

No. 63997-8-I

**COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON, Respondent,

v.

ROBERTO HERNANDEZ, Appellant.

BRIEF OF RESPONDENT

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A. ASSIGNMENTS OF ERROR

None.

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Whether defendant has shown that defense counsel actively represented conflicting interests that adversely affected his performance based on speculation that his public defender failed to list and call the confidential informant as a witness in his trial for delivery of drugs because the witness had been a client of the Public Defender's Office, where the witness had an outstanding warrant for his arrest.

C. FACTS

1. Facts

On January 27, 2009 Appellant Roberto Hernandez was charged with Unlawful Delivery of a Controlled Substance, to-wit: Heroin, in violation of RCW 69.50.401(2)(a) for his acts on January 22, 2009. CP 57-58.

Prior to trial, the prosecutor, who had just been assigned to try the case, informed the court that law enforcement had attempted to, but could not find the confidential informant in the case. 1RP 3-4.¹ She informed the court that the name of the informant had been disclosed to defense counsel in interviews, and that the Public Defender's Office represented

¹ 1RP refers to the verbatim report of proceedings for 7/14/09; 2RP to the volume for 7/15-16/09, and 3 RP to the 8/11/09 volume.

him on a pending case in which he was out on warrant status. 1RP 4. She then advised the court that she would be seeking to exclude information about the informant's warrant and the pending case, but that she intended to elicit testimony that the police had attempted to find him. Id. In response the public defender argued that he was entitled to question the officers about the informant's history and reliability, and informed the court that he intended to request a missing witness instruction given the informant's absence:

... but I can also tell the court I think it would be inappropriate to shield the informant just by his absence from the type of impeachment that would normally be a part of any type of trial that deals with a confidential informant that is working off felony charges. He's certainly got a motive and bias to set somebody up.

1RP 4-5. The prosecutor responded that a missing witness instruction would not be appropriate since the informant was not uniquely available to the State because he was also a client of the Public Defender's Office. At the time of the motions in limine the next day, the public defender reiterated that he should be permitted to inquire about the circumstances of the informant's participation in the controlled buy and his motivations for that participation. 2RP 4-5.

At trial in addition to eliciting testimony about the controlled buy that the informant participated in, the prosecutor elicited testimony that the

informant had been working off a possession of heroin charge, that informants frequently have their own charges and can be drug users, that it is common to lose track with informants because of their drug use and that informants tend to go back to using once their contract with the police is complete. 2RP 16-17, 105. The officer testified that although the informant had come voluntarily to them, they had been unable to find the informant: they had called the phone numbers they had for him, gone to his residence and even surveilled his residence in an attempt to find him. 2RP 18.

On cross examination, defense counsel elicited testimony that “working off charges” means that the informant had to complete some transactions in order to try to get the charges dismissed or reduced. 2RP 48-49, 114-15, 127. He also elicited testimony that the informant’s absence wasn’t due to a desire to maintain his confidentiality, but that he had just decided on his own to disappear and a warrant was out for his arrest. 2RP 54-55, 111-13. The public defender also attempted to elicit testimony regarding the informant’s pending felony, but the State’s objection was sustained. 2RP 50-51. He also attempted to get the officer to testify that the informant wasn’t reliable. 2RP 111-12, 130.

The evidence produced at trial showed that on Jan. 22, 2009 the informant participated voluntarily in a controlled drug buy. 2RP 16, 18.

The informant went to the police station and made a “tipped phone call”² with the detective to purchase \$100 in heroin at Fred Meyer’s from a person who identified themselves as “Roberto” on the phone. 2RP 22-25. The informant was searched prior to the buy to make sure he didn’t have drugs or other money on him. 2RP 26-27. He was then given \$100 in buy money, a copy of which had been made showing the serial numbers. 2RP 19-20, 32, 97. The informant never left the detective’s sight until the detective dropped him off at Fred Meyer’s around 6 p.m. 2RP 69.

Other officers were stationed in unmarked cars in the store’s parking lot. 2RP 30, 34-35, 57. The informant walked into the entryway to the store and made a phone call to let the seller know he was there, as previously arranged. 2RP 34-35, 99. The informant then left the store and waited outside, without talking to or having contact with anyone. 2RP 28, 35-36, 59, 99. After a few minutes a white car, with no one but the driver in it, drove up and the informant got in the front passenger’s side of the car. 2RP 36, 59, 100. The car continued a little way through the parking lot, and after about 15-30 seconds, the informant got out of the car. 2RP 36, 38, 60-61, 100-01. After the informant got out, he headed back to the front of the store where he was arrested and searched, as had been

² A “tipped phone call” is one where the informant tips the receiver so the officer can listen in on the conversation. 2RP 23.

previously arranged. 2RP 28, 31, 37-39. When he was searched this second time, he didn't have any buy money on him, but he did have about .8 grams of heroin in a plastic baggie in his pants pocket. 2RP 39-40, 42, 134, 136.

Meanwhile other officers stopped the car. 2RP 60-62, 102. No one but Hernandez, the driver, was inside. 2RP 65, 107. Hernandez was arrested and read his rights. 2RP 65. When he was searched \$97 was found on him but no drugs. 2RP 67. When Hernandez asked the officers why he was arrested, the officer told him it was for delivering drugs. 2RP 68. Hernandez responded that he wasn't a dealer, he was just helping out a friend, that he was a heroin user, and that he purchased a half ounce from a dealer in Mt. Vernon. 2RP 68. When the officer told him that a half ounce was a large amount, Hernandez told the officer that before going to Mt. Vernon, he would collect money from his friends, buy the half ounce in Mt. Vernon and then distribute the drugs to his friends. 2RP 69. The car was searched and the \$100 buy money was found folded up in a wad in the center console area. 2RP 71, 98, 108, 142. No drugs or drug paraphernalia were found in the car. 2RP 117.

At the time jury instructions were discussed, the public defender requested a missing witness instruction because the informant didn't testify. 2RP 152-53. In response the prosecutor argued that the informant

was not peculiarly available to the State, that he had been represented by the Public Defender's Office and that the State was in the same position as defense in their ability to produce him for trial. 2RP 154. The court denied the request:

The only evidence in the record is that he is on the lam with a warrant for his arrest outstanding. The witness is not in the control of or peculiarly available to the State in this case. And there is an explanation as to why he was not a witness in the case and that they searched for him and they can't find him, he is on the lam.

2RP 154. In closing the public defender argued:

Well, the first thing we saw is that this case rises and falls on the back of an informant, a snitch, someone who is setting these types of situations up to get out of trouble. Someone who is trying to work off a felony charge by setting these types of things up. And if they don't, if they don't set up these types of transactions, if they don't convince the police that they've set up this type of transaction, then they're going to be treated as anyone else charged with a felony would be treated. So they have to perform. They have to do whatever they can to convince officers this is what happened. So, that's what you saw here today. You saw an individual, an informant, who set up Roberto Hernandez.

2RP 165-66. He went on to argue that the informant set up and used the time at the pay phone to obtain the drugs that he provided to the police.

2RP 167. After arguing why the evidence showed it was a set up, he summarized at the end: "This is a set up. That's what this was. Roberto Hernandez was set up by a drug addict who did this in order to get out of his own felony charges."

The jury found Hernandez guilty as charged. CP 31. At sentencing Hernandez faced a standard range of 20-60 months with an offender score of five. CP 20. The judge imposed a 36 month sentence. CP 22.

D. ARGUMENT

- 1. Hernandez cannot demonstrate from this record that his trial attorney had an actual conflict of interest that adversely affected his representation.**

Hernandez asserts his attorney was constitutionally ineffective under the Sixth Amendment because he had a conflict of interest that adversely affected his representation of Hernandez. Specifically, Hernandez alleges that the attorney, a public defender, had a duty of loyalty to the confidential informant in his case because the Public Defender's Office had represented the informant in another case. He alleges therefore that the public defender's continued representation of him and failure to call the informant as a witness was ineffective assistance of counsel. Hernandez also alleges that the trial court should have inquired into the potential conflict because it knew or should have known of the conflict. However, under current law, where defense counsel does not raise a conflict issue at the trial court, the question on appeal is limited to whether the attorney had an actual conflict that

adversely affected his representation of the defendant. Nothing in the record before this Court evidences that Hernandez's attorney was operating under an actual conflict that adversely affected his representation. The attorney had a difficult case, a controlled buy and a defendant who essentially confessed, saying that he was "just helping out a friend." The attorney was able to use the informant's absence to blame the informant and argue to the jury that Hernandez had been set up.

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense." U.S. Const. Amend. VI. This right encompasses the right to an attorney who is free from any conflict of interest in the case. State v. Dhaliwal, 150 Wn.2d 559, 566, 79 P.3d 432 (2003). On the other hand, "the possibility of conflict is insufficient to impugn a criminal conviction. In order to demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance." Cuyler v. Sullivan, 446 U.S. 335, 350, 100 S.Ct. 1708, 1719 (1980).

a. *the trial court did not err because no objection or allegation was made that counsel was operating under any conflict of interest.*

Hernandez asserts the trial court erred in failing to address a conflict of which it should have known.³ While a trial court should adequately inquire into conflicts of which it is made aware, “if the defendant does not make a timely objection in the trial court, a conviction will stand unless the defendant can show that his lawyer had an actual conflict that adversely affected the lawyer’s performance.” State v. Regan, 143 Wn. App. 419, 177 P.3d 783, *rev. den.*, 165 Wn.2d 1012 (2008). Hernandez relies upon Regan to support his argument that the trial court failed in its duty to inquire into the potential conflict. However, Regan specifically acknowledges that where a timely objection is not made in the trial court, alerting the trial court to the potential or alleged conflict, the standard to be applied on appeal is whether the attorney had an actual conflict that adversely affected his representation. In State v. Dhaliwal, the Washington Supreme Court acknowledged that the U.S. Supreme Court case of Mickens v. Taylor⁴ changed the rule previously set

³ While Hernandez alleges this error, he does not affirmatively state what the remedy would be for such an error.

⁴ Mickens v. Taylor, 535 U.S. 162, 122 S.Ct. 1237, 152 L.Ed.2d 291 (2002).

forth in In re Richardson,⁵ requiring reversal where a trial court fails to inquire into a conflict it knew or should have known of, and therefore abrogated that holding of In re Richardson. Dhaliwal, 150 Wn.2d at 570-71. As Hernandez and defense counsel never asserted a conflict of interest at the trial court, the only question before this court is whether the public defender had an actual conflict that adversely affected his representation of Hernandez.

b. *The record does not show that the public defender's representation was adversely affected by it.*

A defendant asserting a conflict of interest on the part of counsel under the Sixth Amendment must demonstrate that his attorney had an actual conflict of interest that adversely affected his performance.

Mickens v. Taylor, 535 U.S. 162, 122 S.Ct. 1237, 152 L. Ed. 2d 291 (2002); State v. Dhaliwal, 150 Wn.2d at 571.

Holding that the *possibility* of a conflict was not enough to warrant reversal of a conviction the *Sullivan* Court stated: '[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 of counsel.'

Dhaliwal, 150 Wn.2d at 573 (*quoting* Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980)). Defendant bears the burden of

⁵ In re Personal Restraint of Richardson, 100 Wn.2d 669, 675 P.2d 209 (1983).

demonstrating an actual conflict adversely affecting the attorney's performance. Id. at 573.

While a defendant must establish an actual conflict that had an adverse effect on his representation, he need not prove that the conflict had an effect on the outcome of the verdict. Mickens, 535 U.S. at 166. An actual conflict of interest is a conflict that adversely affected the attorney's performance, "as opposed to a mere theoretical division of loyalties." Mickens, 535 U.S. at 171; Dhaliwal, 150 Wn.2d at 570-71. Actual conflict requires a showing that the attorney's performance was "actually deficient in some specific way and that the deficiency was causally connected to the conflict of interest." Koste v. Dormire, 345 F.3d 974, 982-83 (8th Cir. 2003), *cert. denied*, 541 U.S. 1011 (2004). An actual conflict will not be found unless the defendant "can point to a specific instance in the record to suggest an actual conflict or impairment of his interest." State v. Martinez, 53 Wn. App. 709, 715, 770 P.2d 646, *rev. den.*, 112 Wn.2d 1026 (1989). Merely alleging that an attorney's trial tactics were questionable will seldom be sufficient to demonstrate an ineffective assistance of counsel claim based on conflict of interest. Dhaliwal, 150 Wn.2d at 572-73.

Hernandez references the Washington Rules of Professional Conduct in order to allege that the public defender was operating under a

conflict of interest.⁶ The issue under the Sixth Amendment is not whether there was a violation of rules of professional conduct, but only whether the attorney had an actual conflict that adversely affected his or her performance. The rules of professional conduct are only relevant if a conflict of interest is raised at the trial court level. State v. White, 80 Wn. App. 406, 412-13, 907 P.2d 310 (1995), *rev. den.* 129 Wn.2d 1012 (1996) (violation of RPC 1.7 “does not embody the constitutional standard for effective assistance of counsel on appeal” but may provide grounds for disqualification at the *trial level*) (emphasis added).

In State v. Hatfield, 51 Wn. App. 408, 754 P.2d 136 (1988), the defendant on appeal alleged that his attorney, a public defender, had an actual conflict of interest because a member of the Public Defender’s

⁶ Hernandez asserts that the public defender violated RPC 1.7 because all members of a law firm are treated as a single attorney under RPC 1.10. Even if public defenders fall under RPC 1.10 as a “law firm,” screening is an accepted practice in addressing potential and/or actual conflicts of interest under the RPCs. See, Sammamish Community Municipal Corp. v. City of Bellevue, 107 Wn. App. 686, 693, 27 P.3d 684 (2001), *rev. den.*, 145 Wn.2d 1023 (2002) (“it is accepted practice for different attorneys within the same public office to represent different clients with conflicting or potentially conflicting interests so long as an effective screening mechanism exists within the office sufficient to keep the clients’ interests separate.”); State v. Stenger, 111 Wn.2d 516, 522-523, 760 P.2d 357 (1988) (“There is a difference between the relationship of a lawyer in a private law firm and a lawyer in a public law office such as prosecuting attorney, *public defender*, or attorney general; accordingly, where a deputy prosecuting attorney is for any reason disqualified from a case, and is thereafter effectively screened and separated from any participation or discussion of matters concerning which the deputy prosecuting attorney is disqualified, then the disqualification of the entire prosecuting attorney’s office is neither necessary nor wise”) (emphasis added).

Office represented a key witness in the case in another matter. At trial that key witness invoked the 5th Amendment after consulting with an attorney appointed by the court who was not a public defender. *Id.* at 409. The defendant argued that his attorney owed a duty of loyalty to both the witness and himself and that the interests were adverse because the defendant had an interest in blaming the crime on the witness. Assuming without deciding that such circumstances constituted an actual conflict of interest, the court found that the defendant had failed to establish that the attorney had actively represented conflicting interests because he had failed to identify a “single act or omission on the part of his attorney which would suggest that she was caught in a ‘struggle to serve two masters.’” *Id.* at 412-13. The court also found that the attorney’s representation was not deficient, that she had presented a vigorous defense, even suggesting in closing that the witness was the one who should be presumed guilty of the crime. *Id.* at 413-14.

In *State v. Martinez*, the defendant, against his attorney’s advice, requested to subpoena a juvenile who had been in the bank that he was alleged to have burglarized so that he could impeach the juvenile’s story. *Martinez*, 53 Wn. App. at 711-12. The trial court denied the request. On appeal the defendant asserted that his attorney, a public defender, had been ineffective because the Public Defender’s Office also represented the

juvenile. The court observed that the mere fact of dual representation will not give rise to an inference of ineffective assistance of counsel. *Id.* at 715. The defendant argued that his attorney operated under an actual conflict because the reason he failed to call the juvenile was likely due to his desire not to attack the credibility of another client of the office. *Id.* at 716. The court disagreed, finding that the attorney's decision not to call the juvenile avoided the risk of the juvenile's potentially incriminating testimony. *Id.* The court denied the conflict of interest claim and noted in a footnote that 'calling a witness for the sole purpose of impeaching him is a pointless exercise.'" *Id.* at 716 n.1.

In Dhaliwal, the defendant alleged on appeal that his Sixth Amendment right to conflict free counsel had been violated by his attorney's concurrent and prior representation of some of the State's witnesses whose interests were adverse to his. The defendant specifically alleged that his attorney's representation was deficient because he was unable to challenge a witness's testimony about a previous assault case because the attorney had represented the witness on that case. Dhaliwal, 150 Wn.2d at 571. Yet, the court found that co-counsel, who had been the one to cross-examine the witness, had thoroughly questioned the witness and had specifically cross-examined him about the prior assault case. *Id.* The defendant also alleged that his attorney had been ineffective by his

dual representation of him and another witness because his attorney failed to object to certain hearsay statements and certain prior bad act testimony. *Id.* at 572. The court found that such a tactical decision, “without more,” did not establish an actual conflict of interest adversely affecting his representation. *Id.* at 573. The court found that all the defendant had established was a potential conflict, and that as such it was insufficient to establish a claim of ineffective assistance of counsel. *Id.*

Hernandez asserts that his attorney, a public defender, had an actual conflict adversely affecting his representation because the confidential informant, a potential State witness that could not be located for trial, had been represented by his office. Hernandez specifically alleges that the public defender’s failure to call the confidential informant as a witness was deficient representation and did not serve Hernandez’s best interests because he could not impeach the confidential informant about the circumstances of the buy and the informant’s motives regarding his participation in it. First, this ignores the fact that it is highly unlikely the public defender could have located the informant. Law enforcement had attempted to locate the informant by calling him, by visiting his residence, and even surveilling his residence, and a warrant was still outstanding for his arrest. Second, if the public defender had been able to find the informant and called him to testify, it is likely that his testimony

would have provided additional incriminating evidence against Hernandez. Contrary to his argument, defense counsel was able to exploit the informant's absence. He was able to elicit from the officers evidence impeaching the informant's reliability and credibility and to use that evidence to argue in closing that the informant had actually set up Hernandez. RP 165-71. Defense counsel was able to make that argument specifically because the informant didn't testify and the informant's absence in and of itself cast doubt on his reliability. As in Martinez the public defender avoided potentially incriminating evidence against his client by not calling the informant as a witness.

Hernandez also argues that the "simultaneous representation" adversely affected his ability to receive a missing witness instruction. But the trial court did not refuse to give the instruction because he was available to the defense, it refused to give the instruction because the informant was not "peculiarly available" to the State because he was "on the lam."

The public defender was hardly *actively* representing two clients where the informant was on warrant status in the case in which the Public Defender's Officer represented him. There was no adverse effect on representation where the attorney argued that the informant had set up his client in order to work off his own charges and essentially blamed the

crime on the informant. Under Dhaliwal and Martinez, the mere fact of dual representation of a witness and the defendant does not give rise to an inference of ineffective assistance of counsel. As in Hatfield, where an attorney argues essentially that the witness, another client, is responsible, or to blame, for the crime, the attorney can hardly be said to be “struggling to serve two masters.” Such circumstances are insufficient to establish an actual conflict adversely affecting representation. The record here does not support even an inference, and Hernandez has failed to demonstrate, that his attorney had an actual conflict that adversely affected his representation.

E. CONCLUSION

Based on the foregoing, the State respectfully requests this Court affirm Hernandez’s conviction.

Respectfully submitted this 15th day of March, 2010.

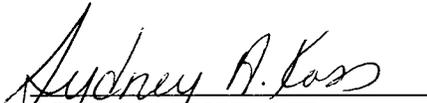


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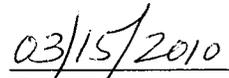
CERTIFICATE

I certify that on this date I placed in the U.S. mail with proper postage thereon, or otherwise caused to be delivered, a copy of the document to which this Certificate is attached to this Court and Appellant's attorney, , addressed as follows:

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