In the Missouri Court of Appeals
Eastern District

DIVISION THREE

STATE OF MISSOURI,	)	ED105371
	)	
Respondent,	)	Appeal from the Circuit Court
	)	of St. Francois County
v.	)	14SF-CR00918-01
	)	
RANDY L. MCENTIRE,	)	Honorable Timothy W. Inman
	)	
Appellant.	)	Filed: March 13, 2018

Introduction

This case addresses the issue of when a trial court must permit an attorney to withdraw due to a conflict of interest. Appellant Randy L. McEntire's (Defendant) trial counsel, Kevin Chase (Chase), sought to withdraw after discovering that his direct supervisor was representing the confidential informant (CI), who was one of the State's witnesses against Defendant, in an unrelated criminal case in another county. During the one-week time span between the State's disclosure of the name of the CI to Chase and Chase learning that his supervisor was the attorney for the CI, a docket entry in the case against the CI reflects that the State intended to file a *nolle prosequi* in the CI's case. Due to the patent appearance of impropriety in this situation, we find that the trial court's denial

of Chase's motion to withdraw was an abuse of discretion. We reverse and remand for a new trial.

Background

The State charged Defendant with two counts of distribution of a controlled substance. Eddie Gilliland (Gilliland) is a confidential informant for the police, and he was involved in two drug transactions that led to the charges against Defendant. The State initially endorsed Gilliland as a witness but had identified him only as "Confidential Informant #5935." On November 2, 2016, Defendant's prior counsel filed a motion to disclose the witness' name and address.

On December 2, 2016, Chase filed a proposed order to disclose the identity of the confidential informant. On December 5, 2016, the trial court ordered the State to disclose the name of the witness that same day. The State filed its answer that day, disclosing Gilliland's name and also responding to a prior request by Defendant that the State disclose whether it had made any deals with any witnesses in exchange for testimony against Defendant. The State asserted the State had not made any deals with Gilliland for his cooperation as a witness in Defendant's case.

Defendant's trial was set to begin one week later on December 12, 2016. That morning, prior to the commencement of trial, Chase moved for leave to withdraw as Defendant's counsel due to a conflict of interest. Chase explained that he had discovered the night before that his direct supervisor, Wayne Williams (Williams), represented Gilliland in an unrelated felony drug possession case in Madison County. Chase informed

the court that the last docket entry in the case against Gilliland was from four days earlier, December 8, 2016, and it indicated that the State intended to file a *nolle prosequi*.[1]

Chase stated that Williams told him Williams had minimal contact with Gilliland and that Gilliland may have mentioned he was a confidential informant, but that the case against Gilliland was set to be dismissed because the Madison County prosecutor's office had not been able to secure a police report. However, because the case against Gilliland was technically still ongoing and therefore Chase's supervisor's representation of Gilliland had not ended, Chase moved to withdraw as counsel for Defendant. The State responded that it would need to call Gilliland as a witness for both counts against Defendant, and that there could be a potential problem for Defendant regarding impeachment of Gilliland if he could not discover the disposition of the case in Madison County. The trial court took a recess to take the matter under advisement.

When proceedings resumed, Chase stated to the trial court that Defendant was not waiving any conflict of interest that Chase's office might have with Gilliland. Chase renewed his request to withdraw. The trial court stated it did not believe a direct conflict existed given that Chase had no knowledge of the conflict until the day before and Gilliland's case was entirely unrelated. The trial court denied Chase's motion to withdraw.

The trial court took another recess, after which Chase again renewed his motion to withdraw and called Gilliland to testify in support of the motion. Gilliland testified that Williams appeared with him in court as his counsel on October 10, 2016, and then again

[1] Defendant was represented by the public defender's office beginning on August 13, 2014. Chase entered his appearance on Defendant's behalf on November 22, 2016. Williams first appeared with Gilliland in court on October 10, 2016, thus the overlap in representation of Gilliland and Defendant by the public defender's office existed at least from October 10, 2016 until Defendant's trial date of December 12, 2016. As of that date, the State had not yet filed its *nolle prosequi* in Gilliland's case, and there is no indication in the record on appeal whether or when that took place.

on December 8, 2016. Gilliland testified that his communication with Williams was minimal and concerned "basically minimizing the bond and getting [him] out sooner." Gilliland testified that Williams told him at the court date on December 8 the case against him would be dismissed due to a lack of evidence. Gilliland testified that he told Williams he was a confidential informant, and Williams said that he did not want to hear anything about it because it could concern one of his clients.

At the end of Gilliland's testimony, Chase argued that Defendant's waiver of a jury trial should mitigate concerns regarding a waste of time, and Chase again requested both a continuance of trial and permission to withdraw. The State responded that "there could be some consequences if there's an appearance of impropriety regarding the relationship between my witness and the public defender's office[.]" The trial court denied Chase's motions, reasoning that "based upon the earlier record, Mr. Chase said that he just found out about this yesterday and had no contact with Mr. Williams with regards to the substantive matters of this issue."

After a bench trial, the trial court found Defendant guilty of both charges and sentenced him to concurrent terms of 15 years' imprisonment on each count. This appeal follows.

Discussion

Defendant does not challenge the sufficiency of the evidence to support his convictions. Rather, he argues that the trial court abused its discretion in denying Chase's motion to withdraw due to a conflict of interest, which constituted a violation of Defendant's Sixth Amendment right to conflict-free counsel. We agree.

We review a trial court's decision on a motion to withdraw for an abuse of discretion. State v. Christeson, 50 S.W.3d 251, 261 (Mo. banc 2001). "Judicial discretion is abused when the trial court's ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." Id.

The Sixth Amendment to the United States Constitution guarantees defendants "the right to . . . have the Assistance of Counsel for [their] defence."[2] U.S. Const. amend. VI. This includes the right to be represented by counsel that is free from conflicts of interest. Wood v. Georgia, 450 U.S. 261, 271 (1981); State ex rel. Fleer v. Conley, 809 S.W.2d 405, 408 (Mo. App. E.D. 1991).

When a potential conflict of interest comes to the trial court's attention, the trial court has an affirmative duty to inquire into the conflict. Cuyler v. Sullivan, 446 U.S. 335, 346 (1980) (discussing Holloway v. Arkansas, 435 U.S. 475 (1978): "Holloway requires state trial courts to investigate timely objections to multiple representation"); see also Caban v. U.S., 281 F.3d 778, 781 (8th Cir. 2002) (duty to conduct inquiry applies "regardless of the nature of the conflict") (citing Wood, 450 U.S. at 272 n.18). When the trial court finds no conflict, its inquiry ends. However, if the court finds an actual conflict or serious potential for conflict, the court has a subsequent obligation to either disqualify counsel or to inquire regarding the defendant's waiver of the conflict. See U.S. v. Edelmann, 458 F.3d 791, 807 (8th Cir. 2006); see also State ex rel. Kinder v. McShane, 87

[2] The Sixth Amendment applies to the states through the Due Process Clause of the Fourteenth Amendment, and the Missouri Constitution, article I, section 18(a), similarly protects a defendant's right to effective assistance of counsel. See State ex rel. Mo. Pub. Defender Comm'n v. Waters, 370 S.W.3d 592, 605 (Mo. banc 2012).

S.W.3d 256, 263 (Mo. banc 2002) (discussing trial court's duty to investigate waiver when actual conflict or serious potential for conflict exists).

Here, Chase made the trial court aware of the potential conflict of interest before trial began, and the trial court conducted an inquiry into the conflict by hearing from Chase, the State, and Gilliland. Chase notified the court that his direct supervisor, Williams, represented Gilliland, a witness against Defendant. The representation had not yet terminated, but during the week in between the State's disclosure of Gilliland's name and the start of Defendant's trial, a docket entry in Gilliland's case indicates the Madison County prosecutor intended to dismiss the case against Gilliland. Williams' representation of Gilliland had not yet terminated at the time of trial. Chase made clear that Defendant did not waive any conflict.

The Missouri Supreme Court has held that "[a]n attorney who represents both the defendant and a prosecution witness in the case against the defendant is representing conflicting interests." State ex rel. Kinder v. McShane, 87 S.W.3d 256, 260 (Mo. banc 2002) (quoting Ciarelli v. State, 441 S.W.2d 695, 697 (Mo. 1969)). Moreover, "[t]hat different lawyers from the same office are separately engaged in the representation makes no difference." Gordon v. State, 684 S.W.2d 888, 890 (Mo. App. W.D. 1985) (citing Ciarelli, 441 S.W.3d 695)).

We note that Missouri's Rules of Professional Conduct do not per se disallow the situation here, where two attorneys from the public defender's office simultaneously represent a defendant and a State's witness against that defendant. Rule 4-1.11,[3] initially adopted in 1994, addresses conflicts of interests specifically for government officers and

[3] All rule references are to Mo. R. Civ. P. (2016), unless otherwise indicated.

employees, including the public defender's office. See State v. Lemasters, 456 S.W.3d 416, 421 (Mo. banc 2015). While such a conflict of interest would be imputed to lawyers in the same firm under Rule 4-1.10, given the special nature of government entities such as the public defender's office, Rule 4-1.11 does not do so, though the comments note that "ordinarily it will be prudent to screen such lawyers." Lemasters, 456 S.W.3d at 422 (quoting Rule 4-1.11, Comment 2). Thus, Missouri's ethical rules do not technically prohibit Williams' and Chase's concurrent representation of Gilliland and Defendant.

However, such a conclusion "does not end the analysis." Lemasters, 456 S.W.3d at 422. As in Lemasters, the trial court here would likely have granted Chase's motion to withdraw if the conflict was imputed under Missouri's ethical rules, "but the converse is not necessarily true." Id. The trial court has an obligation not only to enforce ethical rules, but also to uphold "society's perception that the [criminal justice] system is fair and its results are worthy of reliance." Id. Trials must not only *be* fair, but also "justice must satisfy the *appearance* of justice." Id. at 422-23 (quoting Offut v. United States, 348 U.S. 11, 14 (1954)); see also State ex rel. Horn v. Ray, 325 S.W.3d 500, 511 (Mo. App. E.D. 2010) ("The courts have not only the duty to dispense justice, but the equally important duty to maintain the integrity of the judicial system"). Due to the trial court's obligation to maintain the integrity of the judicial system as well as public confidence in the system, "if a reasonable person with knowledge of the facts would find an appearance of impropriety and doubt the fairness of the trial," the trial court must disqualify conflicted counsel. See Lemasters, 456 S.W.3d at 422-23.

We find under the circumstances here, the trial court abused its discretion in denying Chase's motion to withdraw. The public defender's office actively represented

conflicting interests in that Gilliland was the CI and later a disclosed and endorsed witness in the case against Defendant. The fact that Gilliland's and Defendant's cases were unrelated does not remove the conflict, because "[i]t is the relationship of counsel to the parties that creates the conflict, not the relationship of the offenses." Gordon, 684 S.W.2d at 891. Further, Williams was not simply a distant staff attorney in the same office, but was Chase's direct supervisor. Cf. State v. Johnson, 549 S.W.2d 348, 350-51 (Mo. App. 1977) (finding fact that one attorney from large public defense organization represents defendant and another staff attorney from same organization represented prosecution witness in concluded and unrelated criminal matter does not create per se conflict of interest). Additionally, three days after the State disclosed Gilliland's name to Chase and four days before Defendant's trial, Gilliland's case was set to be dismissed. This is evidence of a serious potential for conflict that should have prompted the trial court to either disqualify Chase or inquire about a waiver. See McShane, 87 S.W.3d at 263. Chase made it clear that Defendant did not waive any conflict.

Williams did not testify regarding what he knew of the conflict or what he communicated to Chase. Though Gilliland testified he did not give Williams any information besides the fact that he was a confidential informant, and Chase testified he and Williams did not discuss Defendant's case, we believe a reasonable person with knowledge of the timeline of events in this case—especially the timing of the pending dismissal of Gilliland's case—would perceive an appearance of impropriety and a conflict of interest. Chase moved to withdraw not once, but three times, and he would have been in the best position to evaluate the seriousness of the conflict of interest. See Holloway, 435 U.S. at 485 ("most courts have held that an attorney's request for the appointment of

separate counsel, based on his representations as an officer of the court regarding a conflict of interests, should be granted"). Moreover, even the State acknowledged the potential difficulty for Defendant to impeach Gilliland and that "there could be some consequences if there's an appearance of impropriety regarding the relationship between my witness and the public defender's office[.]"

Under all of the circumstances here, we find the trial court abused its discretion in failing to disqualify Chase.[4] Though a trial court is permitted to take timing of the notification of a conflict into account in deciding whether to grant a motion to withdraw,

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[4] We note the State's argument that Defendant must show more than an abuse of discretion on the part of the trial court, but additionally that he was actually prejudiced by Chase's representation, citing State v. Johnson, 549 S.W.2d 348 (Mo. App. 1977). The dissenting opinion relies on Johnson as well. Diss. op. at 3. Besides Johnson, sparse Missouri or federal case law addresses the circumstance where a defendant notifies the trial court before trial of a conflict, the trial court conducts an inquiry, and that inquiry is reviewed on appeal. In most instances, either the conflict is never raised or the trial court fails to conduct an inquiry. In the former situation, a defendant who fails to raise a conflict before trial does have to show prejudice, and the vehicle for raising the conflict is a post-conviction motion. See State v. Nettles, 481 S.W.3d 62, 71 (Mo. App. E.D. 2015). In the latter case, if a trial court fails to conduct an inquiry, prejudice is not required and reversal is automatic. Caban v. United States, 281 F.3d 778, 781-82 (8th Cir. 2002) (discussing reversal rule in Cuyler v. Sullivan, 446 U.S. 335 (1980), noting that Cuyler addresses situations where trial court was not notified of conflict but reasonably should have known and inquired). Missouri cases considering extraordinary writs after a trial court denies a motion to disqualify counsel due to a conflict of interest apply an abuse of discretion standard. See State ex rel. Kinder v. McShane, 87 S.W.3d 256, 260 (Mo. banc 2002); State ex rel. Horn v. Ray, 325 S.W.3d 500, 504 (Mo. App. E.D. 2010).

In Johnson, the defendant raised a conflict of interest during trial and defense counsel moved to withdraw, which the trial court denied. 549 S.W.2d at 350. For the defendant to prevail, this Court required evidence that "something must have been done by counsel in the trial, or something must have been foregone by counsel and lost to defendant, which was detrimental to the interests of defendant and advantageous to the interests of [the] witness." Id. However, for this standard, the Johnson court cited post-conviction relief cases, which apply a different standard of review, as noted above. It is important to keep these different types of appeal distinct. See Atley v. Ault, 191 F.3d 865, 873 (8th Cir. 1999) (citing Brecht v. Abrahamson, 507 U.S. 619, 633-38 (1993)) ("collateral review is different from direct review"). Johnson simply appears to conflate the two standards, and it was decided prior to the United States Supreme Court decisions in Holloway and Cuyler regarding the trial court's duty to inquire into conflicts of interests. A more recent Missouri Supreme Court case, State v. Christeson, considered a trial court's denial of a motion to withdraw due to a conflict of interest raised by defense counsel three months prior to trial, and the Missouri Supreme Court reviewed the denial for an abuse of discretion. 50 S.W.3d 251, 261 (Mo. banc 2001). We apply the same standard here. Additionally, though even under this standard defendants often must show prejudice to merit reversal in other types of cases, the prejudice here is to the judicial system, and we do not agree that Defendant should be held to a post-conviction ineffective-assistance-of-counsel standard simply because he had a trial due to this error by the trial court. Until such time as the United States Supreme Court or Missouri Supreme Court would clearly hold evidence of prejudice to defendants is required under these circumstances, the existing cases, besides Johnson, addressing direct appeals after denials of motions to withdraw do not convince us Defendant must additionally show prejudice to the representation he received at trial.

State v. Chalk, 950 S.W.2d 629, 631 (Mo. App. E.D. 1997), a trial court must protect both the integrity of the judicial system and a defendant's Sixth Amendment right to conflict-free counsel, which all parties acknowledged had the potential for serious problems here. Point granted.

Conclusion

The trial court abused its discretion in denying Defendant's counsel's motion to withdraw in light of the circumstances here indicating a serious potential for a conflict of interest given that the State's witness was simultaneously represented by Defendant's counsel's direct supervisor and Defendant did not waive the conflict. We reverse and remand for a new trial.

Gary M. Gaertner, Jr., Presiding Judge

Robert M. Clayton III, J., concurs and
Angela T. Quigless, J., dissents in separate opinion.

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DIVISION THREE

STATE OF MISSOURI,	)	No. ED105371
	)	
Respondent,	)	Appeal from the Circuit Court of
	)	St. Francois County
vs.	)	
	)	
RANDY L. MCENTIRE,	)	Honorable Timothy W. Inman
	)	
Appellant.	)	Filed: March 13, 2018

DISSENT

I agree with the principles enunciated by the majority opinion but not its application to the record before this Court. Therefore, I respectfully dissent and would find the trial court did not abuse its discretion.

The question before the Court was whether an actual conflict of interest existed because both Randy L. McEntire ("Defendant") and the confidential informant Eddie Gilliland ("Gilliland") were simultaneously represented at one point by the same public defender's office. Given our standard of review, we are constrained by the facts of the case before the trial court. I would find the record does not demonstrate facts which support the finding of a conflict of interest or an appearance of impropriety.

Prior to trial, Kevin Chase ("Mr. Chase"), Defendant's public defender, informed the trial court he learned the evening before that Wayne Williams ("Mr. Williams"), his supervisor, recently represented Gilliland in an unrelated case in Madison County Circuit Court that was being

dismissed. Mr. Chase indicated he did not speak to Mr. Williams about Gilliland's Madison County case. Mr. Chase also stated he did not have any privileged communication with Gilliland that would limit his representation of Defendant. Although Mr. Williams did not testify, Mr. Chase informed the trial court that Mr. Williams indicated he had minimal contact with Gilliland during the pendency of Gilliland's case. Mr. Williams spoke to Gilliland on two court dates. Specifically, Mr. Williams spoke with Gilliland about his bond and then that his unrelated case in Madison County was being dismissed. Mr. Williams also indicated Gilliland may have mentioned he was a confidential informant, but Mr. Williams had no confidential information regarding Defendant's case. Likewise, Gilliland confirmed his communications with Mr. Williams were limited to a discussion about Gilliland's bond, and the fact that his unrelated case in Madison County had been dismissed. Gilliland admitted he told Mr. Williams he was a confidential informant and was testifying in an upcoming trial. However, Gilliland did not specify what the trial was about, and Mr. Williams said he did not want to hear anything about the case.

Mr. Chase informed the trial court that the last docket entry in Gilliland's case indicated the Madison County Prosecuting Attorney's Office intended to file a *nolle prosequi*. Mr. Chase stated he did not believe an actual conflict of interest existed because he did not have contact with either Mr. Williams or Gilliland about Gilliland's unrelated case, however, he would "err on the side of caution" and move to withdraw as counsel. In response, the State informed the court it "didn't know about the Madison County case," and "disclosed everything [it] knew to Mr. Chase."

Undeniably, Defendant's Sixth Amendment right to effective and conflict-free counsel would have been violated had Mr. Chase represented both Defendant and Gilliland. *See State ex rel. Kinder v. McShane*, 87 S.W.3d 256, 262 (Mo. banc 2002); *Ciarelli v. State*, 441 S.W.2d 695, 697 (Mo. 1969). However, those were not the facts before the trial court. Rather, Mr. Williams

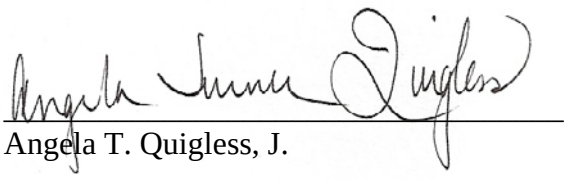
represented Gilliland in Madison County during a portion of the time Mr. Chase represented Defendant in St. Francois County. Mr. Williams did not participate in Defendant's case nor did Mr. Williams and Mr. Chase share any confidential communication regarding either Defendant's or Gilliland's unrelated cases. Mr. Williams never represented Defendant and had no knowledge of the details of Mr. Chase's representation of Defendant. Likewise, Mr. Chase never represented Gilliland and had no privileged communication with either Mr. Williams or Gilliland regarding Gilliland's unrelated case in Madison County. "Absent some showing of a conflict of interest the fact that one attorney from a large public defense organization represents a defendant in a criminal trial, after another staff attorney from the same organization represented a prosecution witness in a concluded and unrelated criminal matter, does not create a per se conflict of interest at defendant's trial." *State v. Johnson*, 549 S.W.2d 348, 350–51 (Mo. App. St. L. Dist. 1977).

Moreover, as the majority noted, the Missouri Rules of Professional Conduct do not *per se* prohibit Mr. Williams's and Mr. Chase's simultaneous representation of Gilliland and Defendant. *See* Rule 4-1.11. Although I agree that the trial court has an obligation to enforce ethical rules and uphold society's perception of the criminal justice system, see *State v. Lemasters*, 456 S.W.3d 416, 421 (Mo. banc 2015), here, as set forth *supra*, the evidence established facts that precluded an appearance of impropriety that otherwise might have cast doubt on the fairness of Defendant's trial. *See id.* at 424. Notably, there was no assertion by Mr. Chase that either clients' interests were directly adverse to the other in the same litigation or other proceeding. There also was no evidence that something was done by counsel or foregone by counsel and lost to Defendant, which was detrimental to the interests of Defendant and advantageous to Gilliland. *See Johnson*, 549 S.W.2d at 350. Simply, there was no evidence of any collaboration between Mr. Chase and Mr. Williams

during the period of simultaneous representation that compromised the fairness of Defendant's trial or his right to conflict-free counsel.

In the absence of a real, rather than perceived, conflict of interest, the trial court does not abuse its discretion in denying a motion to withdraw. *State v. Christeson*, 50 S.W.3d 251, 261 (Mo. banc 2001) ("[T]he determination of whether defense counsel should be allowed to withdraw is within the sound discretion of the trial court[.]"). The only proof of conflict was the happenstance that Mr. Williams represented Gilliland on an unrelated case that was being dismissed while Defendant's case was pending in a different county. I believe this alone, without more would be insufficient to find that the trial court abused its discretion or that a reasonable person would find an appearance of impropriety.

I would affirm the judgment of the trial court.



Angela T. Quigless, J.