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ATTORNEY FOR APPELLANT:

JOSEPH F. THOMS
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

GARY DAMON SECREST
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

FREDERICK JOHNSON,
Appellant-Defendant,

vs.

STATE OF INDIANA,
Appellee-Plaintiff.

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No. 49A02-0604-CR-319

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Richard E. Sallee, Senior Judge
Cause No. 49F10-0508-CM-134535

November 20, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Frederick Johnson appeals his Class A misdemeanor resisting law enforcement and Class A misdemeanor battery convictions. We affirm.

Issue

Johnson raises one issue, which we restate as whether he received ineffective assistance of counsel.

Facts

On August 4, 2005, Indianapolis Police officers Gary Riggs and Mark Campbell executed a search warrant at a house in Indianapolis. After they knocked on the door and identified themselves as police officers, they saw several men run from the front of the house toward the back. Officers Riggs and Campbell chased the men through the house and out the back door. Officer Riggs, who was dressed in a t-shirt that said “police” on the front and the back with badges clipped on the shoulders, followed Johnson. Officer Riggs continued to loudly identify himself as a police officer and told Johnson to stop. Officer Riggs chased Johnson for five or six blocks until Johnson was cornered between a garage and an abandoned truck. Johnson then took a “very offensive stance and raised his hands.” Tr. p. 11. As Officer Riggs attempted to handcuff Johnson, Johnson took a “wild swing” hitting Officer Riggs in the head. *Id.* at 12.

At the same time Officer Campbell chased after Ricky Cole, who had also fled from the house. Officer Campbell was wearing a vest that said “police” on the shoulders and back and his badge on his “outer garment.” Tr. p. 18. Officer Campbell identified himself as police officer and told Cole to stop. After running for approximately three

blocks, a marked police car got involved in the chase. At that point, Cole stopped and walked back toward Officer Campbell, and Cole was apprehended.

On August 8, 2005, Johnson was charged with Class A misdemeanor resisting law enforcement and Class A misdemeanor battery. Johnson and Cole were tried together and represented by the same attorney at a bench trial. Johnson was found guilty as charged. Johnson now appeals.

Analysis

Johnson argues that he was denied a fair trial because the same attorney represented him and Cole and there is no record that Johnson consented to the joint representation. Johnson appears to argue that the joint representation is a per se denial of a fair trial.

Although Johnson claims reversal is required because he did not receive a fair trial, his claim is better categorized as an ineffective assistance of counsel claim. Generally, to prevail on a claim of ineffective assistance of counsel, the defendant must show that counsel's performance fell below an objective standard of reasonableness based on prevailing professional norms, and that the deficient performance resulted in prejudice. Grinstead v. State, 845 N.E.2d 1027, 1031 (Ind. 2006). An exception to the requirement that prejudice must be shown exists where the defendant's attorney "actively represented conflicting interests." Mickens v. Taylor, 535 U.S. 162, 166, 122 S. Ct. 1237, 1241 (2002).

In asserting he did not receive a fair trial, Johnson relies on Holloway v. Arkansas, 435 U.S. 475, 98 S. Ct. 2273 (1978). As discussed in Mickens, Holloway creates an

automatic reversal rule only where defense counsel is forced to represent codefendants over counsel's timely objection, unless the trial court has determined that there is no conflict. Mickens, 535 U.S. at 168, 122 S. Ct. at 1241-42. Because neither Johnson nor his attorney objected to the joint representation at trial, Johnson's reliance on Holloway is misplaced.

Instead, we follow Cuyler v. Sullivan, 446 U.S. 335, 348, 100 S. Ct. 1708, 1718 (1980), in which the Supreme Court declined to extend Holloway's automatic reversal rule where there was no objection at trial. Sullivan required the defendant to show that a conflict of interest actually affected the adequacy of the representation. Id., 100 S. Ct. at 1718. Sullivan also imposed a duty on the trial court to inquire only when it knows or reasonably should have known that a particular conflict existed. Id. at 347, 100 S. Ct. at 1717. In Mickens, however, the Supreme Court rejected the argument that where a conflict exists and the trial court fails to make a Sullivan inquiry, automatic reversal is required. Mickens, 535 U.S. at 172, 122 S. Ct. at 1244. The Court concluded that despite a trial court's failure to inquire into the conflict, a defendant must establish "that the conflict of interest adversely affected his counsel's performance." Id. at 174, 122 S. Ct. at 1245.

Said another way, a defendant who does not object to the representation at trial must show that trial counsel had an actual conflict of interest and that the conflict adversely affected his or her performance. Edwards v. State, 807 N.E.2d 742, 745 (Ind. Ct. App. 2004). When these two prongs are met, prejudice is presumed. Id.

Johnson makes no argument that an actual conflict existed or that the conflict adversely affected counsel's performance. Instead, Johnson appears to argue that because the record contains no evidence of his written consent to the joint representation, there is a per se violation of his right to effective assistance of counsel. In support of this argument, Johnson relies on Indiana Professional Conduct Rule 1.7(b)(4). This rule provides:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) 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.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

Ind. Professional Conduct Rule 1.7.

Joint representation is not a per se violation of the constitutional guarantee of effective assistance of counsel. Edwards, 807 N.E.2d at 745. Nor are we convinced that joint representation automatically creates a conflict of interests that must be consented to in writing.

The charges against Johnson and Cole were not complex. Further, the charges arose out of the same incident, Johnson and Cole fleeing upon the execution of a search warrant. At the bench trial, Officer Riggs testified in detail regarding Johnson's flight and subsequent battery. Then, Officer Campbell testified regarding Cole's flight and apprehension. Johnson's convictions rest largely on Officer Riggs's testimony and were not substantially intertwined with Officer Campbell's testimony or the charges against Cole.

Moreover, Johnson and Cole shared a defense. They both testified that they were in an alley when people came running out of the house. They testified that they started running when they saw the people coming out of the house and did not know they were running from the police. As the State points out, Cole was able to corroborate Johnson's testimony that he was not in the house when the warrant was executed.

Based on the facts of this case, the charges against Johnson and Cole, and the officers' separate testimony regarding each defendant, we cannot conclude that the representation of Johnson was directly adverse to Cole or that there was a significant risk that the representation of Johnson was materially limited by counsel's responsibilities to Cole. Accordingly, we are not convinced that an actual conflict existed for purposes

Johnson's Sixth Amendment right to counsel or Indiana Professional Conduct Rule 1.7. Although obtaining written consent to joint representation is a good practice, in the absence of such conflict, defense counsel was not required to obtain such consent. See Ind. Prof. Cond. R. 1.7(b). Thus, contrary to his assertion, Johnson's ability to understand the intricacies of Indiana Professional Conduct Rule 1.7 is not relevant to our consideration of whether he received ineffective assistance of counsel.

Conclusion

Trial counsel's joint representation of Johnson and Cole did not amount to ineffective assistance of counsel. We affirm.

Affirmed.

SULLIVAN, J., and ROBB, J., concur.