

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 KA 1414

RHP by

STATE OF LOUISIANA

VERSUS

NAMICHA LACEY

Judgment Rendered: **JUN 29 2011**

On Appeal from the 19th Judicial District Court
In and For the Parish of East Baton Rouge
Trial Court No. 12-07-0502

Honorable Michael R. Erwin, Judge Presiding

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Defendant/Appellant
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BEFORE: PARRO, GUIDRY, AND HUGHES, JJ.

HUGHES, J.

The defendant, Namicha Lacey, was charged by bill of information with simple robbery, a violation of LSA-R.S. 14:65. He pled not guilty. The defendant was tried by a jury and on May 13, 2008, he was convicted as charged. Thereafter, on August 13, 2008, Susan Hebert, counsel for the defendant, filed a motion to withdraw. In the motion, counsel disclosed that she had learned, at the close of the case, that she had previously represented the alleged victim in an unrelated criminal matter. Based upon this conflict, counsel requested that she be allowed to withdraw from further representation of the defendant and that conflict-free counsel be appointed. The trial court granted the motion and appointed attorney Bo Rougeou to represent the defendant. Mr. Rougeou filed a motion for a new trial based upon the conflict of interest that existed during the defendant's trial. A hearing was held on the motion. At the conclusion of the hearing, the trial court granted the motion. The State filed a supervisory writ application with this court, seeking review of the trial court's ruling on the motion for a new trial. This court granted the State's writ application with the following language:

WRIT GRANTED. To be entitled to relief without demonstrating prejudice, the defendant must show that a conflict of interest actually affected the adequacy of counsel's representation. **Cuyler v. Sullivan**, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980); **State v. Castaneda**, 94-1118, pp. 11-12 (La. App. 1st Cir. 6/23/95), 658 So.2d 297, 305. Herein, defendant did not demonstrate that an actual conflict of interest adversely affected his lawyer's performance during the trial. The testimony of defendant's trial counsel revealed that her failure to cross-examine the victim about her prior criminal conviction was because of her late discovery of the information and "forgetfulness," not because of divided loyalties. She also testified she never actually remembered the prior representation until after defendant's trial ended and she checked court records. Accordingly, the ruling of the district court granting the motion for new trial is reversed, and this matter is remanded for further proceedings.

State v. Lacey, 2009-0548 (La. App. 1 Cir. 7/31/09) (unpublished).

On remand, a hearing was held on a multiple offender bill, wherein the State sought to have the defendant adjudicated a fourth-felony offender and sentenced pursuant to LSA-R.S. 15:529.1. At the conclusion of the hearing, the trial court found the defendant to be a fourth-felony habitual offender and sentenced him to imprisonment at hard labor for sixty-four years. The defendant moved for reconsideration of the sentence, but the trial court denied the motion. The defendant now appeals, urging in a single counseled assignment of error that he should have been granted a new trial. The defendant also filed a *pro se* brief wherein he argues that he was deprived of effective assistance of counsel at trial.

FACTS

On the evening of December 14, 2007, Latonya Bindon was working as a cashier at the Popeyes restaurant on Florida Boulevard in Baton Rouge, Louisiana, when she observed the defendant, a regular patron at the restaurant, arrive. The defendant initially went to use the restroom facility. He later walked up to the counter and asked to purchase an order of mashed potatoes. Bindon rang up the food item and opened the register to complete the transaction. The defendant rushed behind the counter, pushed Bindon aside, removed the money from the cash register, and fled. Aldreka Brown, another Popeyes employee, was mopping the lobby when the incident occurred. She observed the entire incident. According to Brown, the defendant first attempted to leave through the door on the right side of the restaurant, but it was locked, so he exited through the opposite door.

Bindon and Brown both recognized the defendant as a regular patron of the restaurant and successfully picked him out of a photographic lineup as

the individual who robbed Bindon. On December 16, 2007 the defendant was arrested after he returned to the Popeyes restaurant to use the restroom.

During the trial, Bindon and Brown both identified the defendant, in open court, as the individual who committed the robbery.

COUNSELED ASSIGNMENT OF ERROR

In his sole counseled assignment of error, the defendant argues that a new trial should have been granted, based upon the conflict of interest that existed during his trial. He further argues that the conflict of interest adversely affected his counsel's performance and prejudiced his case. In response, the State contends that because the issue was previously addressed by this court in a writ application, the principle of "law of the case" precludes review of this issue on appeal.

The "law of the case" doctrine embodies the rule that an appellate court ordinarily will not reconsider its own rulings of law in the same case. **Sharkey v. Sterling Drug, Inc.**, 600 So.2d 701, 705 (La. App 1 Cir.), writs denied, 605 So.2d 1099, 1100 (La. 1992). See also **Lejano v. K.S. Bandak**, 97-0388 (La. 12/12/97), 705 So.2d 158, 170, cert. denied sub nom., **Lejano v. K.S. Bandak Assuranceforeningen Gard**, 525 U.S. 815, 119 S.Ct. 52, 142 L.Ed.2d 40 (1998); **Day v. Campbell-Grosjean Roofing & Sheet Metal Corporation**, 260 La. 325, 330, 256 So.2d 105, 107 (1971). The policy applies against those who were parties to the case when the former appellate decision was rendered and who thus had their day in court. **State v. Junior**, 542 So.2d 23, 27 (La. App. 5 Cir.), writ denied, 546 So.2d 1212 (La. 1989). We note that in this matter, however, the former decision was rendered when we exercised our supervisory, not appellate, jurisdiction. Nevertheless, judicial efficiency demands that this court accord great deference to its prior decisions unless it is apparent that the determination

was patently erroneous and produced an unjust result. See **State v. Humphrey**, 412 So.2d 507, 523 (La. 1982) (on rehearing); **State v. Wilkerson**, 96-1965 (La. App. 1 Cir. 11/07/97), 704 So.2d 1, 5, writ denied, 97-3038 (La. 4/3/98), 717 So.2d 646. For these reasons, we are not precluded from reviewing defendant's assigned error.

As a general rule, Louisiana courts have held that an attorney laboring under an actual conflict of interest cannot render effective legal assistance to the defendant he is representing. **State v. Cisco**, 2001-2732, p. 17 (La. 12/3/03), 861 So.2d 118, 129, cert. denied, 541 U.S. 1005, 124 S.Ct. 2023, 158 L.Ed.2d 522 (2004). An actual conflict of interest is defined as follows:

If a defense attorney owes duties to a party whose interests are adverse to those of the defendant, then an actual conflict exists. The interest[s] of the other client and the defendant are sufficiently adverse if it is shown that the attorney owes a duty to the defendant to take some action that could be detrimental to the other client.

Cisco, 2001-2732 at p. 18, 861 So.2d at 130 (citing **Zuck v. Alabama**, 588 F.2d 436, 439 (5th Cir. 1979), cert. denied, 444 U.S. 833, 100 S.Ct. 63, 62 L.Ed.2d 42 (1979)).

The issue of conflicting loyalties usually arises in the context of joint representation, but it can also arise when an attorney runs into a conflict because he or she is required to cross-examine a witness who is testifying against the defendant and who was, or is, a client of the attorney. **State v. Tart**, 93-0772, p. 12 (La. 2/9/96), 672 So.2d 116, 125, cert. denied, 519 U.S. 934, 117 S.Ct. 310, 136 L.Ed.2d 227 (1996).

The time at which a conflict of interest issue is raised is determinative of the standard to be applied in evaluating the claim. In **Holloway v. Arkansas**, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978), prior to trial, the defense counsel moved for the appointment of separate counsel for

each of the three defendants on the basis of conflict of interest, and the motion was denied. **Holloway**, 435 U.S. at 477, 98 S.Ct. at 1175. Prior to the empanelling of the jury, the motion was renewed, but was again denied. **Holloway**, 435 U.S. at 478, 98 S.Ct. at 1175. At trial, the court refused to permit defense counsel to cross-examine any of the defendants on behalf of the other defendants. **Holloway**, 435 U.S. at 479, 98 S.Ct. at 1176. The United States Supreme Court in **Holloway** reversed the defendants' convictions, holding, "whenever a trial court improperly requires joint representation over timely objection reversal is automatic." **Holloway**, 435 U.S. at 488, 98 S.Ct. at 1181. **Holloway** creates an automatic reversal rule only when defense counsel is forced to represent codefendants over his timely objection, unless the trial court has determined that there is no conflict. **Mickens v. Taylor**, 535 U.S. 162, 168, 122 S.Ct. 1237, 1241-42, 152 L.Ed.2d 291 (2002).

In **Cuyler v. Sullivan**, 446 U.S. 335, 337-38, 100 S.Ct. 1708, 1712-13, 64 L.Ed.2d 333 (1980), no objection was made against multiple representation of three defendants until post-conviction. The defendants were tried separately, represented by the same two attorneys. Sullivan was tried first and convicted without his defense attorneys presenting any evidence. The other defendants were acquitted in their trials. **Cuyler**, 446 U.S. at 338, 100 S.Ct. at 1713. In a post-conviction hearing, one of the defense attorneys testified he remembered he had been concerned about exposing defense witnesses for the other trials. **Cuyler**, 446 U.S. at 338-39, 100 S.Ct. at 1713.

The United States Third Circuit Court of Appeals reversed Sullivan's conviction, holding a defendant was entitled to reversal of his conviction whenever he makes some showing of a possible conflict of interest or

prejudice, however remote. **United States ex rel. Sullivan v. Cuyler**, 593 F.2d 512, 519-21 (3d Cir. 1979). The United States Supreme Court subsequently vacated the decision of the Third Circuit, holding, “the possibility of conflict is insufficient to impugn a criminal conviction. 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.” **Cuyler**, 446 U.S. at 350, 100 S.Ct. at 1719.

Thus, the time at which the conflict of interest issue is raised determines whether the rule of **Holloway** or the rule of **Cuyler** applies. When a defendant raises an objection before or during trial because of a possible conflict of interest, **Holloway** requires the trial court to appoint separate counsel or take adequate steps to determine if the claimed risk is too remote. Failure to take either action warrants automatic reversal, even in the absence of specific prejudice. However, should the objection be made after trial, **Cuyler** is controlling, and the defendant must show an actual conflict of interest adversely affected the adequacy of counsel's performance. See State v. Marshall, 414 So.2d 684, 687-88 (La. 1982), cert. denied, 459 U.S. 1048, 103 S.Ct. 468, 74 L.Ed.2d 617 (1982).

In the instant case, the issue of conflict of interest was first raised after trial when the defendant's trial counsel moved to withdraw from the case. Therefore, to receive a new trial, the defendant must have met the test articulated in **Cuyler**, that is, “that an actual conflict of interest adversely affected his lawyer's performance.” **Cuyler**, 446 U.S. at 348, 100 S.Ct. at 1718. See also State v. Reeves, 2006-2419, p. 78 (La. 5/5/09), 11 So.3d 1031, 1082, cert. denied, ___ U.S. ___, 130 S.Ct. 637, 175 L.Ed.2d 490 (2009).

At the hearing on the defendant's new trial motion in this case, Susan Hebert testified that she did not recall having previously represented Bindon during the defendant's trial. She explained that it was likely that the prior representation was not discovered during her pretrial screening because the bill of information initially listed the victim of the robbery as "Popeye's" (sic), and it was not until the morning of the trial that the bill was amended to reflect that the defendant was actually charged with robbing "Latonya Bindon."

Ms. Hebert further testified that after the trial was completed, she asked her secretary to check the Clerk of Court's website to determine if a public defender had represented the victim on her prior offense. It was then that Ms. Hebert learned that she had personally represented the victim several years earlier in a different section of criminal court. Apparently, the victim pled guilty to forgery and received probation. Ms. Hebert did not recall any of the details regarding the representation.

On the issue of her failure to cross-examine the victim regarding her prior conviction, Ms. Hebert explained that her pretrial conversations with the prosecutor had led her to believe that the State's witnesses did not have any prior criminal convictions, and it was not until the morning of the trial that she learned otherwise. After the *voir dire* began, Ms. Hebert was provided a copy of Bindon's rap sheet, which reflected a prior conviction for forgery. Ms. Hebert also explained that, on the morning of the trial, she was forced to re-evaluate the defense strategy after the defendant informed her of his decision not to testify. Ms. Hebert opined that these events (late disclosure of the rap sheet and last-minute change in the defense strategy) likely resulted in her forgetting to question the victim about her prior conviction on cross-examination. Ms. Hebert specifically denied that her

prior representation of the victim (which she stated she did not remember at the defendant's trial) had anything to do with her failure to question the victim about her prior forgery conviction.

At the conclusion of the evidentiary portion of the new trial hearing, counsel presented arguments to the court. In his argument, counsel for the defendant conceded that the situation in this case did not rise to the level of an "actual conflict." Counsel argued, however, that Ms. Hebert's prior representation of the victim created a "potentially conflicting situation" that warranted the granting of a new trial. In response, the State argued that because Ms. Hebert did not recall having represented the victim, she was not presented with a situation wherein she had divided loyalties. Her loyalty was to the defendant and thus, there was no actual conflict.

In granting the motion for new trial, the court reasoned:

The attorney filed the motion to withdraw. After consultation with others, she made the determination that there was a potential conflict in this case. The court is of the opinion that if there was a conflict in this case when she made the decision, it was a conflict or should have been a conflict in the case when the matter was tried. And based upon that, the court grants [the] motion for new trial.

Appellate courts may review the grant or denial of a motion for new trial only for errors of law. See LSA-C.Cr.P. art. 858. Our review of the record before us reveals that an error of law was committed in this case. The trial court's reasons for granting the defendant a new trial show that the ruling was based solely upon the court's finding that a conflict existed. The court failed to consider, as required by **Cuyler**, whether the conflict adversely affected Ms. Hebert's performance. Instead, the court applied the **Holloway** automatic reversal rule. As previously noted, **Cuyler**, not **Holloway**, is the controlling authority in this case.

Clearly, defense counsel was correct in his assertion (at the new trial hearing) that a “potentially conflicting situation” existed in this case, based upon Ms. Hebert’s prior representation of the victim (a key State witness) in the unrelated criminal matter, which could have been used to attack the victim’s credibility. Nevertheless, Ms. Hebert’s testimony at the hearing established that the prior representation, which she did not recall, did not affect her representation of the defendant. Ms. Hebert specifically stated that she failed to cross-examine the victim about her prior conviction, not because of the prior representation, but because she forgot about it during the trial. Ms. Hebert also testified she had not remembered the prior representation until after the defendant’s trial ended and she checked court records. Because Ms. Hebert was completely unaware of any loyalty owed to the victim, as her former client, during cross-examination, the situation was clearly not one of divided loyalties. There is no showing in the record that Ms. Hebert was ever faced with a situation in which she was forced to choose between the interests of the defendant and the victim, her former client.

Considering the foregoing, we adhere to our original conclusion on supervisory review that the defendant did not demonstrate that an actual conflict of interest adversely affected his counsel’s performance during the trial, and the trial court erred in granting the defendant a new trial.

This assignment of error lacks merit.

PRO SE ASSIGNMENT OF ERROR

The defendant has also submitted a pro se brief wherein he asserts he received ineffective assistance of counsel at trial. Specifically, he argues his trial counsel was ineffective in failing to impeach and/or challenge the victim’s credibility by questioning her regarding her prior criminal history.

It is well-settled that a claim of ineffective assistance of counsel is more properly raised by an application for post-conviction relief in the district court where a full evidentiary hearing may be conducted. However, where the record discloses evidence needed to decide the issue of ineffective assistance of counsel and that issue was raised by assignment of error on appeal, the issue may be addressed in the interest of judicial economy. **State v. Williams**, 632 So.2d 351, 361 (La. App. 1 Cir. 1993), writ denied, 94-1009 (La. 9/2/94), 643 So.2d 139.

A defendant is entitled to effective assistance of counsel under the Sixth Amendment to the United States Constitution and Article I, § 13 of the Louisiana Constitution. In assessing a claim of ineffectiveness, a two-pronged test is employed. The defendant must show that (1) his attorney's performance was deficient, and (2) the deficiency prejudiced him. **Strickland v. Washington**, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). The error is prejudicial if it was so serious as to deprive the defendant of a fair trial, or "a trial whose result is reliable." **Strickland**, 466 U.S. at 687, 104 S.Ct. at 2064. In order to show prejudice, the defendant must demonstrate that, but for counsel's unprofessional conduct, the result of the proceeding would have been different. **Strickland**, 466 U.S. at 694, 104 S.Ct. at 2068. See also **State v. Felder**, 2000-2887 (La. App. 1 Cir. 9/28/01), 809 So.2d 360, 369-70, writ denied, 2001-3027 (La. 10/25/02), 827 So.2d 1173. Further, it is unnecessary to address the issues of both counsel's performance and prejudice to the defendant if the defendant makes an inadequate showing on one of the components. **State v. Serigny**, 610 So.2d 857, 860 (La. App. 1 Cir. 1992), writ denied, 614 So.2d 1263 (La. 1993).

The Sixth Amendment to the United States Constitution guarantees the right of an accused in a criminal prosecution “to be confronted with the witnesses against him.” The confrontation clause of the Louisiana State Constitution similarly affords the defendant the right to “confront and cross-examine the witnesses against him.” LSA-Const. art. I, § 16.

Louisiana Code of Evidence Article 609.1 provides, in pertinent part:

A. General criminal rule. In a criminal case, every witness by testifying subjects himself to examination relative to his criminal convictions, subject to limitations set forth below.

B. Convictions. Generally, only offenses for which the witness has been convicted are admissible upon the issue of his credibility, and no inquiry is permitted into matters for which there has only been an arrest, the issuance of an arrest warrant, an indictment, a prosecution, or an acquittal.

The general rule provided by the foregoing is that the credibility of a witness may be impeached by evidence showing the witness has been convicted of a crime. On the other hand, evidence of an arrest, an arrest warrant, an indictment, prosecution, or an acquittal may not be used to impeach the general credibility of a witness. See State v. Casey, 99-0023 (La. 1/26/00), 775 So.2d 1022, 1031, cert. denied, 531 U.S. 840, 121 S.Ct. 104, 148 L.Ed.2d 62 (2000).

The evidence presented at the trial of this case established that shortly after the commission of the offense, Bindon identified the defendant, from a photographic lineup, as the perpetrator. She also identified the defendant in open court at trial. Bindon testified that she recognized the defendant because he was a regular patron of the Popeyes restaurant. Bindon’s identification of the defendant was corroborated by Brown, who also identified him from a pretrial photographic lineup and in open court at the trial. Considering the foregoing, we do not find that defense counsel’s failure to challenge Bindon’s credibility, based upon a prior conviction,

prejudiced the defendant in any way. Absent a showing of prejudice, the defendant's ineffective assistance of counsel claim must fall. See Strickland v. Washington, 466 U.S. at 687, 104 S.Ct. at 2064. This assignment of error lacks merit.

For the stated reasons, the defendant's conviction, habitual offender adjudication, and sentence are affirmed.

**CONVICTION, HABITUAL OFFENDER ADJUDICATION,
AND SENTENCE AFFIRMED.**