NO. COA14-566

NORTH CAROLINA COURT OF APPEALS

Filed: 31 December 2014

STATE OF NORTH CAROLINA

v. Johnston County
No. 13CRS001749

ANTHONY CHRIS JOHNSON,
Defendant.

Appeal by defendant from judgment entered on or about 20 November 2013 by Judge Reuben F. Young in Superior Court, Johnston County. Heard in the Court of Appeals 23 October 2014.

Attorney General Roy A. Cooper, III by Assistant Attorney General Brian D. Rabinovitz, for the State.

Reece & Reece by Michael J. Reece, for defendant-appellant.

STROUD, Judge.

Anthony Chris Johnson ("defendant") appeals from a conviction for possession of an immediate precursor chemical knowing, or having reasonable cause to believe, that the immediate precursor chemical will be used to manufacture methamphetamine. *See* N.C. Gen. Stat. § 90-95(d1)(2) (2013). Defendant contends that (1) the trial court erred in ordering defendant's counsel's legal assistant to appear to testify at trial; and (2) his trial counsel did not provide effective

assistance of counsel due to a conflict of interest. Finding prejudicial error, we hold that defendant is entitled to a new trial.

I. Background

The State's evidence showed that on the morning of 3 April 2013, defendant called James Best and asked him to purchase a box of Sudafed for him. That afternoon, defendant drove Best to a Walmart store. Defendant's wife, Tina Lynn, rode in the front passenger seat. Best entered the Walmart and bought a box of Sudafed. Best returned to the car and gave the box of Sudafed to defendant. Defendant then drove Lynn and Best to a Walgreens store. Defendant entered the Walgreens, leaving Lynn and Best in the car.

After receiving a report of possible drug activity, Officer Sean Cook arrived in the Walgreens parking lot. Officer Cook approached defendant as he was exiting the Walgreens and walking toward the car in which Lynn and Best were waiting. Officer Cook asked defendant if he could search his person, and defendant consented. Officer Cook found a pill in a clear container and car keys in defendant's pockets. Officer Cook asked defendant if he could search the car, and defendant consented. After Officer Cook directed Lynn and Best to leave

the car, Officer Cook conducted a search of the car and found three boxes of Walgreens instant cold packs, three cans of starter fluid, a four-pack of Energizer Ultimate lithium batteries, a 26-ounce can of table salt, and a box of pseudoephredine hydrochloride tablets. Officer Cook arrested defendant for possession of methamphetamine precursors.

On or about 5 August 2013, a grand jury indicted defendant for possession of an immediate precursor chemical, pseudoephredine, knowing, or having reasonable cause to believe, that the immediate precursor chemical will be used to manufacture methamphetamine. *See* N.C. Gen. Stat. § 90-95(d1)(2). Defendant pled not guilty. At trial, the State proffered expert testimony that all of the items found by Officer Cook are necessary to manufacture methamphetamine. The State also used testimony by Margarita Martinez, defendant's counsel's legal assistant, to authenticate defendant's written confession of "full responsibility" for the charge against him. On or about 20 November 2013, a jury found defendant guilty of possession of an immediate precursor chemical knowing, or having reasonable cause to believe, that the immediate precursor chemical will be used to manufacture methamphetamine. On or about 20 November 2013, the trial court sentenced defendant to

16 to 29 months' imprisonment. Defendant gave notice of appeal in open court.

II. Order to Appear

A. Standard of Review

We review questions of law *de novo*. *State v. Harris*, 198 N.C. App. 371, 377, 679 S.E.2d 464, 468, *disc. rev. denied*, 363 N.C. 585, 683 S.E.2d 211 (2009).

B. Analysis

Defendant challenges the trial court's order, under threat of contempt, that Martinez, his own counsel's legal assistant, appear as a witness for the State. On or about 8 November 2013, the State served Martinez a subpoena directing her to appear to testify in this case at 10:00 a.m. on the weeks of Friday, November 8, 2013, Monday, December 2, 2013, and Monday, January 13, 2014.[1] The trial did not begin on any of the dates listed on the subpoena; rather, it began on Monday, November 18, 2013 and ended on Wednesday, November 20, 2013. Defendant contends that Martinez was not required to appear on Tuesday, November 19, 2013, because the subpoena did not include the week of Monday, November 18, 2013. The State counters that Martinez was required to appear on Friday, November 8, 2013 and then to

[1] The subpoena incorrectly lists the last date as January 13, 2013, instead of January 13, 2014.

continue to appear "from session to session" until released by the trial court. *See* N.C. Gen. Stat. § 8-63 (2013) ("Every witness, being summoned to appear in any of the said courts, in manner before directed, shall appear accordingly, and . . . continue to attend from session to session until discharged[.]"). The use of "term" refers to the typical six-month assignment of a superior court judge, whereas "session" refers to the typical one-week assignment within a term. *Capital Outdoor Advertising v. City of Raleigh*, 337 N.C. 150, 154 n.1., 446 S.E.2d 289, 291 n.1 (1994).

But the trial court did not hold a session for this case on Friday, November 8; rather, the session and the trial began over a week later, on Monday, November 18.[2] Defendant's counsel also pointed out to the trial court that the Johnston County Superior Court did not hold a session for any case on Friday, November 8. Because Martinez was directed to appear specifically for this case for specific dates and the trial court did not hold a session of court at which this case was calendared on Friday,

[2] We also note that the State apparently contemplated that the case may possibly be reached at one of several sessions of court, as three were specified on the subpoena. If the State truly believed that the subpoena for November 8, 2013 would remain continuously in force from November 8 until the case was actually reached, there would have been no reason to list the two later dates on the subpoena.

November 8, Martinez was not required to appear on Friday, November 8. We interpret "from session to session" to mean that first there must be a "session" of court at which a particular case is scheduled to be heard to trigger compulsory attendance for that case. *See* N.C. Gen. Stat. § 8-63. From that point onward, a properly subpoenaed witness is required to appear "from session to session" for that case until discharged. *See id.* Given that Martinez was not required to appear on Friday, November 8, we hold that Martinez was not required by the State's subpoena to appear on Tuesday, November 19.

The trial court strongly expressed its displeasure with defendant's counsel because it believed that counsel "knew that [the] subpoena did not have the accurate date on it." But defendant had no duty to ensure that State's witnesses were properly subpoenaed. *See State v. Love*, 131 N.C. App. 350, 358, 507 S.E.2d 577, 583 (1998) ("[T]he State had no burden to see to it that [defendant] procured the attendance of the witnesses he desired to have present."), *aff'd per curiam*, 350 N.C. 586, 516 S.E.2d 382, *cert. denied*, 528 U.S. 944, 145 L.Ed. 2d 280 (1999). Because Martinez had not been properly subpoenaed to appear on Tuesday, November 19, we hold that the trial court erred in

ordering, under threat of contempt, that Martinez appear on that day as a witness for the State.

C. Prejudice

"A defendant is prejudiced . . . when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C. Gen. Stat. § 15A-1443(a) (2013). The State used Martinez's testimony to authenticate defendant's written confession of "full responsibility" for the charge against him. The prosecutor also elicited testimony that Martinez worked for defendant's counsel. Apart from defendant's confession, the only evidence linking defendant to the methamphetamine precursors is Officer Cook's testimony that he discovered the methamphetamine precursors in the car in which defendant and two other passengers were riding and Best's testimony that defendant had asked him to buy a box of Sudafed and had accepted the box from him. But for the written confession, there is a reasonable possibility that the jury may have believed that one or both of the other people in the car were responsible for possession of the precursors. Accordingly, we hold that, had Martinez not appeared at trial, there is a "reasonable possibility" that defendant would not have been

convicted of possession of an immediate precursor chemical knowing, or having reasonable cause to believe, that it will be used to manufacture methamphetamine. *See id.* Because the trial court committed prejudicial error, we hold that defendant is entitled to a new trial.[3]

III. Conflict of Interest

Defendant next contends that his trial counsel did not provide effective assistance of counsel due to a conflict of interest arising from Martinez testifying as a prosecution witness. Given the likelihood that Martinez will testify again on remand, we address this issue.

A criminal defendant has the right to effective assistance of counsel under both the federal and state constitutions. *Strickland v. Washington*, 466 U.S. 668, 686, 80 L.Ed. 2d 674, 692 (1984); *State v. Braswell*, 312 N.C. 553, 562-63, 324 S.E.2d 241, 248 (1985).

> The right to effective assistance of counsel includes the right to representation that is free from conflicts of interest.
>
> When a defendant raises a claim of ineffective assistance of counsel, in most instances he or she must show that (1)

[3] Defendant also contends that his constitutional right to be present was violated, because he was not present during the trial court's conference with the lawyers regarding the State's subpoena of Martinez. Because we hold that defendant is entitled to a new trial, we do not reach this issue.

> counsel's performance was deficient and (2) the deficient performance prejudiced the defense. However, when the claim of ineffective assistance is based upon an actual, as opposed to a potential, conflict of interest arising out of an attorney's multiple representation, a defendant may not be required to demonstrate prejudice under *Strickland* to obtain relief.

State v. Choudhry, 365 N.C. 215, 219, 717 S.E.2d 348, 352 (2011) (citations and quotation marks omitted). Although the conflict of interest here does not arise from an attorney's representation of a prosecution witness, we analogize this case to that line of cases, because here defendant's counsel employed Martinez, a prosecution witness. *See, e.g.*, *id.*, 717 S.E.2d 348; *State v. James*, 111 N.C. App. 785, 433 S.E.2d 755 (1993).

> When the court becomes aware of a potential conflict of interest with regard to a defendant's retained counsel, especially when the person with the potentially compelling interest is known to be a prosecution witness[,] the [trial] judge shall conduct a hearing to determine whether there exists a conflict of interest. In addition, the trial judge should see that the defendant is fully advised of the facts underlying the potential conflict and is given the opportunity to express his or her views.

James, 111 N.C. App. at 791, 433 S.E.2d at 758-59; *see also State v. Ballard*, 180 N.C. App. 637, 643, 638 S.E.2d 474, 479 (2006), *disc. rev. denied and dismissed*, 361 N.C. 358, 646

S.E.2d 119 (2007). A defendant can waive his right to conflict-free representation, if done knowingly, intelligently, and voluntarily. *James*, 111 N.C. App. at 791-92, 433 S.E.2d at 759. Defendant here had no opportunity to knowingly, intelligently, and voluntarily waive any conflict that may have existed. *See id.*, 433 S.E.2d at 759.

In *State v. James*, the defendant's counsel represented a prosecution witness in another matter. *Id.* at 788, 433 S.E.2d at 757. Here, although the nature of the relationship between defendant's counsel and the prosecution witness was employer and employee, the same types of concerns exist.

> 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. Here, the trial court was fully aware that Martinez was employed by defendant's counsel and, perhaps for that reason, just prior to her testimony, had ordered her to appear despite the lack of a valid subpoena.

The record does not reveal the circumstances under which Martinez came to notarize an incriminating statement for her own employer's client, and it would seem quite likely that this information may implicate privileged attorney-client communications. As an employee of counsel, Martinez was potentially aware of communications and information that would be protected by the attorney-client privilege. *See Scott v. Scott*, 106 N.C. App. 606, 612, 417 S.E.2d 818, 822 (1992) ("[C]onfidential communications made to an attorney in his professional capacity by his client are privileged, and the attorney cannot be compelled to testify to them unless his client consents."), *aff'd*, 336 N.C. 284, 442 S.E.2d 493 (1994). This privilege applies to Martinez, as an employee of defense counsel. *See State ex rel. ESPN v. Ohio State Univ.*, 970 N.E.2d 939, 948 (Ohio 2012) (per curiam) ("[T]he attorney-client privilege applies to agents working on behalf of legal counsel[.]"); *Augustine v. Allstate Ins. Co.*, 807 N.W.2d 77, 85 (Mich. Ct. App. 2011) ("The attorney-client privilege attaches to direct communication between a client and his attorney as well as communications made through their respective agents."). Placing defendant's counsel in the position that he may need to extensively cross-examine Martinez but cannot because this may

require disclosure of privileged communications between Martinez or defendant's counsel and defendant raises a potentially severe conflict of interest. *See State v. Gonzelez*, 234 P.3d 1, 13-14 (Kan. 2010) (holding that, "[i]n view of the role and importance of a trustworthy and confidential attorney-client relationship, particularly in [an adversarial] system of criminal justice, and of the potential for damage to that system if the relationship is too cavalierly invaded or compromised," a prosecutor who wishes to subpoena a criminal defense counsel to testify about a current or former client's confidential information must establish, among other elements, that the information sought is not protected by the attorney-client privilege).

The State argues that the only purpose for Martinez's testimony was to provide the foundation for admission of the defendant's statement, since she notarized it. The State's argument implies that Martinez had no relevant knowledge of the case other than the fact that defendant signed the statement. This assumption may be true, but the record does not demonstrate it since no inquiry was made into the conflict of interest. And if this assumption were the case, the State had no reason to ask Martinez about her employment as defense counsel's legal assistant—other than to let the jury know that defendant had

essentially confessed to his own attorney.

The trial court did not conduct a *James* hearing to determine whether an actual conflict of interest existed. *See James*, 111 N.C. App. at 791, 433 S.E.2d at 758-59. Accordingly, we hold that, should Martinez testify again for the State on remand, the trial court must conduct a hearing to determine whether an actual conflict of interest exists. *See id.* at 791, 433 S.E.2d at 758-59; *Ballard*, 180 N.C. App. at 643, 638 S.E.2d at 479. We also note that even if defendant has new trial counsel on remand, the issue of privileged communications between defendant and his prior counsel still exists and should be addressed.

IV. Conclusion

Because the trial court committed prejudicial error in ordering Martinez to appear, we hold that the defendant is entitled to a new trial.

NEW TRIAL.

Judges GEER and BELL concur.