IN THE SUPREME COURT OF THE STATE OF DELAWARE

DAMIAN HITCHENS,	§	
	§	No. 468, 2006
Defendant Below,	§	
Appellant,	§	Court Below: Superior Court of
	§	the State of Delaware in and for
v.	§	Sussex County
	§	
STATE OF DELAWARE,	§	Cr. I.D. No. 0210009956
	§	
Plaintiff Below,	§	
Appellee.	§	

Submitted: June 27 , 2007
Decided: July 26, 2007

Before **STEELE**, Chief Justice, **HOLLAND** and **JACOBS**, Justices.

O R D E R

This 26th day of July 2007, upon consideration of the briefs of the parties and the record in this case, it appears to the Court that:

1. Damian Hitchens ("Hitchens"), the defendant-below appellant, contends that the Superior Court erroneously refused to vacate his probation violation sentences because: (i) his counsel at sentencing had a *per se* conflict of interest; and (ii) the sentence on his burglary conviction exceeded the balance of the Level V time remaining on that sentence. We find that appellant's first claim has no merit and, therefore, affirm. As for appellant's second claim, because the Superior Court erred in imposing the sentence for Hitchens' 2004 probation violation, we reverse and remand for resentencing.

2. The pertinent facts are not in dispute. In November 2002, Hitchens was arrested and charged with, among other things, second degree burglary and first degree robbery. On April 28, 2003, Hitchens pled guilty to second degree burglary and aggravated menacing (a lesser included offense of first degree robbery). On the burglary conviction, the Superior Court sentenced Hitchens to five years at Level V imprisonment with credit for 157 days previously served, suspended upon successful completion of Level V Boot Camp program for three years of probation. On the aggravated menacing conviction, Hitchens was sentenced to another three years of Level V imprisonment, suspended for 2 years Level II probation. Hitchens completed the Boot Camp program in April 2004.

3. Thereafter, Hitchens violated his probation on three separate occasions. Hitchens first violated his probation in June 2004. For violating his probation on the burglary charge, the Superior Court sentenced Hitchens to four years, six months of Level V imprisonment, suspended for four months at Level IV home confinement and decreasing levels of probation. On the aggravated menacing probation violation ("VOP"), the Superior Court sentenced Hitchens to three years of Level V imprisonment, suspended for two years at Level III supervision.

4. In December 2004, Hitchens violated the terms of his probation a second time. As a result, on the burglary VOP, the Superior Court sentenced Hitchens to four years, six months at Level V imprisonment, with credit for 21

days previously served, suspended for six months home confinement, followed by 18 months at Level III supervision. On the menacing VOP, Hitchens was sentenced to three years at Level V imprisonment, suspended for two years at Level III supervision.

5. In November 2005, Hitchens violated his probation a third time, and was charged with violating seven conditions of his Level III probation. During his July 28, 2006 VOP hearing, Hitchens admitted violating his probation curfew and not reporting for mandatory office appointments after absconding from probation. At that hearing, Hitchens was represented by Assistant Public Defender Carole Dunn. In order to decide a remaining disputed issue, the Superior Court conducted a further VOP hearing, on August 3, 2006, at which Hitchens was represented by the Assistant Public Defender Stephanie Tsantes ("Tsantes"). Tsantes had previously been a Deputy Attorney General. Moreover, she was involved in prosecuting Hitchens on the original criminal charges, and had signed the charging documents and plea agreements securing Hitchens' convictions.

6. Following the August 2006 VOP hearing, the Superior Court found that Hitchens had violated five conditions of his Level III probation. On the burglary charge violation, the court sentenced him to four years, five months imprisonment, followed by one year of work release and two years of probation for the aggravated menacing charge.

7. On appeal, Hitchens contends that his probation violation sentences should be vacated for two reasons: First, his attorney at sentencing (Tsantes) had a *per se* conflict of interest. Second, his sentence on the burglary VOP charge exceeded the balance of the Level V time remaining on that sentence. We address the issues generated by those two contentions.

8. Hitchens first claims that his sentences should be reversed, because Tsantes' substantial participation in the same case in which she had earlier been involved as a prosecutor created a *per se* conflict of interest. Because it presents a question of law, we review Hitchens' claim *de novo*.[1]

9. To be entitled to relief in a conflict of interest dispute, the defendant must: (1) "prove by clear and convincing evidence there is a conflict of interest in the first place;"[2] and (2) "demonstrate how the conflict will prejudice the fairness of the proceeding."[3] Having reviewed the briefs and the record, we conclude that Hitchens' conflict of interest claim lacks merit.

10. Hitchens claims that "[t]he existence of a conflict in the present case cannot reasonably be debated." Because Tsantes had personally prosecuted him in his original criminal proceeding (Hitchens claims), solely for that reason she could

[1] *Outten v. State*, 720 A.2d 547, 551 (Del. 1998).

[2] *IMG Global v. Moffett*, 1998 Del. Ch. Lexis 224 (Del. Ch. Nov. 12, 1998).

[3] *Id.*

not represent Hitchens in his subsequent VOP hearing, even though the facts underlying the VOP charges were unrelated to the facts underlying his original convictions. Rule 1.11(a)(2) of the Delaware Lawyer's Rules of Professional Conduct ("DLRPC") explicitly prohibits a lawyer "who has formerly served as a public officer or employee of the government" from representing "a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee."[4] Here, Tsantes personally prosecuted Hitchens in the criminal proceeding leading to his guilty plea to aggravated menacing and second degree burglary in April 2003. But, Tsantes left the Department of Justice in April 2004. Therefore, she was not involved as a prosecutor in Hitchens' subsequent VOP proceeding in August 2006,[5] wherein she represented Hitchens who was found to have violated his probation.

11. Because DLRPC 1.11 prohibits a lawyer from both prosecuting and representing a client "in a *matter* in which the lawyer participated personally and

[4] Rule 1.11 (a) (2) of Delaware Lawyer's Rules of Professional Conduct states that:

> Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government. . . . (2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.

DLRPC 1.11(a)(2).

[5] The VOP report was returned in May 2006 and a hearing was held in July 2006.

substantially as a public officer or employee. . .,"[6] the threshold issue is whether Hitchens' 2006 VOP proceeding constituted the same "matter" as his original criminal proceeding. DLRPC 1.11(e) defines "matter" to include: (i) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties; and (ii) any other matter covered by the conflict of interests rules of the appropriate government agency.[7]

12. Although Rule 1.11(e) does not resolve the issue directly, Comment 10 to that Rule provides guidance on the question of whether the two matters were the same:

> [10] For purpose of paragraph (e) of this Rule, a "matter" may continue in another form. In determining whether two particular matters are the same, the lawyer should consider the extent to which the matters involve the same basic facts, the same or related parties, and the time lapsed."

13. Applying the Comment 10 criteria, we conclude that Hitchens' VOP proceeding did not involve the same "matter" as his original criminal proceeding. The only element common to the original prosecution of Hitchens in 2003 and his VOP proceedings in 2006, is that the parties were identical. Tsantes' representation of Hitchens in 2006 was limited to his subsequent violation of

[6] DLRPC 1.11(a) (2) (emphasis added).

[7] DLRPC 1.11(e).

probation. When Hitchens' 2006 VOP hearing took place, his original criminal trial had been concluded and Hitchens had been convicted. The Superior Court's determination of the VOP charges was based on Hitchens' later conduct, not his conduct underlying the original offense. Moreover, the two matters were separated in time by more than three years. Therefore, the factual predicate for Hitchens' VOP charges was essentially unrelated to the original charges.

14. As we held in *Jenkins v. State*,[8] "probation revocation is not a stage of a criminal prosecution."[9] The distinction between an original prosecution and a defendant's subsequent VOP proceeding finds further support in *State v. King*,[10] a case where the prosecution attempted to disqualify defense counsel because he was the attorney who prosecuted the offense that later led to a violation of probation.[11] The Florida Court of Appeals held that because the "alleged violation [was] based upon a factual predicate entirely unrelated to his prior offense," defense counsel had no "substantial involvement on behalf of the prosecution in the same action."[12] Moreover, the Florida Court held, "it does not appear that there has been any

[8] 2004 Del. LEXIS 549, at *7 n. 12 (Del. Nov. 23, 2004).

[9] *Id*. at *9.

[10] 447 So.2d 395, 396 (Fla. App. 1984).

[11] *Id.*

[12] *Id.*

advantage gained that would work to the disadvantage of the state."[13] The reasoning in *King* applies equally here. Because Hitchens' VOP hearing was not the same "matter" as his original criminal proceeding, Hitchens has not satisfied the first requirement of his conflict of interest claim.

15. Even assuming that Hitchens' VOP proceeding did involve the same matter as his original proceeding, Hitchens has failed to satisfy the second requirement—to establish that his defense counsel's deficient performance actually prejudiced him. In Delaware, the fact that defense counsel had a conflict of interest, without more, is normally insufficient to overturn a judgment.[14] That is, "[even if] a defendant claims that counsel was ineffective because of a conflict of interest, [the defendant] must still establish prejudice."[15]

16. Here, it is undisputed that Hitchens was not prejudiced by any alleged conflict of interest. Hitchens admits in his own brief that "it does not appear that [Hitchens] suffered any prejudice from Ms. Tsantes representation," because he was "represented by another Public Defender, Ms. Dunn, at the time he admitted

[13] *Id.*

[14] *Stigars v. State*, 1990 Del. Lexis 120, at *2 (Del. Mar. 29, 1990), citing *Burger v, Kemp*, 483 U.S. 776 (1987).

[15] *Id.*

violating his probation,"[16] and "it appears that Ms. Tsantes vigorously represented [him]."

17. Hitchens claims that it is not necessary to show prejudice because Tsantes had a "*per se* conflict of interest" that necessitated her withdrawal, having previously prosecuted him as a Deputy Attorney General. To support this argument, Hitchens cites Illinois case law. In Illinois, a *per se* conflict of interest exists where "certain facts about the defense counsel's status, by themselves . . . engender a disabling conflict." Once a "*per se*" conflict of interest exists, a defendant is not required to establish prejudice.[17]

18. Delaware has not adopted that "*per se* conflict of interest" rule. Moreover, even under a "*per se*" rule, this case falls outside the factual parameters

[16] Once a defendant admits violating his probation, he exposes himself to the prison terms the Superior Court had previously suspended. *See Harris v. State*, 768 A.2d 469 (Del. 2001) (Order).

[17] *People v. Miller*, 771 N.E. 2d 386, 388 (Ill. 2002).

of the Illinois cases Hitchens cites.[18] In *People v. Kester*,[19] defense counsel had been previously involved as an assistant state's attorney in the same proceeding. The Illinois Supreme Court determined that because a potential conflict of interest existed, the defendant was not required to show any actual prejudice resulting from defense counsel's dual representation.[20] *Kester* is inapposite because there, defense counsel had been involved in the same proceeding, first as a prosecutor and thereafter as a defense attorney. Here, however, Tsantes was no longer employed by the Delaware Department of Justice at the time Hitchens committed the act that ultimately led to the August 2006 VOP proceedings. In addition, Hitchens' alleged probation violations were based on facts entirely unrelated to the

[18] The Illinois Supreme Court has applied the *per se* conflict of interest rule in several cases. *See People v. Washington*, 461 N.E.2d 393 (Ill. 1984) (defense counsel also served as part-time prosecutor for municipality whose police officers were called as State's witness against defendant); *People v. Fife*, 392 N.E.2d 1345 (Ill. 1979) (appointed defense counsel also employed part-time by State as Special Assistant Attorney General handling only unemployment compensation cases and defendant not informed of affiliation, nor validly waived such representation); and *People v. Coslet*, 364 N.E.2d 67 (Ill. 1977) (appointed defense counsel also served in related case as attorney for administrator of victim's estate).

[19] 361 N.E.2d 569 (Ill. 1977).

[20] *Id.* at 572.

prior offense. Thus, this situation is not "too fraught with the dangers of prejudice"[21] such as would justify the application of the *per se* rule.

19. Similarly, in *People v. Newberry*,[22] court-appointed defense counsel had previously served as the head of the criminal division of the State's Attorney's Office at the time that the defendant was indicted. The *Newberry* court declined to apply the *per se* rule, because there was no inherent prejudice to the defendant in that particular factual setting.[23] Here, although Tsantes did personally serve in the criminal proceedings as both the prosecutor and later as defense counsel, Hitchens' original criminal proceeding (in which Tsantes was a prosecutor) and his VOP

[21] *People v. Stoval*, 239 N.E.2d 441, 443 (Ill. 1968), quoting *United States ex rel. Miller v. Myers*, 253 F. Supp. 55 (E.D. Pa. 1966).

[22] 302 N.E.2d 34 (Ill. 1973).

[23] *Id.*

proceeding (in which Tsantes was defense counsel) were essentially unrelated. Thus, even if there were a *per se* rule, that rule would not apply here.[24]

20. Hitchens' second claim is that the Superior Court erred in imposing sentence on the probation violation. This Court reviews a Superior Court sentencing decision for abuse of discretion.[25]

21. A revocation of probation falls within the broad discretion of the trial court.[26] If a violation of probation is established, the sentencing court may "require the probation violator to serve the sentence imposed, or any lesser sentence, and, if imposition of sentence was suspended, may impose any sentence which might originally have been imposed."[27] A reviewing court will not reverse a sentence unless it is demonstrated that the imposed sentence was beyond the

---

[24] Moreover, the Illinois *per se* rule is a minority rule. In contrast, the United States Court of Appeals for the Ninth Circuit declined to create a *per se* rule barring subsequent representation of a defendant by his former prosecutor, and held that:

> Although the possibilities for actual conflicts are very real when attorneys "switch sides" in a subsequent criminal case involving the same defendant, such conflicts do not automatically occur. Determining whether an attorney has an actual conflict involves a closer examination of the facts of each particular case, with a particular eye to whether the attorney will, in the present case, be required to undermine, criticize, or attack his or her own work product from the previous case.

Maiden v. Bunnell, 35 F.3d 477, 480-81 (9th Cir. 1994).

[25] *Kurzmann v. State*, 903 A. 2d 702, 714 (Del. 2006).

[26] *Brown v. State*, 249 A.2d 269, 272 (Del. 1968), holding that "[j]ust as probation is an 'act of grace,' revocation of probation is an exercise of broad discretionary power."

[27] 11 *Del. C.* § 4334(c) (2001).

maximum allowed by law or was the result of vindictive or arbitrary action by the sentencing court.[28]

22. In this case, the Superior Court intended to reimpose the entire unserved balance of Hitchens' burglary sentence as a consequence of his violation of probation. The court actually imposed a sentence of four years, five months imprisonment. Hitchens' original sentence was five years, suspended after completion of the Boot Camp program, with credit for one hundred fifty-seven days. Hitchens claims that the sentence actually imposed exceeded the maximum term to which Hitchens was then subject. The State so concedes. As Hitchens correctly notes, a defendant sentenced to the Boot Camp program is entitled to credit for every day he spent in the program. The boot camp program is for a minimum of six months.[29] The State concedes that when the Superior Court sentenced Hitchens to four years and six months at Level V imprisonment in December 2004, that sentence did not reflect the one hundred fifty-seven days for which Hitchens was entitled to receive credit. That omission continued through Hitchens' two subsequent probation violations. Thus, to that extent the Superior Court's December 2004 sentence was invalid.

[28] *See Mayes v. State*, 604 A.2d 839 (Del. 1992).

[29] 11 *Del. C.* § 6704(d) (2001).

23. Hitchens further argues that he is entitled to the time he was detained in default of a cash bond while awaiting his 2006 VOP hearing. He was incarcerated in default of the $5,000 cash bond set by the Superior Court from May 10, 2006 until he was sentenced on August 3, 2006, but "[n]one of this time was credited toward [his] sentence." In *Brown v. State*,[30] this Court held that a defendant is entitled to the credit for time he served while actually incarcerated, but the record here does not reflect whether Hitchens was actually incarcerated from May 10, 2006 through August 3, 2006. On remand this issue should be considered as well.

NOW, THEREFORE, for the foregoing reasons, the judgments of the Superior Court are **AFFIRMED IN PART, REVERSED IN PART** and **REMANDED** for resentencing, including the determination of any credits for time Hitchens was entitled. Jurisdiction is not retained.

BY THE COURT:

/s/ Jack B. Jacobs
Justice

[30] 793 A.2d 306 (Del. 2002).