STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1319

State of Minnesota,
Respondent,

vs.

Deanna Murphy-Scullard,
Appellant.

Filed October 7, 2008
Affirmed
Halbrooks, Judge

Hennepin County District Court
File No. 06052065

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; and

Michael O. Freeman, Hennepin County Attorney, David C. Brown, Assistant County Attorney, C-2000 Government Center, 300 South 6th Street, Minneapolis, MN 55487 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Bradford Colbert, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Klaphake, Judge; and Schellhas, Judge.

U N P U B L I S H E D O P I N I O N

HALBROOKS, Judge

Appellant challenges the district court's refusal to allow her to withdraw her guilty plea, contending that she received ineffective assistance of counsel at the plea-withdrawal hearing because her attorney had a conflict of interest. Specifically, appellant argues it was a conflict of interest for the same attorney who represented her when she pleaded guilty to also represent her when attempting to withdraw the plea, based on the attorney's own prior improper conduct. Because we conclude that appellant failed to make the required showing concerning the adverse effect on her attorney's performance resulting from any alleged conflict of interest, we affirm.

FACTS

At approximately 10:00 a.m. on July 29, 2006, officers of the Brooklyn Park Police Department responded to appellant Deanna Murphy-Scullard's apartment after a report of a stabbing. The victim of this stabbing was appellant's boyfriend, T.V., who was found a short distance from appellant's apartment. T.V. told officers that appellant assaulted him after the couple had gotten into a fight, stabbing him in the back with a knife while he was lying face down on the couch. T.V. was taken to the hospital and treated for his stab wounds as well as a collapsed lung. Officers then went to appellant's apartment and arrested her without incident.

Appellant was charged with felony first-degree assault in violation of Minn. Stat. § 609.221 (2004) on August 1, 2006. At appellant's bail hearing the next day, Sara Sjoholm, an attorney from the Hennepin County Public Defender's Office (the Fourth

Judicial District), was appointed as appellant's counsel. Appellant subsequently agreed to plead guilty to the charged offense in return for the stay of execution of her 86-month sentence, subject to successfully completing six years of probation.

At appellant's January 5, 2007 guilty-plea hearing, she had two attorneys of record: Sjoholm and Kelly Madden.[1] Madden, also of the public defender's office, was present because Sjoholm was going on leave soon thereafter, and Madden was assuming responsibility for appellant's case. At the hearing, Sjoholm discussed with appellant the waiver of her rights, went over the plea petition with her, and established the factual basis for her plea. The only time Madden spoke during the hearing was to discuss with the district court the dates that she was available to represent appellant at the sentencing hearing.

On March 9, 2007, appellant moved to withdraw her guilty plea. This motion was signed by Madden and was filed before appellant's sentencing. A hearing regarding this matter was held before the district court on March 26, 2007, in which Madden was appellant's sole attorney. At this hearing, Madden argued that appellant felt that (1) her low "blood levels," which were the result of prior medical conditions causing extensive blood loss, had not been properly investigated and that this may have led to the overlooking of a possible mental-impairment defense to the assault charge; (2) she had not been properly advised regarding the potential collateral consequences of the plea in regard to a pending family-law matter; (3) she had been coerced by both Madden and

[1] Madden was listed as appellant's attorney of record on the plea transcript and also was represented to the district court that she was one of appellant's counsel of record.

Sjoholm into accepting the plea because "she was told she would go straight to prison" if she did not; and (4) both Madden and Sjoholm had failed to provide her with other necessary information regarding her decision to plead guilty. Madden also stated that appellant felt that "defense counsel did not act in her best interest." The district court orally denied appellant's motion to withdraw her plea and set April 6, 2007, as the date for appellant's sentencing.

Appellant was represented by a third attorney from the public defender's office, Davi Axelson, at her sentencing hearing. The district court sentenced appellant in accordance with the terms of her plea agreement. This appeal follows.

D E C I S I O N

Appellant claims that Madden had a conflict of interest when she was representing appellant at the plea-withdrawal hearing because appellant was trying to withdraw the plea based on Madden's own prior ineffectiveness in representing her when she pleaded guilty. Appellant argues that this conflict put Madden in the impossible position of having to effectively argue her own prior ineffectiveness. Appellant asks this court to reverse and remand the district court's refusal to allow her to withdraw her guilty plea so that other counsel can argue the matter.

A. Ineffective assistance of counsel and conflicts of interest

The Sixth Amendment provides a criminal defendant with the right to effective assistance of counsel. *McMann v. Richardson*, 397 U.S. 759, 771 n.14, 90 S. Ct. 1441, 1449 n.14 (1970). This Sixth Amendment right includes the "right to representation that is free from conflicts of interest." *Wood v. Georgia*, 450 U.S. 261, 271, 101 S. Ct. 1097,

1103 (1981); *see also Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 2065 (1984) ("Representation of a criminal defendant entails certain basic duties," including "a duty to avoid conflicts of interest."). Claims of ineffective assistance of counsel are mixed questions of fact and law, which we review de novo. *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003).

Generally, to support a claim of ineffective assistance of counsel, the burden is on the defendant to demonstrate (1) that counsel's performance fell below an objective standard of reasonableness and (2) that there is a reasonable probability that the result of the trial would have been different but for counsel's errors, i.e., that the defendant was prejudiced. *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064; *State v. Miller*, 666 N.W.2d 703, 716 (Minn. 2003). A court "need not address both the performance and prejudice prongs if one is determinative." *Rhodes*, 657 N.W.2d at 842 (citing *Strickland*, 466 U.S. at 697, 104 S. Ct. at 2069).

But the *Strickland* analysis is altered when a defendant claims that counsel was ineffective due to a conflict of interest. A conflict of interest exists if "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." Minn. R. Prof. Conduct 1.7(a)(2). The defendant's burden when claiming that a conflict of interest rendered counsel's performance ineffective "depends on whether . . . the alleged conflict was brought to the [district] court's attention." *Cooper v. State*, 565 N.W.2d 27, 32 (Minn. App. 1997), *review denied* (Minn. Aug. 5, 1997).

When a defendant alleges on appeal that trial counsel was ineffective as a result of an *unobjected-to* conflict of interest, as appellant does here, the defendant is warranted relief upon establishing that (1) "an actual conflict of interest" existed and (2) this conflict "adversely affected" counsel's performance, with prejudice being presumed under such circumstances. *Cuyler v. Sullivan*, 446 U.S. 335, 348, 100 S. Ct. 1708, 1718 (1980); *Cuypers v. State*, 711 N.W.2d 100, 104 (Minn. 2006).[2] "Thus, a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief." *Sullivan*, 446 U.S. at 349–50, 100 S. Ct. at 1719; *see also Gustafson v. State*, 477 N.W.2d 709, 713 (Minn. 1991) (quoting *Sullivan*). Furthermore, "[l]egal representation which is adversely affected by actual conflicts of interest is never considered harmless error." *United States v. Tatum*, 943 F.2d 370, 375 (4th Cir. 1991) (citing *Glasser v. United States*, 315 U.S. 60, 76, 62 S. Ct. 457, 467 (1942)).

"Proceeding under *Sullivan* places a lighter burden on the defendant than *Strickland* because demonstrating an adverse effect is significantly easier than showing prejudice." *Hall v. United States*, 371 F.3d 969, 973 (7th Cir. 2004) (quotation omitted). The two *Sullivan* requirements are often intertwined, and thus the analysis of each frequently overlaps. *Tatum*, 943 F.2d at 375.

[2] This is in contrast to the evaluation of an *objected-to* conflict of interest, in which case automatic reversal is warranted under *Holloway v. Arkansas* upon the conclusion that a conflict did indeed exist. 435 U.S. 475, 488, 98 S. Ct. 1173, 1181 (1978) ("[W]henever a trial court improperly requires joint representation over timely objection [to a conflict of interest] reversal is automatic.").

Here, we must first address a threshold question before discussing whether Madden's purported conflict of interest rendered her assistance ineffective: was Madden actually appellant's "counsel" for purposes of the Sixth Amendment and its guarantee of effective assistance of counsel?

B. "Representation" within the meaning of the Sixth Amendment

The central tenet of appellant's argument is that a conflict of interest existed because Madden represented her both in her decision to plead guilty and during her later attempt to withdraw her guilty plea. But this argument stands upon a premise that is not beyond question: that Madden did in fact "represent" appellant (i.e., was appellant's "counsel") when she pleaded guilty. The question of whether a lawyer "represented" a defendant, or served as "counsel" within the meaning of the Sixth Amendment, is a mixed question of fact and law, which an appellate court reviews de novo. *See Sullivan*, 446 U.S. at 341–42, 100 S. Ct. at 1714–15 (stating that the question of whether an attorney represented both Sullivan and other codefendants in different proceedings is a legal conclusion and "requires the application of legal principles to the historical facts of this case").

"For a lawyer's advice to constitute ineffective assistance of counsel, it must come from a lawyer who is representing the criminal defendant or otherwise appearing on the defendant's behalf in the case." *United States v. Martini*, 31 F.3d 781, 782 (9th Cir. 1994). "The Sixth Amendment right to effective assistance of counsel guaranteed under *Strickland* . . . does not include the right to receive good advice from every lawyer a criminal defendant consults about his [or her] case." *Id*. But an "attorney's constitutional

ineffectiveness can manifest itself [in the courtroom] even though the attorney never appears in court." *Stoia v. United States*, 22 F.3d 766, 769 (7th Cir. 1994). Thus, retained counsel who merely advises a defendant or works behind the scenes on the defendant's case is still "counsel" for the purposes of *Strickland* even if the attorney does not actively represent the defendant (or even appear) in court. *See id*. at 769–70 (finding that an attorney retained for "behind the scenes" work and who never appeared in court was still counsel for purposes of the Sixth Amendment, and thus the attorney's allegedly ineffective assistance due to a conflict of interest could be challenged under *Sullivan*).

Along with Sjoholm, Madden was appellant's counsel of record at the guilty plea hearing. In other words, appellant had retained Madden's services (through appointment), and Madden was formally representing appellant when she pleaded guilty. Formally retaining an attorney is an important, although not dispositive, factor for the purposes of being deemed "counsel" under the Sixth Amendment and its guarantee of effective assistance of counsel. *See Martini*, 31 F.3d at 782 (distinguishing between an attorney actually representing the defendant in the case at issue on appeal, who would fall within the Sixth Amendment and *Strickland*, and a separate attorney the defendant talked to "who was not representing Martini in his defense" in the particular case, who would not); *Stoia*, 22 F.3d at 769 (agreeing that a non-appearing attorney who "gives a defendant legal advice even though he has not been retained by the defendant to help prepare his defense" is not within the right to effective assistance of counsel, but finding that a formally retained, non-appearing attorney who worked behind the scenes is encompassed by this right).

Although Madden was present during appellant's guilty-plea hearing, it was Sjoholm who interacted with appellant at the hearing. But the fact that an attorney does not personally participate in a significant hearing up to and including trial does not mean that the attorney's representation is outside of the effective assistance of counsel guaranteed by the Sixth Amendment. *Stoia*, 22 F.3d at 769-70. Furthermore, although the extent of Madden's involvement in appellant's case prior to the guilty-plea hearing is not entirely clear from the record, transcripts indicate that Madden did apparently discuss with appellant the decision to plead guilty and counseled her in regard to the plea. The state also conceded at oral argument that the record supports this conclusion.

Because Madden was appellant's attorney of record and had at least some minimal involvement in counseling appellant in regard to her guilty plea, we conclude that Madden "represented" appellant, that is, was appellant's "counsel," for the purposes of the Sixth Amendment and *Strickland*'s protection of effective assistance of counsel.

C. Conflict of interests and representation of a defendant at both a guilty-plea hearing and a plea-withdrawal hearing

"[U]ntil a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance." *Sullivan*, 446 U.S. at 350, 100 S. Ct. at 1719. An actual conflict of interest exists if the defense attorney is placed in a position requiring the attorney to make a choice between advancing his or her own interests and the client's interests. *United States v. Ziegenhagen*, 890 F.2d 937, 939 (7th Cir. 1989).

Establishing the existence of an actual, yet unobjected-to, conflict of interest does not necessarily entitle an appellant to reversal. The Supreme Court clarified in *Mickens v. Taylor*, 535 U.S. 162, 172–73, 122 S. Ct. 1237, 1244 (2002), that an appellant is also required to show adverse effect under the *Sullivan* rule to be entitled to relief. But *Mickens* does not require an appellant "to engage in speculation pointing to an *actual* adverse effect . . . . A[n] [appellant] demonstrates an adverse effect by showing that there is a reasonable likelihood that his counsel's performance would have been different had there been no conflict of interest." *Hall*, 371 F.3d at 974. And, as already noted above, we need not address both the question of whether an actual conflict existed and whether the conflict adversely effected counsel's performance if one inquiry is dispositive. *Rhodes*, 657 N.W.2d at 842 (citing *Strickland*, 466 U.S. at 697, 104 S. Ct. at 2069).[3]

Here, appellant asserts Madden's representation of her at both her guilty-plea hearing and her plea-withdrawal hearing created an "actual conflict of interest" because she was attempting to withdraw the plea based on Madden's own prior improper conduct, citing several cases from other jurisdictions supporting her argument. *See Riley v. Dist. Court in & for Second Judicial Dist.*, 507 P.2d 464, 465–66 (Colo. 1973); *Roberts v. State*, 670 So.2d 1042, 1044 (Fla. Dist. Ct. App. 1996); *People v. White*, 751 N.E.2d 594, 599–600 (Ill. App. Ct. 2001). But we are not required to address this argument, and therefore do not, because we conclude that, even assuming arguendo that Madden was laboring under an actual conflict of interest, appellant has failed to show under the

[3] *Rhodes* was applying this rule in the context of a traditional *Strickland* analysis, but we see no reason why it does not fit equally well in a *Sullivan* analysis.

second-prong of the *Sullivan* test that there was a "reasonable likelihood that [her] performance would have been different had there been no conflict of interest." *Hall*, 371 F.3d at 974.

In her brief, appellant discusses only whether an actual conflict of interest existed. Although she correctly notes that prejudice is presumed upon establishing that an actual conflict existed that adversely effected counsel's representation, she fails to discuss the adverse-effect prong of the inquiry. But making a showing on adverse effect is a condition precedent to the presumption of prejudice. Thus, even assuming an actual conflict existed, appellant has made no attempt at all to demonstrate a reasonable likelihood that Madden's performance would have been different absent the conflict. And it is not this court's responsibility to develop or make appellant's arguments for her. Accordingly, because appellant failed to make the required showing of adverse effect constituting the second prong of a *Sullivan* inquiry, she is not entitled to relief based on Madden's purported conflict of interest in arguing appellant's plea-withdrawal motion.

Affirmed.