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NO. 49534-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

CLIFFORD KRENTKOWSKI,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Stephanie Arend, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY¹

AN ACTUAL CONFLICT OF INTEREST DENIED
KRENTKOWSKI EFFECTIVE ASSISTANCE OF COUNSEL.

Where an actual conflict of interest adversely affected counsel's performance, reversal is required even without a showing of prejudice. Cuyler v. Sullivan, 446 U.S. 335, 349-50, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980); State v. Regan, 143 Wn. App. 419, 427, 177 P.3d 783 (2008); In re Personal Restraint of Richardson, 100 Wn.2d 669, 677, 675 P.2d 209 (1983), abrogated in part on other grounds, State v. Dhaliwal, 150 Wn.2d 559, 571, 79 P.3d 432 (2003). In order to show adverse effect, an accused need only demonstrate "that some plausible alternative defense strategy or tactic might have been pursued but was not and that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests." Regan, 143 Wn. App. at 428 (quoting United States v. Stantini, 85 F.3d 9, 16, (2nd Cir. 1996)).

Krentkowski contends, for reasons set forth fully in the opening brief, that his right to effective assistance of counsel was comprised when the trial court denied defense counsel's repeated motions to withdraw

¹ The State's arguments regarding the violation of Krentkowski's due process rights through an auto-decline determination have been sufficiently addressed in the Brief of Appellant and need not be challenged further on reply.

based upon an articulated actual conflict of interest. Brief of Appellant (BOA) at 18-26.

In response, the State first argues that the trial court correctly determined there was only a theoretical possibility of conflict but no actual conflict. Brief of Respondent (BOR) at 33. The State contends, "the defendant identified no area in which he would be limited by having previously represented Mr. Alexander." BOR at 34. As discussed fully in the opening brief however, counsel candidly and repeatedly explained to the court in his motions to withdraw: (1) he had represented LeShaun Alexander, the alleged target of Krentkowski's charged incident, in another shooting case; (2) that despite withdrawing as Alexander's counsel, his joint representation affected his duty to maintain confidences and privileged information; (3) that as a result of his privileged communications with Alexander he had information that was favorable to Krentkowski but adverse to Alexander, including information that would be relevant to Krentkowski asserting a claim of self-defense; and that (4) revealing or using this information to Krentkowski's benefit would necessarily violate his duty of confidentiality to Alexander. BOA at 22-23 (citing 2RP 4-33, 709-11, 1471-77, 2370-77).

The State's response brief not only fails to address any of these points, but also fails to mention, much less distinguish, the cases cited by

Krentkowski in the opening brief. See BOA at 18-26 (citing Cuyler v. Sullivan, 446 U.S. 335, 349-50, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980); Holloway v. Arkansas, 435 U.S. 475, 484-85, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978); In re Personal Restraint of Richardson, 100 Wn.2d 669, 677, 675 P.2d 209 (1983); State v. Regan, 143 Wn. App. 419, 425, 177 P.3d 783 (2008); State v. MacDonald, 122 Wn. App. 804, 95 P.3d 1248 (2004)). Where, as here, the State fails to respond to arguments made by Krentkowski, the State concedes those issues. See In re Det. of Cross, 99 Wn.2d 373, 379, 662 P.2d 828 (1983) (“Indeed, by failing to argue this point, respondents appear to concede it.”).

Nevertheless, in an attempt to circumvent the specific points raised by Krentkowski's counsel, the State points to defense counsel's initial appearance in Krentkowski's case, in which he stated that his representation of Krentkowski would not necessarily affect his representation of Alexander. BOR at 34-35 (citing IRP 5). The issue of whether defense counsel's representation of Krentkowski would affect his representation of Alexander is a different question than whether his representation of Alexander would affect his representation of Krentkowski. First, counsel represented only that Alexander might be dissatisfied having an attorney who also represented the person who allegedly shot at him. This is an important distinction. As it pertained to

Alexander, counsel did not articulate any specific duties to Krentkowski that might adversely affect Alexander. At best, counsel articulated a potential conflict of interest between himself and Alexander based on his representation of Krentkowski. Nonetheless, this articulated potential conflict was sufficient enough to permit counsel's withdrawal from Alexander's case on June 29, 2016. See CP 609, 753-54.

Second, counsel's withdrawal in Alexander's case does little to alleviate the conflict in Krentkowski's case because the articulated privileged information that would be beneficial to Krentkowski, but violate counsel's duty of confidentiality to Alexander, remains intact regardless of whether counsel was simultaneously representing Alexander.

The State also cites to State v. White, 80 Wn. App. 406, 907 P.2d 310 (2008), in support of its argument that the actual conflict of interest does not require reversal in Krentkowski's case. BOR at 32-33. White however, is factually distinguishable from what transpired here.

One week after Keon Shim was charged with first degree assault in the shooting of Brian Tappin, appointed counsel entered a notice of appearance on Shim's behalf. White, 80 Wn. App. at 408. The attorney reviewed Shim's file but did not meet or talk with Shim. He did however, discuss the case with Shim's stepfather and allegedly suggested Shim should consider a guilty plea. Id. at 408-09.

Shortly after this conversation, Shim's stepfather retained counsel for Shim. Appointed counsel was allowed to withdraw and retained counsel for Shim filed a notice of appearance and substitution of counsel. White, 80 Wn. App. at 409.

Two weeks later, the State named Dirck White as a co-defendant in Shim's case. The same appointed counsel filed a notice of appearance on White's behalf. Neither co-defendant brought appointed counsel's earlier representation of Shim to the trial court's attention. White, 80 Wn. App. at 409.

The case proceeded to trial where the State theorized that Shim fired the gun, and that White, as the driver of the car, acted as Shim's accomplice. The codefendants pursued conflicting defenses, each attempting to exculpate himself by inculpating the other. White, 80 Wn. App. at 409.

In an affidavit filed at trial, appointed counsel acknowledged that White's police report "seemed familiar" but that he did not realize he represented both codefendants in the same matter until after it was brought to his attention after judgement was imposed. White, 80 Wn. App. at 409.

On appeal, both White and Shim argued that appointed counsel's undisclosed conflict of interest required reversal of their convictions.

White, 80 Wn. App. at 409. After analyzing the facts from several different legal arguments, this Court disagreed. Id. at 416.

As an initial matter, this Court questioned whether Shim and appointed counsel ever even entered into an attorney-client relationship since they had never met, had any direct communication, and Shim had never brought the alleged conflict of interest to the attention of his new attorney during the course of the trial. White, 80 Wn. App. at 410.

Notwithstanding the ambiguity surrounding the attorney-client relationship, this Court concluded that there was no indication that appointed counsel "actively" represented conflicting interest. As the Court explained, "he never directly communicated with Shim, and Shim does not allege that Appointed Counsel was privy to any confidences that could create an active conflict of interest." White, 80 Wn. App. at 412. The court therefore concluded that there was nothing in the record to support the argument that appointed counsel's allegiance to White was impaired. Id.

Similarly, the Court was unwilling to presume prejudice because the record contained no indication that the alleged conflict of interest adversely affected appointed counsel's defense of White; a point which White conceded in his briefing. White, 80 Wn. App. at 412-13.

This Court was also unpersuaded that the trial court had an obligation to inquire into the potential conflict of interest since the conflict was not brought to its attention and therefore the court could not reasonably have known about the potential conflict. White, 80 Wn. App. at 414.

Finally, this Court rejected Shim's argument that the presumption of prejudice applicable under RPC 1.9(a) applied after entry of final judgment. White, 80 Wn. App. at 415-16. This Court noted that because Shim was raising the conflict of interest issue for the first time on appeal, he was required to show that appointed counsel's violation of RPC 1.9 actually prejudiced him. Because Shim conceded that no such evidence of prejudice existed, this Court determined that appointed counsel's actions did not warrant reversal. Id.

What transpired in White bears little resemblance to Krentkowski's case. First, there can be no dispute that defense counsel entered into attorney-client relationships with both Alexander and Krentkowski. Notably, the State does not dispute this.

Unlike White, the trial court in Krentkowski's case was also repeatedly put on notice of the conflict of interest and was therefore required to fully and adequately inquire into the matter. As the State notes, the trial court concluded there was no concurrent conflict of interest

because counsel had withdrawn from Alexander's case. BOR at 33. As discussed above, and in the opening brief however, this does not alleviate the conflict in Krentkowski's case. BOA 24-25. Moreover, the trial court's conclusion here addresses the conflict only from the perspective of RPC 1.7, it does not address, or resolve, the conflict the from the standpoint of RPC 1.9. BOA at 21-25.

Finally, unlike White, Krentkowski does not challenge the actual conflict of interest for the first time on appeal and is not required to show that the conflict prejudiced his interests. Rather, prejudice is presumed. And unlike White, where Shim did not allege that appointed counsel was privy to any confidences that could create an active conflict of interest, here Krentkowski's attorney repeatedly asserted that he his duty of confidence to Alexander prevented his use of information that would be favorable to Krentkowski, including evidence beneficial to a self-defense claim. For the aforesaid reasons, the State's reliance on White is misplaced and highlights the deficiencies of both the trial court's inquiry into the actual conflict of interest and the prejudice stemming therefrom.

Next, the State maintains that LeShaun Alexander "had nothing to do with this case." Brief of Respondent (BOR) at 34. This argument is misplaced for several reasons. First, it ignores the prosecutor's opening statement in this case, in which he noted that Alexander had previously

shot at Gore, Kitt, and Krentkowski, which lead to the retaliatory shooting for which Krentkowski was charged with murder and assault. 2RP 686. Second, it also ignores the plethora of witness testimony at trial that Alexander was the intended target of the charged offenses in this case. See 2RP 1583, 2406, 2408, 2465, 2480, 2485, 2583-86, 2602-03, 2607, 2616-17. Finally, the prosecutor in Krentkowski's case -- who was the same prosecutor in Alexander's case -- did not oppose defense counsel's motion to withdrawal from Alexander's case, acknowledging the appearance of a conflict of interest because Alexander and Krentkowski were the "particular individuals involved factually in the case, not just rival gangs". CP 753; 2RP 14, 21. The State's contention that Alexander "had nothing to do with this case" must be rejected as it misconstrues the record.

The State also appears to hypothesize, without citing any supporting authority, that an actual conflict of interest should have become apparent sooner. See BOR at 34-35 ("one would think that if there were in fact any material limitation on the lawyer's representation, the gang evidence issue is where it would make its appearance since the basis of the conflict was simply that both clients were gang members."). Counsel identified the conflict to Krentkowski, brought it to the trial court's attention, and was allowed to withdraw in Alexander's case, well before

pre-trial motions in this case. BOA at 13-14; 2RP 407; CP 607-09, 713-57. It is hard to imagine that counsel could have identified the actual conflict of interest any sooner in this case.

Even assuming for sake of argument that the conflict should have become apparent sooner however, it can just as easily be hypothesized that the full extent of an actual conflict of interest cannot be determined until trial testimony is taken and the facts of the charged incident are fully developed. For example, here it was not until August 1 that Trevion Tucker testified that he saw Alexander outside the store with a gun in his hands, facts which if true, might have given rise to a self-defense argument. See 2RP 2466, 2586, 2607, 2617.

Finally, the State notes that Krentkowski expressed confidence in counsel and requested that his representation continue. BOR at 35 (citing 3RP 534, 544). Significantly, the State does not suggest this constitutes a waiver of the actual conflict of interest. Nor could it. Krentkowski expressed confidence in counsel only in the limited context of deciding whether he wanted to represent himself at trial. In contrast, Krentkowski explicitly refused to waive the conflict of interest after being advised by independent counsel. CP 718; 2RP 26-27.

Counsel's relationship and duty of loyalty to Alexander materially limited counsel's representation of Krentkowski and demonstrates an

actual conflict that adversely affected counsel's performance. Since prejudice is conclusively presumed, the trial court's refusal to grant defense counsel's motion to withdraw in this case denied the defendant effective assistance of counsel and he is entitled to a new trial.

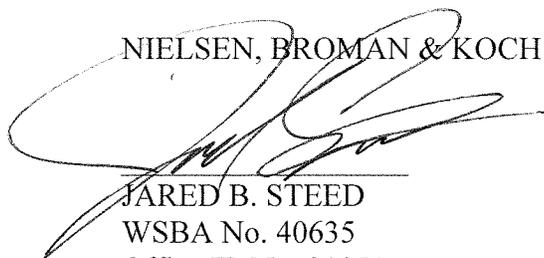
B. CONCLUSION

For the reasons discussed above and in the opening brief, this court should reverse Krentkkowski's convictions and remand for a new trial. Alternatively, this Court should accept the State's concession of error and remand this case for resentencing. This Court should also exercise its discretion and deny appellate costs.

DATED this 20th day of July, 2018.

Respectfully submitted,

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