn't think it was a mistake." The judge once more asked Riley if the reasons for his

request to proceed pro se stemmed from a disagreement about how the case should be handled. Riley agreed, referring specifically to a disagreement with his counsel over the presentation of "mitigating evidence" and an "alibi defense." The judge again strongly advised Riley against representing himself.

(7) When the judge asked if the attorneys wished him to ask any further questions of Riley, one of the prosecutors stated that he wished to address some of the issues raised by Riley in more detail. The prosecutor stated it was well known that the State intended to present latent fingerprint evidence from a beer bottle at trial and that defense counsel had ethical concerns about Riley's proposed strategy for countering that evidence. He further stated: "So it's not simply . . . a disagreement in terms of strategy, but restrictions, ethical restrictions on what defense counsel may be able to do, which has caused a conflict."

(8) Defense counsel responded that he had concerns about raising such issues with the judge, since the judge would be the fact finder for purposes of sentencing. Defense counsel further stated that he had contacted the Professional Ethics Committee for input on his ethical concerns,[7] and had raised those concerns

[7] The record on appeal reflects that, on March 20, 2003, Riley's counsel wrote to the Co-Chair of the Professional Ethics Committee for advice on what to do if a client seeks to present false alibi evidence at trial. Specifically, he stated that he believed Riley intended to present false testimony that the fingerprint evidence was planted and that he was not in Dover, where the murder took place, on the day of the murder. He further stated that his review of materials from

with Riley.[8] He stated that, due to the possible prejudicial impact on the trial, someone other than the trial judge should conduct any inquiry into the specific nature of the evidence in dispute.[9] The judge then asked Riley if he agreed that there were irreconcilable differences between him and his counsel, to which he responded, "Yes," adding, ". . . that's why they can't represent me. Because if they do represent me, then certain evidence they couldn't put on." Riley again requested a "private" conference with the judge and his counsel.[10]

(9) After asking several questions concerning Riley's level of education, the judge ruled on his request to proceed pro se, explicitly declining to inquire further into the evidentiary issues that formed the basis for the disagreement between Riley and his counsel. The judge stated: ". . . I have endeavored to ascertain the reasons . . . why [Riley] wanted to represent himself, and . . . those reasons seemed to focus on issues of evidence, probably strategy, and I've tried to

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post-conviction counsel revealed that Riley had admitted to post-conviction counsel in five separate interviews that he had participated in the robbery and murder.

[8] The record on appeal reflects that, on March 14, 2003, Riley's counsel wrote to Riley advising him to accept a plea bargain and advising him that there was evidence in the file that he previously had admitted to the crime in an interview with a psychiatrist. In his opening brief, Riley asserts, without record support, that his counsel told him that, if Riley testified at trial in support of an alibi defense, he would inform the judge that the testimony was false.

[9] The record on appeal reflects that, on March 24, 2003, counsel informed then President Judge Ridgely that, depending upon what happened at Riley's trial, he might be needed to resolve an ethical issue that could not be presented to the trial judge.

[10] It should be noted that the three March 2003 letters written by Riley's counsel were not part of the record in the Superior Court. Rather, they became part of the record in this appeal when Riley included them in the appendix to his opening brief.

satisfy myself that . . . it's irreconcilable . . . ." and, further, ". . . I am not inclined, . . . having satisfied myself that the differences between counsel and the defendant seem to relate directly to the case itself, . . . to hold some kind of an in camera proceeding with the defendant where I get involved in the details of that issue."

(10) Once again strongly admonishing Riley about the dangers of representing himself, the judge determined that Riley's decision to proceed pro se was knowing, intelligent and voluntary. He further ordered that Riley's counsel would remain as "standby counsel." When Riley objected to that arrangement, both the judge and counsel assured Riley that the purpose of standby counsel was to assist him only if he requested assistance. When the judge then explained that standby counsel would step in to represent Riley if he changed his mind about representing himself during the trial, Riley again objected, stating that the arrangement would result in a "conflict of interest."

(11) During trial, Riley represented himself, with the help of standby counsel. He elected not to testify in his own behalf. Certain portions of the transcript of Riley's first trial were admitted into evidence, including Riley's testimony that he was not in Dover, Delaware at the time of the murder and that the incriminating fingerprint evidence was planted. Riley chose not to address these matters in his closing argument. After trial had concluded, Riley requested that

standby counsel represent him during the penalty phase. The Superior Court granted Riley's request.

(12) Shortly after the penalty phase of the trial had begun, Riley filed a pro se motion requesting an extension of the time within which to file a motion for a new trial. Riley argued that his motion for a new trial, which was grounded in his argument that his counsel's disqualifying conflict of interest had deprived him of his constitutional right to counsel, should be considered by the trial judge only after sentencing. At the sentencing hearing on May 19, 2003, the Superior Court denied Riley's motion, finding that there had been no disqualifying conflict of interest, only a disagreement between Riley and his counsel over trial strategy, and, moreover, that Riley's waiver of his right to counsel had been knowing, intelligent and voluntary.

(13) The first issue to be determined in this appeal is whether Riley's counsel's actions created a disqualifying conflict of interest. Riley never specifically identifies his counsel's alleged "conflict of interest." He simply complains that his counsel would not pursue an alibi defense on his behalf. Rule 1.7 of the Delaware Lawyers' Rules of Professional Conduct provides that a lawyer has a "concurrent conflict of interest" if "the representation of one client will be directly adverse to another client" or "there is a significant risk that the

representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer."[11] Riley's claim of a "conflict of interest" does not fall into any of these categories.

(14) Professional Conduct Rule 1.2 states that a lawyer "shall abide by a client's decisions concerning the objectives of representation," but also provides that the lawyer must act within the boundaries of the Rules and the law in carrying out those objectives.[12] Moreover, while a criminal defendant has a constitutional right to testify in his own defense, he does not have the right to testify falsely.[13] The United States Supreme Court has ruled that an attorney who refuses to cooperate with his client's planned perjury, as is ethically required, does not deprive the defendant of his right to counsel or his right to testify truthfully[14] and that such actions by counsel do not give rise to a disqualifying conflict of interest.[15] This Court has recognized that no per se conflict of interest between attorney and

[11] The three examples of a "personal interest of the lawyer" provided by the Comment to the Rule are, first, where "the probity of a lawyer's own conduct in a transaction is in serious question," second, "when a lawyer has discussions concerning possible employment . . . with an opponent of the lawyer's client, or with a law firm representing the opponent," and, third, when a lawyer refers "clients to an enterprise in which the lawyer has an undisclosed financial interest."
[12] See also Prof'l Conduct R. 1.6, 1.16, and 3.3.
[13] *Shockley v. State*, 565 A.2d 1373, 1377 (Del. 1989), citing *Nix v. Whiteside*, 475 U.S. 157, 173-76 (1986) (the right to counsel does not include the right to a lawyer who would assist the client in illegal activity).
[14] *Nix v. Whiteside*, 475 U.S. at 173-74.
[15] Id. at 176.

client is created when an attorney, recognizing his ethical obligations, questions the veracity of his client's anticipated trial testimony.[16] There is, thus, no factual or legal basis for Riley's contention that his counsel's actions constituted a conflict of interest or that his counsel should have been disqualified from representing him.[17]

(15) Riley also contends that the trial judge failed to discharge his obligation to inquire fully into the disagreement between Riley and his counsel. The transcript of the colloquy between Riley and the judge at the March 19, 2003 hearing clearly reflects that the judge made the appropriate inquiries into the nature of the disagreement and properly determined, on that basis, that there was no disqualifying conflict of interest.[18] Having made that determination, the judge properly concluded that Riley's choice was to either accept the representation of his court-appointed counsel or proceed pro se.

(16) The final issue for consideration is whether there was error or abuse of discretion on the part of the Superior Court in granting Riley's request to proceed pro se. The determination of whether a defendant has knowingly, intelligently and

[16] *Shockley v. State*, 565 A.2d at 1376-79. We note that the cases cited by Riley in support of his claim of a conflict of interest are factually distinguishable from the case at bar.

[17] Riley argues that his counsel was reluctant to share the specifics of the disagreement with the judge because he wanted to hide his own misconduct. We reject that characterization of Riley's counsel's actions. Rather, as the record reflects, Riley's counsel was concerned about the possible impact on Riley's sentencing should the judge become aware of the specifics of Riley's proposed defense. See *Holloway v. Arkansas*, 435 U.S. 475, 487 n. 11 (1978) (disclosure of client confidences to the trial court creates significant risks of unfair prejudice, especially when the disclosure is to a judge who may be called upon later to impose sentences).

[18] Prof'l Conduct R. 1.7; *Swan v. State*, 820 A.2d 342, 350-52 (2003).

voluntarily waived the right to counsel depends upon the particular facts and circumstances surrounding the case, including the background, experience and conduct of the defendant.[19] Moreover, the judge can make that determination only by conducting a penetrating and comprehensive examination of all the circumstances and only after emphasizing to the defendant the perils he faces by representing himself.[20] The transcript of the March 19, 2003 hearing clearly reflects that the judge conducted a detailed examination of the specific circumstances of Riley's request to proceed pro se and, while warning him repeatedly of the risks of doing so, properly granted his request.

(17) This Court has reviewed the record carefully and has concluded that Riley's appeal is wholly without merit and devoid of any arguably appealable issue.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Jack B. Jacobs
Justice

[19] *Briscoe v. State*, 606 A.2d 103, 107 (Del. 1992) (citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *Stigars v. State*, 674 A.2d 477, 479-81 (Del. 1996).
[20] Briscoe v. State, 606 A.2d at 107 (citing *Johnson v. Zerbst*, 304 U.S. at 465).