IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

JAMES DALE HOLCOMBE,

Appellant,

v. Case No. 5D18-3338

STATE OF FLORIDA,

Appellee.

_____/

Opinion filed September 14, 2020

Appeal from the Circuit Court
for Volusia County,
James R. Clayton, Judge.

Michael Ufferman, of Michael Ufferman Law Firm, P.A., Tallahassee, for Appellant.

Ashley Moody, Attorney General, Tallahassee, and L. Charlene Matthews, Assistant Attorney General, Daytona Beach, for Appellee.

GROSSHANS, J.

James Holcombe (Appellant) appeals the judgment and sentence entered by the trial court after a jury found him guilty of racketeering and conspiracy to engage in a pattern of racketeering. We affirm on all issues, write to address Appellant's conflict-of-interest argument, and remand for correction of a scrivener's error.

Cash for Cards, a business operated and owned by Appellant, purchased gift cards and sold them to online vendors. Appellant employed various individuals, including William Hooper and Matt Angell. Based on the large volume of cards purchased by the business, law enforcement began an eight-month investigation which resulted in the arrest of Appellant, Hooper, Angell, and others. During the course of that investigation, law enforcement learned that the business knowingly purchased gift cards from individuals who had obtained the gift cards through fraudulent means.

Ultimately, the State charged Appellant with racketeering and conspiracy to engage in a pattern of racketeering. In contrast, Angell and Hooper's charges consisted of multiple counts of dealing in stolen property.

Two attorneys from the same firm were retained to represent Appellant, Angell, and Hooper. At a pretrial hearing, the trial court addressed the possible conflict of interest stemming from the joint representation of these individuals. The trial court explained to them some of the risks associated with joint representation but never advised them of the right to obtain separate attorneys.[1]

Following this hearing, Angell and Hooper entered open guilty pleas to the charges against them. The trial court declined to sentence them until after Appellant's trial.

Prior to the selection of the jury for Appellant's trial, the prosecutor raised the conflict issue in light of Angell and Hooper's pleas. The prosecutor asserted that, in her view, the conflict was now non-waivable. Disagreeing with the prosecutor's position, the trial court concluded that any conflict had already been properly waived.

[1] Defense counsel represented to the trial court that Appellant and his codefendants had signed conflict waivers.

During the trial, the State called numerous witnesses—including Angell and Hooper—who testified about their interactions with the customers, Appellant's role in the business, how often Appellant was present at the business, and the policies enacted by Appellant. Like other State witnesses, Angell and Hooper were cross-examined by defense counsel. Ultimately, the jury found Appellant guilty as charged on both counts, and the trial court sentenced him to a total of ten years in prison. This appeal timely followed.

On appeal, Appellant asserts entitlement to a "per se" reversal based on his attorney's conflict of interest.[2] He claims that his attorney's joint representation of him, Angell, and Hooper during the trial resulted in an actual conflict of interest, which he did not validly waive due to insufficient advisements by the trial court.[3] According to Appellant, he need only show a conflict existed—not that the conflict adversely affected his counsel's performance. We disagree.

"The issue of whether there was an actual conflict of interest is a mixed question of law and fact. Mixed questions of law and fact require an appellate court to defer to the trial court on factual matters but provide independent review of legal determinations." State v. Alexis, 180 So. 3d 929, 934 (Fla. 2015) (first citing Hunter v. State, 817 So. 2d

[2] Appellant also contends that his convictions are not supported by sufficient evidence, assails certain evidentiary rulings, challenges the trial court's decision to give the willful-blindness and principals instructions, faults the trial court for failing to exercise discretion when it declined to impose a downward departure sentence, and challenges the assessment of two costs. We affirm as to each of these issues without further discussion.

[3] Specifically, Appellant asserts that the trial court failed to advise him of his right to obtain other counsel. See Larzelere v. State, 676 So. 2d 394, 403 (Fla. 1996).

786, 792 (Fla. 2002); and then citing State v. Glatzmayer, 789 So. 2d 297, 301 (Fla. 2001); Stephens v. State, 748 So. 2d 1028, 1032 (Fla. 1999)).

The Sixth Amendment of the United States Constitution provides that a defendant shall have the right to counsel for his defense. Amend. VI, U.S. Const. "As a general matter, a defendant alleging a Sixth Amendment violation must demonstrate 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" Mickens v. Taylor, 535 U.S. 162, 166 (2002) (quoting Strickland v. Washington, 466 U.S. 668, 694 (1984)). Case law recognizes an exception for an actual conflict of interest, which the Supreme Court defines as a conflict that "adversely affected . . . counsel's performance." Id. at 174. Where this standard is met, prejudice is presumed—meaning that a defendant is "spared . . . the need of showing probable effect upon the outcome." Id. at 166.

Here, Appellant does not point to, nor does the record reflect, any adverse performance on the part of defense counsel. Appellant merely asserts that there was an "actual conflict" because defense counsel represented Appellant as well as Angell and Hooper during the trial. He emphasizes that defense counsel cross-examined Angell and Hooper, whom counsel still represented. However, such facts do not, without more, constitute an actual conflict for Sixth Amendment purposes. See, e.g., West v. People, 341 P.3d 520, 533 (Colo. 2015) (noting that a defendant must demonstrate an adverse effect on the representation in order to prove an actual conflict of interest).

Appellant relies on Lee v. State, 690 So. 2d 664 (Fla. 1st DCA 1997), for the proposition that he need not demonstrate an adverse effect on counsel's representation in order to obtain a reversal. In Lee, the First District found that a defendant had not

voluntarily waived his right to conflict-free counsel due to the trial court's failure to conduct a sufficient inquiry. Id. at 668. Citing Holloway v. Arkansas, 435 U.S. 475 (1978), the Lee court stated, "If . . . the defendant preserves the conflict issue by raising it before trial and does not validly waive the conflict, the trial court's failure to conduct an inquiry or appoint separate counsel . . . requires that the resulting conviction be reversed." 690 So. 2d at 668–69.

We conclude that Lee does not support a reversal here. Lee predates Mickens and does not discuss how the conflict adversely affected counsel's representation in that case. To the extent Lee could be interpreted to mean that an actual conflict occurs simply because defense counsel represents a State witness, such an interpretation would be contrary to Mickens as noted by the Florida Supreme Court in Alexis. See Alexis, 180 So. 3d at 936 ("In order to demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an actual conflict of interest **adversely affected** his lawyer's performance. . . . When the claim is that the trial court failed to conduct an inquiry about a potential conflict which it knew or should have known about, the claimant must show that a conflict of interest affected counsel's performance." (emphasis added) (internal quotation marks omitted) (first quoting Cuyler v. Sullivan, 446 U.S. 335, 350 (1980); and then citing Mickens, 535 U.S. at 170–72)).

Accordingly, we affirm the judgment and sentence in all respects but remand for the limited purpose of correcting a scrivener's error in the sentencing scoresheet, which incorrectly indicates that Appellant did not proceed to trial. [4]

AFFIRMED; REMANDED for correction of scrivener's error.

[4] Appellant properly raised this issue both on appeal and in the lower court.

COHEN and SASSO, JJ., concur.