IN THE SUPREME COURT OF IOWA

No. 16–1994

Filed February 16, 2018

STATE OF IOWA,

Appellee,

vs.

CARLOS RAMON MULATILLO,

Appellant.

Appeal from the Iowa District Court for Wapello County, Annette J. Scieszinski, Judge.

A criminal defendant appeals the district court order disqualifying his privately retained counsel from further representation because counsel had previously represented a confidential informant listed to testify on behalf of the State at defendant's trial. **REVERSED AND REMANDED.**

Steven Gardner of Denefe, Gardner & Zingg, P.C., Ottumwa, for appellant.

Thomas J. Miller, Attorney General, Kyle Hanson, Assistant Attorney General, Lisa Moressi, County Attorney, and Amy Jo Hering, Assistant County Attorney, for appellee.

ZAGER, Justice.

Carlos Ramon Mulatillo privately retained attorney Steven Gardner to defend him on felony drug charges. Gardner had represented Mulatillo for fifteen months. Less than two weeks before the jury trial was to commence, the State filed additional minutes of testimony listing the name of a confidential informant who would testify against Mulatillo concerning five controlled drug buys he made from Mulatillo. This was the first time Mulatillo and Gardner were informed of the name of the confidential informant and the potential conflict of interest involving this individual. Gardner had previously represented the confidential informant for approximately one month in October 2014 on felony drug charges. Those drug charges led to the confidential informant agreeing to cooperate and assist the State. This cooperation agreement ultimately led to the confidential informant making controlled buys from Mulatillo.

The State alleged that Gardner had a conflict of interest and filed a motion for a *Watson* hearing.[1] During the hearing, Gardner denied that there was a conflict of interest. Gardner denied that he obtained any confidential information from the confidential informant during his brief representation of him. Further, Gardner proclaimed any cooperation agreement with law enforcement was negotiated and consummated through another attorney after Gardner had withdrawn from the case. The State and the current attorney for the confidential informant presented hearsay statements suggesting Gardner had engaged in conversations with the former prosecutor about the possibility of the

[1]*See State v. Watson*, 620 N.W.2d 233, 238 (Iowa 2000) ("A trial court has the duty sua sponte to inquire into the propriety of defense counsel's representation when it 'knows or reasonably should know that a particular conflict exists.' " (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 347, 100 S. Ct. 1708, 1717 (1980)))

informant working for the task force in exchange for consideration on his own pending felony drug charges. At the conclusion of the hearing, the district court concluded that there was a serious potential for a conflict of interest that precluded Gardner from representing Mulatillo. It granted the State's motion to disqualify Gardner. Upon our review, we conclude there was insufficient evidence presented to demonstrate such a serious potential for a conflict of interest that would warrant disqualifying Gardner from continued representation of Mulatillo. Accordingly, we reverse the district court order of disqualification and remand for further proceedings.

I. Background Facts and Proceedings.

On June 15, 2015, the State of Iowa charged Mulatillo with thirteen felony drug offenses. These charges included one count of conspiracy to deliver more than five grams of methamphetamine, six counts of delivery of more than five grams of methamphetamine, and six counts of failure to affix a drug tax stamp. The complaints noted that a confidential informant was used to make controlled buys of methamphetamine from Mulatillo. On June 23, attorney Steven Gardner filed his appearance and plea of not guilty on Mulatillo's behalf. On July 28, the State filed its trial information and minutes of testimony. The minutes listed the names of multiple law enforcement officers who would testify as witnesses. It also referred to the expected testimony of an unnamed confidential informant. The State later filed additional minutes of testimony on August 3 and December 10, but neither of these filings referred to the confidential informant. On August 3, Mulatillo filed a written arraignment, plea of not guilty, and waiver of speedy trial. This document identified Steven Gardner as his privately retained attorney.

On February 17, 2016, the prosecutor advised Gardner in an email, "I also wanted to make sure you were aware that you represented the confidential informant utilized for Carlos' buys prior to that individual becoming a confidential informant." The prosecutor did not disclose the name of the confidential informant to Gardner. While the case was pending, a pretrial conference was conducted on May 31. As part of the pretrial conference order, the district court noted discovery would be completed by agreement and there were no pending motions that needed to be set for hearing. Jury trial was set for October 18.

On September 29, attorney Ryan Mitchell filed a notice to the court claiming Gardner had a conflict of interest in representing Mulatillo due to his prior representation of one of the State's witnesses. Gardner emailed Mitchell inquiring about the name of the witness he was referring to in the notice, and Mitchell responded, "I do not believe I can reveal this information. It is the State's responsibility to do this since they are choosing to go to trial." Gardner then emailed the prosecutor for information about the confidential informant to which the prosecutor responded, "[Y]ou represented the confidential informant in Carlos' case prior to them officially signing up as a confidential informant, but in the case that they signed up to receive consideration for prior to Mr. Mitchell representing them." The prosecutor did not provide Gardner with the name of the confidential informant.

On October 3, after an expedited hearing on the notice filed by attorney Mitchell, the district court concluded Mitchell had no standing to file his notice with the court because he did not represent a party in Mulatillo's case. Accordingly, no action was taken by the district court regarding the potential conflict of interest. On October 5, thirteen days prior to the scheduled jury trial, the State emailed the name of the

confidential informant to attorney Gardner and filed additional minutes of testimony that listed Michael Davidson—Mitchell's client—as a witness the State intended to call to testify at trial. This was the first time that the State identified Michael Davidson as the confidential informant who would testify about his role in making controlled buys of methamphetamine from Mulatillo. Both Davidson and another confidential informant were identified as "working proactively with law enforcement for consideration" concerning their own felony drug charges. Two days later, the State filed a motion for a *Watson* hearing alleging that Gardner had a conflict of interest in representing Mulatillo because Gardner had previously represented Davidson for approximately one month in September and October of 2014. According to the minutes of testimony, Mulatillo made five deliveries of methamphetamine to Davidson in January and March 2015, while Davidson was acting as a confidential informant. In its motion, the State alleged that the drug charges Davidson was facing when Gardner represented him were causally linked to his decision to become the confidential informant who made controlled buys from Mulatillo.[2]

On November 9, the district court conducted the *Watson* hearing with all interested counsel participating. At the hearing, Davidson declined to waive his attorney–client privilege, and Mulatillo opposed the disqualification of Gardner as his attorney. The district court heard conflicting professional statements about the nature and extent of Gardner's representation of Davidson. Gardner detailed the extent of his

[2]Mulatillo also filed a motion to continue the trial on October 7, based on the recent disclosure of Davidson as one of the confidential informants the State intended to call as a witness to testify against him. There were also other pending motions, including the State's request for a *Watson* hearing. Following a hearing on the motion, the district court granted the motion to continue the trial.

representation as follows: after receiving a telephone call from Davidson, Gardner met with Davidson briefly for a consultation. The primary purpose of this meeting was to discuss his pending drug charges and the terms of Gardner's representation of Davidson. A formal retainer agreement was prepared and executed by Davidson. An appearance and plea of not guilty was filed on behalf of Davidson on September 19, 2014. Additionally, a standard motion to produce was prepared and filed on Davidson's behalf by someone in Gardner's office. Other than the initial conference, Gardner had no other meetings with Davidson to discuss the case, plot strategy, or discuss discovery. According to Gardner, the only additional contact he had with Davidson was a telephone message asking him to withdraw his representation of Davidson. Gardner filed his withdrawal on October 17.

Gardner categorically denied that he had any communication with the prosecutor or Davidson at any time regarding the possibility of Davidson assisting law enforcement for consideration of his own pending felony drug charges. Gardner maintained that any discussions or agreements related to Davidson serving as a confidential informant occurred after Gardner withdrew from Davidson's case on October 17. At the hearing, the district court asked Gardner questions about problems that could arise while he was cross-examining Davidson during Mulatillo's trial. For example, the judge asked Gardner what he would do if "Mr. Davidson lies about something that you have knowledge he lied about because you had the skinny on his background or his involvement or whatever from your representation." Gardner responded that he did not know because he had never been in that situation, nor would that situation occur in this case since the only information he would have, or impeachment evidence, would be a matter of public record.

Nevertheless, Davidson was unwilling to waive attorney–client privilege, so the district court did not have the opportunity to independently review any notes Gardner took during his initial consultation with Davidson.

Meanwhile, Amy Hering—the current prosecutor—and attorney Mitchell made statements that contradicted Gardner. Hering admitted that she did not "know what was discussed between Mr. Gardner and Mr. Davidson." However, she continued, "I believe that Mr. Davidson's meeting with the task force where he decided to become a confidential informant was scheduled while Mr. Gardner was representing him." Nevertheless, she stated she was "not positive on what communications, if any, [the former prosecutor] and Mr. Gardner had." Before Mitchell provided his statement, Gardner objected, arguing Mitchell lacked standing to participate since his client was not a party in the proceedings. The district court acknowledged the objection, but it permitted Mitchell to make a professional statement. Mitchell stated, "I had more than one conversation with the former drug prosecutor, and she informed me she had conversations with Mr. Gardner regarding Mr. Davidson working for them."

Taking the statements of Gardner, Hering, and Mitchell into account, the district court granted the State's motion to disqualify Gardner from representing Mulatillo on the drug charges. The district court noted,

> [G]iven the necessary defense strategies that would have to be undertaken to represent Mr. Mulatillo's interests here and the relationship that Mr. Gardner's had previously with the confidential informant having involved a similar type of drug prosecution, having been related in time to the confidential informant's actual involvement in this case, and being predictably a key part of defense strategy in this case to undermine the credibility of the confidential informant, there's just serious potential for problems developing.

The district court stated in conclusion,

> To permit Mr. Gardner to go forward as counsel for Mr. Mulatillo really implicates the Court's complicity in Mr. Gardner's violation of the Iowa Rules of Professional Conduct for Attorneys and specifically rule 32:1.7 which prohibits an attorney who has formerly represented a client in a matter in the same or a substantially-related matter from representing another client's interests that are materially adverse to the former client's.

Mulatillo filed an application for discretionary review, which we granted. On appeal, Mulatillo claims the district court violated his constitutional right to counsel and erred in finding Gardner's continued representation of Mulatillo would violate Iowa Rule of Professional Conduct 32:1.7.

II. Standard of Review.

Our determination of whether there is a conflict of interest is a mixed question of law and fact. *State v. McKinley*, 860 N.W.2d 874, 878 (Iowa 2015). We review a defendant's claim that the constitutional right to counsel has been violated de novo. *Id.* Yet, the district court has discretion to determine whether the case presents an actual conflict of interest or a serious potential for a conflict, so we review the conflict-of-interest determination of the district court for an abuse of discretion. *Id.* "An abuse of discretion occurs when a district court exercises its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *State v. Wilson*, 878 N.W.2d 203, 210–11 (Iowa 2016). Finally, "[t]he district court's 'factual findings in disqualification cases will not be disturbed on appeal if they are supported by substantial evidence.' " *Bottoms v. Stapleton*, 706 N.W.2d 411, 415 (Iowa 2005) (quoting *Killian v. Iowa Dist. Ct.*, 452 N.W.2d 426, 429 (Iowa 1990)).

III. Analysis.

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI; Iowa Const. art. I, § 10 ("In all criminal prosecutions . . . the accused shall have a right to . . . have the assistance of counsel."). The right to counsel includes the right to choose counsel when that counsel is not court appointed. *McKinley*, 860 N.W.2d at 879; *see also United States v. Gonzalez-Lopez*, 548 U.S. 140, 144, 151, 126 S. Ct. 2557, 2561, 2565 (2006). The defendant is deprived of his or her right to counsel when the court erroneously prevents the defendant from being represented by his or her counsel of choice, and no further inquiry into ineffectiveness of counsel or prejudice is required to establish a violation of the defendant's right to counsel. *Gonzalez-Lopez*, 548 U.S. at 148, 126 S. Ct. at 2563. Such deprivation constitutes structural error due to the resulting "unquantifiable and indeterminate" consequences it produces. *Id.* at 150, 126 S. Ct. at 2564 (quoting *Sullivan v. Louisiana*, 508 U.S. 275, 282, 113 S. Ct. 2078, 2083 (1993)).

Nevertheless, the right to choose counsel is not absolute. "It cannot be overlooked that 'the essential aim of the [Sixth] Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers.' " *State v. Smith*, 761 N.W.2d 63, 69 (Iowa 2009) (alteration in original) (quoting *Wheat v. United States*, 486 U.S. 153, 159, 108 S. Ct. 1692, 1697 (1988)). "The court can still disqualify the defendant's preferred attorney if the circumstances present an actual conflict or a serious potential for conflict." *McKinley*, 860 N.W.2d at 880. "Such representation . . . invites disrespect for the integrity of the court [and] it is also detrimental to the independent interest of the trial judge

to be free from future attacks" related to the conflicted attorney's representation of the defendant. *Smith*, 761 N.W.2d at 69 (alteration in original) (quoting *State v. Vanover*, 559 N.W.2d 618, 627 (Iowa 1997)).

An actual conflict of interest under the Sixth Amendment is one "that adversely affects counsel's performance." *Mickens v. Taylor*, 535 U.S. 162, 172 n.5, 122 S. Ct. 1237, 1244 n.5 (2002); *see State v. Smitherman*, 733 N.W.2d 341, 347 (Iowa 2007) (adopting *Mickens*'s definition of "actual conflict of interest" in Iowa). However, this case involves a hearing on the conflict issue in the pretrial stage of the proceedings which required the district court to perform a forward-looking analysis of the case to assess the likelihood that a potential conflict might transform into an actual conflict as the case progressed through the pretrial and trial stages. Thus, the district court had to perform its analysis under the "serious potential for conflict" standard. *McKinley*, 860 N.W.2d at 881.

"A serious potential for conflict occurs when the record indicates an actual conflict is likely to arise." *Id.* Since "the task of assessing the potential for conflict well in advance of trial is such a difficult one, the standards applicable to making that assessment must be flexible." *United States v. Johnson*, 131 F. Supp. 2d 1088, 1094 (N.D. Iowa 2001) (quoting *United States v. Agosto*, 675 F.2d 965, 970 (8th Cir. 1982), *abrogated on other grounds by Flanagan v. United States*, 465 U.S. 259, 263 & n.2, 104 S. Ct. 1051, 1053 & n.2 (1984)). Nonetheless, " 'substantial weight is given to defense counsel's representations' in determining whether an actual conflict exists." *Smith*, 761 N.W.2d at 76 (quoting *United States v. Flynn*, 87 F.3d 996, 1001 (8th Cir. 1996)). The party moving for disqualification bears the burden to establish that a conflict or serious potential for conflict under the rules exists, and the

finding that a conflict or serious potential for conflict exists must be supported by substantial evidence. *Bottoms*, 706 N.W.2d at 417–18.

In this case, the district court properly held a hearing on the conflict of interest issue and performed the necessary analysis to determine whether a serious potential for conflict existed. In doing so, the district court determined any further representation of Mulatillo by Gardner would constitute "a conflict or serious potential for conflict that risks an adverse effect on attorney Gardner's representation of defendant Mulatillo" that was "sufficient to countermand the defendant's preference in maintaining Mr. Gardner as his lawyer." The district court also noted allowing Gardner to continue representing Mulatillo would violate rule 32:1.7 of the Iowa Rules of Professional Conduct. We must review the record to determine whether there is substantial evidence to support the district court finding that there is serious potential for an actual conflict of interest under the facts presented here.

"[O]ur starting point in evaluating a claim that an attorney should be disqualified from representing a party is the ethical principles outlined in the Iowa Rules of Professional Conduct." *Bottoms*, 706 N.W.2d at 415. Though the rules alone are not dispositive, they serve as guidelines for the court to determine whether an actual conflict is likely to arise if the attorney at the center of the disqualification action continues to represent the defendant. *McKinley*, 860 N.W.2d at 881, 885. Rule 32:1.7(a)(2) prohibits an attorney from representing a client if the representation includes a concurrent conflict of interest in which "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to . . . a former client." Iowa R. Prof'l Conduct 32:1.7(a)(2). An attorney is materially limited when his or her "ability to consider, recommend, or carry out an

appropriate course of action" is restricted due to the attorney's "other responsibilities or interests." *Id.* r. 32:1.7 cmt. [8]. Further, an attorney has certain duties to former clients that prohibit him or her from representing a subsequent client "in the same or substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing." *Id.* r. 32:1.9(a). A matter is "substantially related" when there is "a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter." *Id.* r. 32:1.9 cmt. [3].

In addition to the rules of professional conduct, we also consider the following additional factors in determining whether disqualifying an attorney due to a potential conflict of interest violates the right to counsel of choice: "[t]he nature of the conflict," the "[p]resence of non-conflicted co-counsel," whether the defendant voluntarily waived the potential conflict on the record, defense counsel's efforts to avoid interacting with the witness who poses a conflict, and the "[s]peculative nature of the conflict." *Smith*, 761 N.W.2d at 72–74. In considering these factors in *McKinley*, we found the district court's disqualification of public defenders working in the same office as other public defenders who previously represented the state's witnesses in unrelated cases was erroneous. *McKinley*, 860 N.W.2d at 882–85. In reaching this decision, we concluded "other public defenders' past representation of the witnesses on matters unrelated to the crime charged against McKinley" did not violate the Iowa Rules of Professional Conduct because the other defenders' past representation of the state's witnesses would not materially limit defense counsel's representation of the defendant. *Id.* at

882–83 (emphasis omitted). Notably, there was no evidence in the record "tending to establish any confidence or secret learned during the public defenders' prior representations of the witnesses on unrelated matters" that would be used against the witnesses or materially benefit the defendant's defense. *Id.* at 883. Therefore, we found no actual conflict of interest or serious potential for an actual conflict of interest existed. *Id.* at 884.

Applying our rules of professional conduct and the above factors to the facts presented here, we cannot conclude that there was substantial evidence to support the district court finding that there was a serious potential for an actual conflict of interest warranting the disqualification of attorney Gardner. Gardner's representation of Davidson was very brief—only one month. Gardner had a single, initial consultation with Davidson that was brief in nature. During this consultation, they primarily discussed the basis under which Gardner would be retained. When the district court inquired into the nature of this consultation, Gardner informed the district court that he does not discuss the option of becoming a confidential informant in any initial consultations with felony drug defendants. The only pleadings filed on behalf of Davidson included an appearance and not guilty plea, a written arraignment, and a motion to produce. There is no evidence in the record of any additional meetings between Gardner and Davidson. Gardner did not have any communications with Davidson about why Davidson wanted Gardner to withdraw as his attorney. Gardner stated, "I merely received a phone message instructing me to do so, and I did so." Gardner also told the court, "I did not represent Mr. Davidson in relationship to any conduct that occurred in this case, nor did I negotiate any matters with any Task Force or prosecutors in relationship to any agreements made by

Mr. Davidson." Gardner further proposed that the district court verify his statements by calling either the task force individual or former prosecutor who may have communicated with Davidson about becoming a confidential informant. However, neither of these individuals testified or provided any evidence during the *Watson* hearing.

We give substantial weight to the statements Gardner made about the scope of his representation of Davidson and his determination that there was no potential for a serious conflict of interest in his continued representation of Mulatillo. *See Flynn*, 87 F.3d at 1001. Having worked with both clients at issue, Gardner is the most knowledgeable of his interactions with the clients and whether a conflict exists or will develop during the course of such representation. *United States v. Cox*, 580 F.2d 317, 322 (8th Cir. 1978). Gardner asserted on the record during the *Watson* hearing that his representation of Davidson was limited and did not produce confidential information regarding Davidson that would either hinder Gardner's ability to "carry out an appropriate course of action" for Mulatillo, or materially advance Mulatillo's interests. Iowa R. Prof'l Conduct 32:1.7 & cmt. [8]; *see id.* r. 32:1.9. Gardner was unable to show the district court the "half page of notes" produced during his representation of Davidson because Davidson did not waive his attorney–client privilege. But Gardner made a professional statement explaining that he never discussed becoming a confidential informant with Davidson and invited the district court to contact the drug task force and former prosecutor to verify this. The State failed to provide substantial evidence to support a finding that Gardner's continued representation of Mulatillo would present a serious potential for an actual conflict of interest.

The only evidence the State provided was hearsay statements from attorney Mitchell claiming Gardner had conversations with the drug task force or former prosecutor about the possibility of Davidson working as a confidential informant. While the district court properly considered these hearsay statements since Gardner never objected to this evidence, these statements did not rise to the level of substantial evidence that would support disqualifying Gardner.

Although the attorney for Davidson claimed Gardner had conversations with the former drug prosecutor about Davidson becoming a confidential informant, there is no further evidence to support this claim. The State did not have the former prosecutor, or any individual from the drug task force, testify about their interactions with Gardner while he was representing Davidson. The hearsay statements from attorney Mitchell alone did not amount to substantial evidence that would outweigh the important interest to Mulatillo in exercising his constitutional right to counsel of his choice. Rather, these statements speak to the speculative nature of the serious potential for an actual conflict of interest.

Most significantly, as in *McKinley*, the record is bereft of any evidence "tending to establish any confidence or secret learned during the [defense counsel's] prior representations of [Davidson] on unrelated matters" that could be used against Davidson during cross-examination or to materially benefit Mulatillo, or conversely that could impede Gardner's cross-examination of Davidson. *McKinley*, 860 N.W.2d at 883. Moreover, Gardner has not violated any professional rules of conduct by representing Mulatillo subsequent to his brief representation of Davidson. Based on this record, the potential for conflict is minimal, not serious. Such a speculative conflict does not outweigh the important

constitutional right Mulatillo has to retain counsel of his choice, especially given the time and resources both Mulatillo and Gardner have put into preparing for trial in this case.

"Counsel will not be disqualified simply because the opposing party *alleges* the *possibility* of differing interests." *Bottoms*, 706 N.W.2d at 415. In this case, the evidence provided by the State did not rise to the level of substantial evidence that is necessary to prove that Gardner's continued representation of Mulatillo creates a serious potential for an actual conflict of interest. The district court order disqualifying Gardner, based primarily on speculative evidence of a potential conflict, constitutes an untenable ground for the district court to exercise its discretion. Therefore, we reverse the district court order disqualifying Gardner from representing Mulatillo.[3]

IV. Conclusion.

For the aforementioned reasons, we reverse the disqualification order and remand for further proceedings.

REVERSED AND REMANDED.

[3]The State raises as an alternative ground for affirmance that Mulatillo never agreed on the record to waive any potential conflict arising out of Gardner's past representation of Davidson. Gardner stated at oral argument in our court that his client would be willing to make a formal waiver on remand.