

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2017-CA-001441-MR

JOSEPH P. COLVIN, JR.

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE ANGELA MCCORMICK BISIG, JUDGE  
ACTION NO. 16-CR-000004-003

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
REMANDING

\*\* \*\* \* \*\* \* \*\* \*

BEFORE: JONES, MAZE, AND TAYLOR, JUDGES.

JONES, JUDGE: Joseph P. Colvin, Jr., pleaded guilty to one count of fleeing or evading police (complicity), one count of receiving stolen property over \$10,000 (complicity) and two counts of robbery in the first degree (complicity). He was sentenced to serve eleven years on each count with his sentences to run concurrently. Joseph's plea was conditioned on his right to appeal the trial court's refusal to appoint him new, conflict-free counsel. The alleged conflict arose

because Joseph and one of his co-defendants were represented by counsel who worked out the same public defenders' office. Based on the record before us, we cannot ascertain whether a conflict actually existed. Accordingly, we remand this matter to the trial court. On remand, the trial court must conduct a hearing complete with findings of fact and conclusions of law on the issue of whether a conflict actually existed.

### **I. Background**

Two gas station convenience stores located in Louisville, Kentucky, were robbed on or about December 28, 2015. Joseph and two other men, Lawaun Colvin ("Lawaun") and Cameron Mason, were arrested and charged in connection with the robberies. Mason retained private counsel. Joseph and Lawaun were unable to afford private counsel. As a result, the trial court appointed counsel from the Louisville Metro Public Defenders' Office to represent them. Attorney Rania Attum was appointed to represent Joseph; Attorney Aaron Dyke was appointed to represent Lawaun.

Because Attorney Attum and Attorney Dyke worked out of the same public defenders' office, they apparently believed it was necessary to secure a written waiver of dual or multiple representation from their clients. *See* RCr<sup>1</sup> 8.30. Lawaun signed a conflict form on or about February 8, 2016, but Joseph refused to

---

<sup>1</sup> Kentucky Rules of Criminal Procedure.

do so. For reasons that are not entirely clear, Joseph's failure to sign the waiver was not brought to the trial court's attention until June 9, 2017, just a few days before the trial was scheduled to begin. By this time, the litigation had been going on for approximately eighteen months.

Upon being made aware of the issue, the trial court briefly questioned Joseph about his refusal to sign the waiver. Joseph told the trial court that he had his reasons for not signing the form, but did not specify them. Specifically, he stated: "I mean it is. I got my reasons, I can't really pinpoint them." Aside from asking Joseph to explain his reasons for not signing the waiver, the trial court did not inquire further. Specifically, the trial court did not question either Attorney Attum or Attorney Dyke regarding their collaboration, if any.

Instead, the trial court ruled that Joseph had failed to articulate sufficient grounds to appoint new counsel and ordered the trial to proceed over Attorney Attum's objection. After this ruling, Joseph entered a conditional guilty plea, reserving his right to appeal the trial court's denial of conflict counsel following his refusal to sign the waiver of dual or multiple representation.<sup>2</sup> He is currently serving an eleven-year sentence.

---

<sup>2</sup> RCr 8.09 provides:

With the approval of the court a defendant may enter a conditional plea of guilty, reserving in writing the right, on appeal from the judgment, to review of the adverse determination of any specified

## II. Analysis

Joseph asserts that the trial court's refusal to appoint him new counsel violated his Sixth Amendment right to the effective assistance of counsel. The Sixth Amendment, which applies to the states through the Fourteenth Amendment, guarantees a defendant the right "to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI.; *Benton v. Maryland*, 395 U.S. 784, 794, 89 S. Ct. 2056, 2062, 23 L. Ed. 2d 707 (1969). "[I]t has long been recognized that the right to counsel is the right to the effective assistance of counsel." *U.S. v. Cronin*, 466 U.S. 648, 654, 104 S. Ct. 2039, 2044, 80 L. Ed. 2d 657 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771, n.14, 90 S. Ct. 1441, 1449, 25 L. Ed. 2d 763 (1970)). In turn, effective counsel means conflict-free counsel. *Burger v. Kemp*, 483 U.S. 776, 796-97, 107 S. Ct. 3114, 3127, 97 L. Ed.2 d 638 (1987); *Bartley v. Commonwealth*, 400 S.W.3d 714, 719 (Ky. 2013).

In evaluating a Sixth Amendment challenge predicated on counsel's alleged conflict of interest, it is of paramount importance to recognize that there are two different standards. *Beard v. Commonwealth*, 302 S.W.3d 643 (Ky. 2010). Which standard applies depends on whether the conflict was raised for the first

---

trial or pretrial motion. A defendant shall be allowed to withdraw such plea upon prevailing on appeal.

time at (or before) trial or at some later point during post-conviction proceedings.

*Id.*

As the *Beard* court explained, if the defendant or his counsel raises the alleged conflict at or before trial, we follow the standard set out in *Holloway v. Arkansas*, 435 U.S. 475, 98 S. Ct. 1173, 55 L. Ed. 2d 426 (1978). *Holloway* instructs us that to prevail on a Sixth Amendment challenge based on a conflict of interest that was raised at or before trial, a defendant need only show that his counsel had a conflict of interest. *Id.* Where the defendant shows that his counsel had a conflict, reversal is automatic. *Id.* The defendant is not required to make any showing that the conflict actually prejudiced him or impacted his counsel's performance. *Beard*, 302 S.W.3d at 645-47; *see also Samuels v. Commonwealth*, 512 S.W.3d 709, 712 (Ky. 2017).

For unpreserved objections (*i.e.*, objections not raised until after trial) to conflicted counsel, we follow the more stringent standard set out in *Cuyler v. Sullivan*, 446 U.S. 335, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980), and *Mickens v. Taylor*, 535 U.S. 162, 122 S. Ct. 1237, 152 L. Ed. 2d 291 (2002). *See Bartley v. Commonwealth*, 400 S.W.3d 714, 719 (Ky. 2013). Under this standard, the defendant is required to prove both the existence of a conflict and that the conflict actually prejudiced him. *Id.*; *Kirkland v. Commonwealth*, 53 S.W.3d 71, 75 (Ky. 2001).

Joseph raised the conflict issue prior to the start of trial so the *Holloway/Beard* standard applies. To prevail, Joseph needed only to establish the existence of a conflict of interest. The trial court's colloquy with Joseph, however, indicates that it applied a standard similar to *Cuylar*. The trial court essentially requested Joseph to explain how the alleged conflict burdened his counsel's ability to effectively represent him. This was not the correct inquiry. Instead of questioning Joseph regarding his reasons for not wanting to waive the conflict, the trial court should have questioned counsel to determine whether a conflict actually existed. If a conflict was present, the trial court had to appoint replacement counsel. *See Samuels*, 512 S.W.3d at 713 (“[T]he correct inquiry is whether [the defendant] demonstrated that [his counsel] was actually conflicted; the adequacy of the assistance she provided in representing him is irrelevant to that inquiry.”).

Some conflicts can be decided as a matter of law. This is not one of them. The fact that both Attorney Attum and Attorney Dyke both worked out of the same public defenders' office is not enough in and of itself to create a conflict. By the same token, however, the fact that Joseph and Lawaun were represented by different counsel is not a sufficient basis on which to conclude no conflict existed. When counsel work out of the same public defenders' office, the trial court must consider the totality of the circumstances of the individual case before it. *Id.* at 716. Such factors include, but are not limited to, the nature of the representations,

the interests of the clients, the presence of any collaboration between the attorneys, the involvement of the attorneys with each other's cases, the sharing of an investigator, and whether the attorneys had access to the confidential client communications and information of the other. *Id.*

The short colloquy conducted by the trial court did not address any of these issues. As a result, the record is devoid of any factual findings related to these crucial issues. Without such findings, we cannot determine whether a conflict existed. And, without knowing whether a conflict actually existed, we cannot resolve the ultimate issue before us: whether the trial court's refusal to appoint new counsel violated Joseph's Sixth Amendment right to the effective assistance of counsel. As such, we must remand this matter to the trial court for a hearing complete with findings of fact and conclusions of law on the issue of whether a conflict of interest existed.

### **III. Conclusion**

For the foregoing reasons, we remand this matter to the Jefferson Circuit Court for a hearing and the entry of findings of fact and conclusions of law in conformance with this opinion and *Samuels v. Commonwealth*, 512 S.W.3d 709 (Ky. 2017).

TAYLOR, JUDGE, CONCURS.

MAZE, JUDGE, DISSENTS WITH SEPARATE OPINION.

MAZE, JUDGE, DISSENTING: Respectfully, I must dissent from the majority's conclusion that the trial court erred by denying Colvin's motion for new counsel without a hearing. I agree with the majority that the requirements of RCr 8.30 are implicated in cases where co-defendants are represented by attorneys from the same public defender's office. *Mitchell v. Commonwealth*, 323 S.W.3d 755, 761 (Ky. App. 2010). While Colvin is not required to show prejudice, he is required to show that an actual conflict of interest existed. *Beard v. Commonwealth*, 302 S.W.3d 643, 646-47 (Ky. 2010). A conflict arises from competing duties or interests that create the potential for prejudice. *Id.* at 647.

In this case, Colvin did not identify any such competing duties that created such a conflict. He merely stated that he wanted to be represented by a different attorney. An indigent defendant is not entitled to the appointment of a particular attorney, and a defendant who has been appointed counsel is not entitled to have that counsel substituted unless adequate reasons are given. *Deno v. Commonwealth*, 177 S.W.3d 753, 759 (Ky. 2005) (citing *Baker v. Commonwealth*, 574 S.W.2d 325, 326-27 (Ky. App. 1978), and *Fultz v. Commonwealth*, 398 S.W.2d 881, 882 (Ky. 1966)). Even under the rule set out in *Samuels v. Commonwealth*, 512 S.W.3d 709 (Ky. 2017), Colvin was required to demonstrate



that his counsel was burdened by an actual conflict of interest. *Id.* at 716. Given Colvin's failure to identify that his counsel had an actual or potential conflict, I must conclude that the trial court did not err by denying his motion for new counsel without further inquiry.

**BRIEFS FOR APPELLANT:**

Daniel T. Goyette  
Chief Public Defender

Adam Braunbeck  
Assistant Appellate Defender  
Louisville, Kentucky

**BRIEF FOR APPELLEE:**

Andy Beshear  
Attorney General of Kentucky

Emily Bedelle Lucas  
Assistant Attorney General  
Frankfort, Kentucky