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NO. COA06-939

NORTH CAROLINA COURT OF APPEALS

Filed: 3 April 2007

STATE OF NORTH CAROLINA

v.

Bertie County
No. 01 CRS 50423

TERRENCE LOWELL HYMAN

Appeal by defendant from order entered 28 November 2005 by Judge Cy A. Grant, Sr., in Bertie County Superior Court. Heard in the Court of Appeals 7 March 2007.

Attorney General Roy Cooper, by Assistant Attorney General Joan M. Cunningham, for the State.

Winifred H. Dillon, for defendant-appellant.

TYSON, Judge.

Terrence Lowell Hyman ("defendant") appeals from order entered ruling defense counsel's representation at defendant's trial was not adversely affected by defense counsel's prior representation of a State's witness. We affirm.

I. Background

On 30 July 2001, a Bertie County grand jury indicted defendant for the first-degree murder of Ernest Lee Bennett, Jr. ("the victim"). On 14 May 2001, the trial court appointed attorney Teresa Smallwood ("Smallwood") to represent defendant. On 13 March

2002, the trial court also appointed attorney Hackney High as co-counsel to represent defendant.

A. State's Evidence

On 12 September 2003, defendant was tried for first-degree murder. During defendant's trial, Derek Speller ("Speller") testified for the State. Speller testified he had known defendant for a couple of years prior to the victim's murder. Speller arrived at the L&Q Social Club in Windsor around midnight on the night the murder occurred, entered the club, and placed a food order. Around 2:00 a.m., the victim became involved in a physical fight. Speller testified he saw defendant enter the club with a gun and shoot the victim. Speller saw the victim clutch his side and run toward the exit. Defendant shot the victim again in the back as the victim ran out of the club. The victim laid down onto the ground outside the club and Speller saw defendant shoot the victim again. Speller also testified that he saw Demetrius Jordan ("Jordan") shoot upwards six or seven times in the parking lot, enter his car, and leave the scene.

During direct examination by the State, Speller testified the only person to whom he had spoken about this case to was "Teresa." He testified Teresa "told [him she] wanted [him] to help her with the case at one point in time. But other than that, that's it."

During Smallwood's cross-examination of Speller, he identified "Teresa" as herself, the defense attorney. Speller testified that Smallwood and her law partner, Tonza Ruffin, had represented him at a probation violation hearing in September 2002. This probation

violation hearing occurred after the victim's murder, after defendant was indicted, and after Smallwood was appointed to represent defendant. Smallwood's representation of Speller occurred prior to defendant's trial.

During cross-examination, Smallwood asked Speller whether she and the witness had engaged in a conversation about defendant's case. Speller denied he told Smallwood he had seen Jordan with both .380 and nine millimeter handguns. Speller denied he saw someone other than defendant shoot the victim with a chrome gun inside the club and run out the back door. Speller also denied he had heard Jordan shoot the victim outside, and that he had not come forward with this information because he was "hustling" for Jordan who was "lethal."

Speller testified the only conversation he and Smallwood had about defendant's case occurred in the parking lot of Smallwood's law office, when Speller told her that he could not help her. On 16 September 2003, defendant was convicted of first-degree murder and appealed.

On that appeal, this Court held an actual conflict of interest existed, but stated from the "face of the record [whether] defendant's attorney's prior representation of Speller affected her representation of defendant" was not apparent. *State v. Hyman*, 172 N.C. App. 173, 616 S.E.2d 28 (2005) (Unpublished). This Court remanded to the trial court "for an evidentiary hearing to determine if the actual conflict adversely affected [the attorney's] performance[.]" *Id.* (quotation omitted).

B. Remand Hearing

On 3 October and 2 November 2005, the trial court conducted hearings on this issue. Smallwood testified Speller had retained her law partner to represent him on a probation violation hearing and that "at some point in time [she] . . . stepped in on her [law partner's] behalf to enter a plea on the probation matter, the probation violation case."

Smallwood testified her only contact with Speller occurred during this representation, which lasted between five to ten minutes. She did not speak to Speller about anything other than the probation violation. Smallwood testified she had not represented Speller on any other matter, including the charge that culminated in the probation judgment. During Smallwood's representation of Speller, she: (1) never spoke with Speller about defendant; (2) did not obtain any information from Speller about defendant during her representation of Speller; and (3) did not learn any impeaching information about Speller during her representation of him.

Smallwood testified all later conversations with Speller that pertained to defendant "took place from an investigatory standpoint after the fact of [her] representation of [Speller] and incident to [her] preparation for the Hyman trial." Any information Smallwood used in Speller's cross-examination was obtained after her representation of Speller was complete and was incident to her preparation for defendant's trial.

On 28 November 2005, the trial court concluded that Smallwood's representation of defendant was not adversely affected by her prior representation of Speller. Defendant appeals.

II. Issue

Defendant argues Smallwood's actual conflict of interest adversely affected her representation of him.

A. Standard of Review

"Our appellate courts have long held that an appellant's failure to assign error to each finding of fact and to identify in his brief which findings are challenged, will result in the presumption that the findings are supported by competent evidence." *State v. Taylor*, 155 N.C. App. 251, 258, 574 S.E.2d 58, 64 (2002) (citing *State v. Cheek*, 351 N.C. 48, 63, 520 S.E.2d 545, 554 (1999), *cert. denied*, 530 U.S. 1245, 147 L. Ed. 2d 965 (2000)), *cert. denied*, 357 N.C. 65, 579 S.E.2d 572 (2003). We review a trial court's conclusions of law *de novo* after the trial court found and concluded an actual conflict of interest existed which adversely affected the defense counsel's representation of the defendant. *Id.* at 260, 574 S.E.2d at 65.

B. Conflict of Interest

Defendant argues the trial court erred when it concluded Smallwood's representation of him had not been adversely affected by her prior representation of Speller, a State's witness. We disagree.

"The right to counsel guaranteed by the Sixth Amendment of the United States Constitution is a fundamental right." *State v.*

James, 111 N.C. App. 785, 789, 433 S.E.2d 755, 757 (1993) (citing *Argeringer v. Hamlin*, 407 U.S. 25, 32 L. Ed. 2d 530 (1972)). "The right to effective assistance of counsel includes the right to representation that is free from conflicts of interest." *State v. Bruton*, 344 N.C. 381, 391, 474 S.E.2d 336, 343 (1996) (internal quotation omitted). "Whether an impermissible conflict of interest or ineffective assistance of counsel is present must be determined from an ad hoc analysis, reviewing the circumstances as a whole." *State v. Hardison*, 126 N.C. App. 52, 55, 483 S.E.2d 459, 461 (1997). A defendant who raises no objection at trial must demonstrate that an actual conflict of interest adversely affected the performance of his lawyer. *James*, 111 N.C. App. at 789, 433 S.E.2d at 757.

This Court has held:

We believe *representation of the defendant as well as a prosecution witness* (albeit in another matter) creates several avenues of possible conflict for an attorney. Confidential communications from either or both of a revealing nature which might otherwise prove to be quite helpful in the preparation of a case might be suppressed. Extensive cross-examination, particularly of an impeaching nature, may be held in check. Duties of loyalty and care might be compromised if the attorney tries to perform a balancing act between two adverse interests.

Id. at 790, 433 S.E.2d at 758.

In *James*, and as here, the defense attorney represented the defendant in one matter and represented a prosecution witness in an unrelated matter. This Court held the record "clearly show[ed] on its face that the conflict adversely affected counsel's

performance" because: (1) "the overlap of representation prior to and at the time of trial of both parties . . . resulted in an unavoidable conflict as to confidential communications, and affected counsel's ability to effectively impeach the credibility of [the] witness" and (2) counsel never explored the prosecution witness's suggested plea. *Id.* at 790-91, 433 S.E.2d at 758-59.

C. Analysis

Defendant initially assigned error to the trial court's findings of fact numbered 13 and 14, *infra*. Defendant failed to brief these assignments of error on appeal. "Questions raised by assignments of error in appeals from trial tribunals but then not presented and discussed in a party's brief are deemed abandoned." N.C.R. App. P. 28(a) (2007); *see State v. Angel*, 330 N.C. 85, 91-92, 408 S.E.2d 724, 728 (1991) (Although the appellant initially assigned error to the trial court's order, he abandoned this assignment of error by failing to brief and argue it on appeal.).

Defendant abandoned these two assignments of error and, by doing so, does not challenge *any* of the trial court's findings of fact. Unchallenged findings of fact are binding on appeal. *See In re Moore*, 306 N.C. 394, 404, 293 S.E.2d 127, 133 (1982) ("Since respondent did not except to any of the findings [of fact], they are presumed to be correct and supported by evidence."); *see also State v. Watkins*, 337 N.C. 437, 438, 446 S.E.2d 67, 68 (1994) (Findings of fact which are not excepted to are binding on appeal.); *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) (Where no exception is taken to a finding of fact, the

finding is presumed to be supported by competent evidence and is binding on appeal.).

Our appellate courts have long held that an appellant's failure to assign error to each finding of fact and to identify in his brief which findings are challenged, will result in the presumption that the findings are supported by competent evidence. *State v. Cheek*, 351 N.C. 48, 63, 520 S.E.2d 545, 554 (1999); see *Concrete Service Corp. v. Investors Group, Inc.*, 79 N.C. App. 678, 684, 340 S.E.2d 755, 759-60 (Finding that the failure of appellant to "except and assign error separately to each finding or conclusion that he or she contends is not supported by the evidence . . . will result in waiver of the right to challenge the sufficiency of the evidence to support particular findings of fact."), *cert. denied*, 317 N.C. 333, 346 S.E.2d 137 (1986).

The trial court entered the following uncontested findings of fact:

3. That the defendant Hyman was indicted by a Bertie County grand jury on July 30, 2001 for first-degree murder.
4. That attorney Teresa Smallwood was court appointed to represent Defendant Hyman on May 14, 2001.
5. That attorney Hackney High was appointed co-counsel to represent Defendant Hyman on March 13, 2002.
6. That the defendant Hyman was tried on the charge of first-degree murder and was convicted of the charge by a jury on September 12, 2003.
7. That during the trial of the case the State of North Carolina called a Derrick Speller as a witness.

8. That Derrick Speller was cross-examined by Attorney Smallwood whereby Mr. Speller testified that he had previously been represented by Attorney Smallwood at a probation violation hearing in Bertie County district court.

9. That Derrick Speller had employed the services of an attorney[,] Tonza Ruffin[,] to represent him at the probation hearing and Ms. Ruffin had entered an appearance of representation in a Bertie County district court on August 14, 2002.

10. That Attorney Tonza Ruffin was a law partner with Attorney Smallwood at the time Derrick Speller employed Attorney Ruffin.

11. That on September 26, 2002 Attorney Smallwood appeared as counsel with Derrick Speller in the Bertie County district court at his probation violation hearing.

12. That Ms. Smallwood never spoke with Derrick Speller about his case prior to September 26, 2002 and only spoke with him five or ten minutes prior to the violation hearing.

13. That Attorney Smallwood during her five to ten-minute conversation with Derrick Speller *never spoke with Derrick Speller concerning any matter relating to her representation of Terrence Hyman.*

14. During her five to ten-minute conversation with Derrick Speller Attorney Smallwood did *not obtain any information for or about Derrick Speller that she could have used to impeach or attack Derrick Speller's credibility as a witness during the trial of the defendant Terrence Hyman.*

(Emphasis supplied).

Defendant failed to show the trial court erred when it concluded that Smallwood's representation of him was not adversely affected by her previous representation of Speller. Uncontested findings of fact show Smallwood never spoke with Speller about any

matter concerning defendant when she represented Speller at Speller's probation violation hearing. Smallwood did not obtain any "[c]onfidential communications from either or both of a revealing nature which might otherwise prove to be quite helpful in the preparation of a case might be suppressed." See *James*, 111 N.C. App. at 790, 433 S.E.2d at 758.

Smallwood's representation of Speller at his probation hearing did not continue before, during, or after her representation at defendant's trial. As distinct from *James*, there was no "overlap of representation prior to and at the time of trial" between Smallwood's prior representation of Speller at his probation violation hearing and her representation of defendant at his first-degree murder trial.

Smallwood did not represent Speller on his underlying charge that led to his probation violation hearing and did not represent Speller after the probation violation hearing. Smallwood's representation of Speller was limited to five to ten minutes prior to and during the probation violation hearing.

No evidence was shown that Smallwood's prior representation of Speller "affected [her] ability to effectively impeach the credibility of witness [Speller]." *Id.* The record on appeal contains no evidence that Smallwood obtained any information about either Speller or defendant during her representation of defendant that Smallwood could have used to impeach Speller during trial.

James is distinguishable from the facts here. In *James*, this Court held the record "clearly showed on its face that the conflict

adversely affected counsel's performance" and reasoned the conflict adversely affected counsel's performance because: (1) "the overlap of representation prior to and at the time of trial of both parties . . . resulted in an unavoidable conflict as to confidential communications, and affected counsel's ability to effectively impeach the credibility of [the] witness and (2) counsel never explored the prosecution witness's suggested plea. 111 N.C. App. at 790-91, 433 S.E.2d at 758. In *James*, the defense attorney represented a prosecution witness before, during, and after defendant's trial. 111 N.C. App. at 790-91, 433 S.E.2d at 758. Here, Smallwood's representation of Speller was completed nearly one year prior to the beginning of defendant's trial. The trial court's findings of fact that are binding on appeal show Smallwood never spoke with Speller about defendant and did not obtain any information about him that could be used to impeach him. Defendant has failed to show Smallwood's prior representation of Speller adversely affected her representation of defendant. This assignment of error is overruled.

III. Conclusion

Although defendant initially assigned error to the trial court's findings of fact numbered 13 and 14, he failed to argue either assignment of error on appeal. Assignments of error not argued are deemed abandoned. *Cheek*, 351 N.C. at 63, 520 S.E.2d at 554. Defendant failed to show the trial court erred when it found and concluded Smallwood's representation of him was not adversely

affected by her previous representation of Speller. The trial court's order is affirmed.

Affirmed.

Judges ELMORE and GEER concur.

Report per Rule 30(e).