NO. COA08-1495

NORTH CAROLINA COURT OF APPEALS

Filed: 18 August 2009

STATE OF NORTH CAROLINA

v. Cumberland County
No. 07 CRS 063287

JEFFERY ROBINSON

Appeal by defendant from judgments entered 26 June 2008 by Judge Jack A. Thompson in Cumberland County Superior Court. Heard in the Court of Appeals 20 May 2009.

*Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Daniel D. Addison, for the State.*

*Moser, Schmidly & Roose, by Richard G. Roose, for defendant-appellant.*

HUNTER, Robert C., Judge.

Defendant appeals from jury convictions finding him guilty of 1) felonious breaking and entering; 2) felonious larceny 3) felonious possession of stolen goods; and 4) having obtained habitual felon status. Defendant asserts that the trial court's failure to conduct a sufficient inquiry into defense counsel's potential conflict of interest resulted in reversible error. After careful review, we find no prejudicial error.

Background

On 13 April 2008, subsequent to the issuance of indictments in this matter, defendant wrote a letter to Judge E. Lynn Johnson, the

presiding judge in the Superior Court of Cumberland County.[1] In this letter, defendant expressed his desire to review the discovery materials obtained in his case and claimed that his attorney, Ms. Pam Leslie ("Ms. Leslie"), a court-appointed public defender, refused to provide him the discovery materials per office policy. On 15 April 2008, Judge Johnson issued a letter to defendant and provided a carbon copy to Ms. Leslie. The letter denied defendant's request for a copy of the discovery material, but advised Ms. Leslie to contact defendant to determine if he wished to view the original documents from jail.

On 29 February 2008, the trial court received another letter from defendant stating that he wished to have Ms. Leslie removed from his case because he felt that she did not have his "best interest at heart." On 12 March 2008, Judge Johnson sent defendant a letter indicating that a hearing would be held with regard to defendant's "letter requesting new counsel."[2]

On 4 April 2008, a pretrial hearing was held, and defendant asserted his desire to have Ms. Leslie removed from his case because she failed to provide him with a copy of the discovery material in his case and he did not feel that there was adequate time for him to review the file and prepare for trial. Ms. Leslie informed the court that defendant had reviewed the discovery

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[1] Defendant incorrectly dated the letter 13 April 2007.

[2] Defendant's letter, which was incorrectly dated but filed 29 February 2008, did not specifically request new counsel, but asked that Ms. Leslie be removed from the case. Defendant intimated that he was independently searching for new counsel.

material and that he could review it again if he chose, but that he could not keep a copy of the material in jail. Defendant informed the court that he wished for Ms. Leslie to remain his counsel until he was able to hire another attorney. Ms. Leslie was not removed from the case at that time.

On 3 June 2008, at a pretrial motion hearing, defendant again addressed the court and asked to receive a copy of the discovery materials. Ms. Leslie informed the court that defendant reviewed the materials twice and she had gone over it with him. The court did not order counsel to give defendant a copy of the discovery materials, and at that time, defendant did not ask that Ms. Leslie be removed from his case. Defendant did not obtain private counsel.

Trial was set for 23 June 2008, and on the morning of trial, defendant requested that Ms. Leslie be removed from his case. Defendant expressed concern that he did not know what Ms. Leslie would say at trial, that he had not spoken with her enough, and that he was dissatisfied with the way in which she had handled plea negotiations. Ms. Leslie claimed that she had many conversations with defendant about plea bargaining and trial, and that he declined the plea offer presented. Ms. Leslie further informed the court that on the Saturday before trial, defendant gave her the name of a witness he wished to call at trial. According to Ms. Leslie, this witness was currently being represented by the Public Defender's Office. The following dialogue then took place:

> MS. LESLIE: Based on our current representation of this person, I cannot pursue

> any possible defense that that individual may be able to offer my client. I also cannot disclose the nature of what my client told me about that defense because we currently represent this other individual. So it really ties my hands, and I need to bring that to the court's attention because that is one of the things that he pointed out on Saturday when we had this discussion. That name did not come up before Saturday morning; otherwise, I would have investigated that and brought it to the court's attention at an earlier time. I don't know if he wants to address the court on that issue or any other issue, but I felt I needed to bring that to the court's attention on the record.
>
> THE COURT: Okay. Mr. Robinson, getting back to you. Let me inquire again, is there any reason you cannot continue cooperating with your attorney in the trial of this case, if it's tried? And apparently, it's going to be tried.
>
> THE DEFENDANT: Yes, sir. I would like to have another representation, if possible. I'll go -- I'll represent myself.

The court then explained to defendant the repercussions of proceeding *pro se*. When asked if he understood, defendant responded, "[y]es sir. I don't want to represent myself, but -- [.]" The court interjected,

> I'm not going to . . . voluntarily remove Ms. Leslie as counsel of record. And that's, uh -- if you can -- you've told me nothing that constitutes grounds for her removal. She's done everything she's supposed to do and now is prepared to go to trial. We have a jury panel waiting to start the trial of this case. And this trial will go on.

Defendant did not raise the issue of the witness he wished to call. Defendant continued to assert his desire for a new attorney, and the trial judge refused to grant this request as he could not ascertain any reason for doing so. The trial court determined that

defendant had waived his right to counsel, though defendant refused to sign the waiver. Defendant was then asked what witnesses he intended to call for trial, and the only witness he named was Willie Edge ("Mr. Edge"), the witness Ms. Leslie referenced in her earlier discussion with the court.

Before the jury was called in, the court once again asked defendant if he wished for Ms. Leslie to represent him, and he responded, "[s]he can help me out." The trial court more pointedly asked defendant if he wished for Ms. Leslie to resume her role and conduct his defense. Defendant definitively said "[n]o." The trial continued with defendant acting *pro se*, but Ms. Leslie was appointed as standby counsel. On 25 June 2008, defendant called Mr. Edge to testify. The court gave defendant an opportunity to first question Mr. Edge outside of the presence of the jury, at which time Mr. Edge stated that he would not answer questions pursuant to his rights under the Fifth Amendment. Mr. Edge was never called before the jury. Defendant continued to represent himself throughout the trial. The jury returned a verdict of guilty on all charges, except felony conspiracy, on 26 June 2008. Judgment was entered on the convictions of felonious breaking and entering and felonious larceny. Defendant was sentenced to two consecutive terms of 121 to 155 months imprisonment.

## Analysis

The sole argument presented by defendant on appeal is that when Ms. Leslie notified the court that her office represented a witness whom defendant wished to call at trial, i.e. Mr. Edge, the

trial court was required to conduct an inquiry regarding a potential conflict of interest, and the trial court's failure to do so resulted in denying defendant effective assistance of counsel and constitutes reversible error per se.

"'It is well settled that de novo review is ordinarily appropriate in cases where constitutional rights are implicated.'" *State v. Maynard*, __ N.C. App. __, __, 673 S.E.2d 877, 879 (quoting *Piedmont Triad Reg'l Water Auth. v. Sumner Hills, Inc.*, 353 N.C. 343, 348, 543 S.E.2d 844, 848 (2001)), *disc. review denied*, 363 N.C. 259, 677 S.E.2d 165 (2009).

> The right to assistance of counsel is guaranteed by the Sixth Amendment to the Federal Constitution and by Article I, Sections 19 and 23 of the Constitution of North Carolina. The Sixth Amendment guarantee is made applicable to the states by the Fourteenth Amendment to the Federal Constitution. This right is not intended to be an empty formality but is intended to guarantee effective assistance of counsel.

*State v. Sneed*, 284 N.C. 606, 611-12, 201 S.E.2d 867, 871 (1974) (citations omitted); *see also Avery v. Alabama*, 308 U.S. 444, 84 L. Ed. 377 (1940); *Powell v. Alabama*, 287 U.S. 45, 77 L. Ed. 158 (1932).

> While it is a fundamental principle that an indigent defendant in a serious criminal prosecution must have counsel appointed to represent him, an indigent defendant does not have the right to have counsel *of his choice* appointed to represent him. This does not mean, however, that a defendant is never entitled to have new or substitute counsel appointed. A trial court is constitutionally required to appoint substitute counsel whenever representation by counsel originally appointed would amount to denial of defendant's right to effective assistance of

> counsel, that is, when the initial appointment has not afforded defendant his constitutional right to counsel.

*State v. Thacker*, 301 N.C. 348, 351-52, 271 S.E.2d 252, 255 (1980) (citations and footnote omitted). While the trial court in the case *sub judice* was satisfied that Ms. Leslie provided effective assistance to defendant up until the time defendant decided to proceed *pro se*, defendant nonetheless requested new counsel. Defendant argues that his right to substitute counsel in the event of ineffective assistance of counsel encompasses a duty for the trial court to, at the very least, make an inquiry into the reasons why defendant might request substitute counsel. *Thacker* makes it clear, however, that the trial court is not required to make a detailed inquiry into a defendant's dissatisfaction with his or her appointed counsel, holding:

> Thus, when faced with a claim of conflict and a request for appointment of substitute counsel, the trial court must satisfy itself only that present counsel is able to render competent assistance and that the nature or degree of the conflict is not such as to render that assistance ineffective.

*Id.* at 353, 271 S.E.2d at 256. Here, since the trial court was satisfied that defense counsel could provide competent and effective assistance based upon defendant's reasons for requesting new counsel, it properly declined to make a detailed inquiry into the conflict.

However, the specific issue in this case is whether the trial court was required to make a detailed inquiry into a potential conflict of interest, not defendant's general displeasure with Ms.

Leslie's representation. *Thacker* does not address that issue. It is undisputed that once defense counsel apprised the trial court of a potential conflict of interest in calling a witness whom Ms. Leslie's office was currently representing in an unrelated matter, the trial court failed to inquire into the nature of this potential conflict of interest. Thus, the question on appeal is whether the trial court erred in failing to make such an inquiry.

While defendant in this case opined about Ms. Leslie's service, he did not raise the potential conflict of interest as grounds for appointing substitute counsel. "When a defendant fails to object to a conflict of interest at trial, a defendant 'must demonstrate that an actual conflict of interest adversely affected his lawyer's performance.'" *State v. Mims*, 180 N.C. App. 403, 409, 637 S.E.2d 244, 248 (2006) (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 348, 64 L. Ed. 2d 333, 346-47 (1980)); *see also State v. Bruton*, 344 N.C. 381, 391, 474 S.E.2d 336, 343 (1996).

"'[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.'" *Mims*, 180 N.C. App. at 409, 637 S.E.2d at 248 (quoting *Cuyler*, 446 U.S. at 349-50, 64 L. Ed. 2d at 347). Accordingly, while defendant need not demonstrate prejudice, he must show that the adequacy of his representation was affected by an actual conflict of interest. "Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice." *Strickland v. Washington*, 466 U.S. 668, 692, 80 L. Ed. 2d 674, 696 (1984). Defendant argues

that the trial court required him to represent himself *pro se* when the court refused to appoint substitute counsel at his request. This did not amount to an actual or constructive *denial* of counsel. The court determined that Ms. Leslie could competently and effectively represent defendant despite his complaints. Defendant then decided, of his own volition and against the trial judge's recommendation, to represent himself. Indigent defendants do not have a right to choose their appointed counsel, and Ms. Leslie was retained in an advisory role to defendant for the duration of the trial. Thus, prejudice cannot be presumed in this case based on denial of assistance of counsel.

Defendant relies heavily on the case of *State v. James*, 111 N.C. App. 785, 433 S.E.2d 755 (1993). There, "[d]efendant argue[d] that he was deprived of his federal and state constitutional rights to the full and effective assistance of counsel and due process of law by trial counsel's conflicting interests in *simultaneously representing defendant and State's witness* . . . ." *Id.* at 788, 433 S.E.2d at 757 (emphasis added). The court agreed with defendant and held:

> [I]n a situation of this sort, the practice should be that the trial judge inquire into an attorney's multiple representation once made aware of this fact. If the possibility of conflict is raised before the conclusion of trial, the trial court must take control of the situation. A hearing should be conducted to determine whether there exists such a conflict of interest that the defendant will be prevented from receiving advice and assistance sufficient to afford him the quality of representation guaranteed by the sixth amendment.

*Id.* at 791, 433 S.E.2d at 758 (citations and quotations omitted). The Court further held:

> No such inquiry was made in the instant case, and the failure of the trial judge to conduct an inquiry, in and of itself, constitutes reversible error. Ordinarily, we would remand the case to the trial court for a hearing to determine if the actual conflict adversely affected the lawyer's performance. However, where the record, as in this case, clearly shows on its face that the conflict adversely affected counsel's performance, we will not remand for an evidentiary hearing, but order a new trial.

*Id.* at 791, 433 S.E.2d at 759. Accordingly, this Court ordered a new trial. *Id.*

*James* makes it clear that the trial court must inquire into a potential conflict of interest. *Id.* at 791, 433 S.E.2d at 758. The trial court in this case did not conduct an inquiry into Ms. Leslie's potential conflict of interest; therefore, we find that the trial court erred in such inaction. However, unlike in *James*, there was no obvious adverse affect on defendant's case due to a conflict of interest. In *James*, since the defense attorney simultaneously represented defendant and the State's witness, albeit in unrelated matters, the attorney owed a duty of loyalty to both. This posed clear conflicts for the attorney, as he could not disclose confidential communications with the witness to the court nor could he vigorously cross-examine the witness for the benefit of his client. *Id.* at 790, 433 S.E.2d at 758. Ultimately, this Court found that the attorney "actively represent[ed] conflicting interests and this adversely affected defendant herein." *Id.*

No such conflict exists in the case *sub judice*. Here, counsel did not simultaneously represent defendant and a witness for the State. Counsel was not subject to divided loyalties. Rather, counsel disclosed a *potential* conflict of interest to the court to ensure that an individual represented by her office in an unrelated matter would not be incriminated.

An important aspect of this case is that defendant decided to represent himself for reasons unrelated to any potential conflict of interest. Furthermore, defendant, representing himself *pro se*, was able to conduct a *voir dire* of Mr. Edge and discovered that he would not, in any circumstance, provide meaningful testimony. Defendant then decided not to call Mr. Edge to the stand before the jury. Therefore, even if defense counsel's inability to question Mr. Edge amounted to an actual conflict of interest, that hindrance proved benign insofar as the witness ultimately refused to testify. Because we are able to determine from the face of the record that any conflict of interest did not adversely affect defense counsel's performance, we find that there would be no issues to be determined by the trial court on remand and the trial court's error in failing to conduct an inquiry does not warrant a new trial.

In sum, we hold that the trial court erred in failing to inquire into the potential conflict of interest, but further hold that defendant has not shown that his representation was affected by an actual conflict and is therefore not entitled to a new trial.

No Prejudicial Error.

Judges STEELMAN and GEER concur.

Report per Rule 30(e).