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COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JOHN EPPS, JR., APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF STEVENS COUNTY

BRIEF OF RESPONDENT

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I. APPELLANT'S ASSIGNMENTS OF ERROR

1. The defendant claims the search warrant issued for his residence lacked probable cause.
2. The defendant claims that his Sixth Amendment right to counsel was violated based on his claim that his defense attorney sent pictures of phone texts to the prosecutor.

II. ISSUES PRESENTED

1. Does the affidavit supporting the search warrant describe facts and circumstances sufficient to establish a reasonable inference that the defendant was involved in criminal activity and that evidence of the criminal activity could be found at his home?
2. Has the defendant established a clear claim that his Sixth Amendment right to counsel was violated because his defense attorney sent pictures of phone texts to the prosecutor?

III. STATEMENT OF THE CASE

The salient facts supporting the issuance of the search warrant are outlined below, as contained in the search warrant affidavit and addendums prepared by affiant Stevens County Sheriff's Office Detective Gregory Gowin.

On June 10, 2017, the Spokane County Sheriff's Office (SCSO) served a temporary restraining order (TRO) at Mr. Epps' residence, a residence Epps described as being in the woods. CP 53, 54. As they drove up the road approaching his residence, the deputies observed a silver and black rifle in Epps' hands. CP 53. Deputy Cochran, who followed the other deputies up Epps' driveway, believed the firearm to be a silver barreled break action shotgun with a black stock. CP 55. Upon the officers' approach, Epps turned, and walked into his residence. CP 53. Epps then returned outside. When asked about the firearm, he informed the officer he had put the gun away. CP 53. He was briefly detained because a Stevens County Dispatch check showed Epps had been convicted of a felony. *Id.* However, it was promptly determined that Epps had his firearm possession rights restored, had a proper Concealed Pistol License (CPL), and could lawfully possess firearms. CP 53-54.

Nine days later, on June 19, 2017, Spokane Superior Court issued a one-year order of protection as well as a separate order requiring Epps to surrender his firearms and CPL to the SCSO or Spokane Police Office. CP 54. Epps was present at the hearing and signed the order. *Id.* That day he signed an order stating he had no guns to surrender because he possessed no guns. *Id.* Four days later, on June 23, 2017, he called Deputy Ennis;

Deputy Ennis drove to Epps' property where Epps surrendered his CPL. CP 54, 58.

While he was meeting with Deputy Ennis to surrender his CPL, Epps informed Ennis that he "still had firearms in a 'safe' place because he lived in the woods." CP 44 (Deputy Ennis opined in his affidavit, which was submitted with the original affidavit to the signing judge as Addendum B, CP 68, that Epps "implied that he still had [firearms] on his property"). He also informed Ennis that he had [other] firearms in pawn. CP 45, 68.

On June 27, 2017, the affiant checked Epps pawn history on the SCSO database and determined that Epps had pawned 13 firearms between October 2014 and June 24, 2017. The affiant contacted the different pawn shops and determined Epps recently had sold one firearm, one had been previously confiscated by the SCSO, and one was still in pawn. CP 54.

On July 3, 2017, Affiant Stevens County Sheriff's Detective Gowin, contacted Eagle pawn and determined that since June 10, 2017, Epps had pawned one gun, a Henry .22 long rifle, and that rifle was not silver and black in color. CP 56.

A search warrant was authorized on July 5, 2017, and served on July 6, 2017. RP 73. The deputies found a .22 rifle and a shotgun on

Mr. Epps' property. A Winchester shotgun was found near the only bed of the small one-roomed, 200 square foot cabin. RP 77.

The State tried Mr. Epps on two counts of unlawful possession of a firearm; the first count was for the Winchester shotgun found by his bed and the second count was for the .22 Remington rifle found outside the home. CP 69-70. The jury convicted Mr. Epps for the unlawful possession of a shotgun, count 1, and acquitted him on the possession of the .22 rifle found outside the cabin. CP 98, 99.

IV. ARGUMENT

A. THE AFFIDAVIT SUPPORTING THE WARRANT DESCRIBES FACTS AND CIRCUMSTANCES SUFFICIENT TO ESTABLISH PROBABLE CAUSE THAT THE DEFENDANT POSSESSED A FIREARM AT HIS RESIDENCE.

1. Standard of Review.

The issuance of a search warrant is reviewed only for abuse of discretion. *State v. Maddox*, 152 Wn.2d 499, 509, 98 P.3d 1199 (2004). An appellate court reviews de novo a trial court's conclusion of whether an affidavit supported probable cause to issue a search warrant. *State v. Neth*, 165 Wn.2d 177, 183, 196 P.3d 658 (2008). De novo review gives great deference to the issuing judge's assessment of probable cause and resolves any doubts in favor of the search warrant's validity. *State v. Chenoweth*, 160 Wn.2d 454, 477, 158 P.3d 595 (2007).

“Probable cause exists if the affidavit supporting the warrant describes facts and circumstances sufficient to establish a reasonable inference that a person is involved in criminal activity and that evidence of the criminal activity can be found at the place to be searched.” *State v. Martines*, 184 Wn.2d 83, 90, 355 P.3d 1111 (2015) (citing *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999)).

There must be a “nexus between criminal activity and the item to be seized and between that item and the place to be searched.” *Neth*, 165 Wn.2d at 183.

It is the probability of involvement in criminal activity or the likelihood of discovering evidence of it in a particular place that governs the existence of probable cause for a search warrant. *Maddox*, 152 Wn.2d at 505.¹ Probable cause requires more than suspicion or conjecture, *but it does not require certainty.*” *Chenoweth*, 160 Wn.2d at 476 (emphasis added). The judicial officer issuing the warrant is entitled to make reasonable inferences from the facts and circumstances set out in the affidavit. *Maddox*, 152 Wn.2d at 505.

¹ Probable cause exists when the affidavit in support of the search warrant “sets forth facts and circumstances sufficient to establish a reasonable inference that the defendant is probably involved in criminal activity and that evidence of the crime may be found at a certain location.” *State v. Jackson*, 150 Wn.2d 251, 264, 76 P.3d 217 (2003).

An appellate court considers only the information contained within the supporting affidavit. *Neth*, 165 Wn.2d at 182. Affidavits in support of a search warrant are examined in a commonsense, non-hypertechnical manner. *State v. Chamberlin*, 161 Wn.2d 30, 41, 162 P.3d 389 (2007); *State v. Stone*, 56 Wn. App. 153, 158, 782 P.2d 1093 (1989), *review denied*, 114 Wn.2d 1013 (1990) (an affidavit must contain facts from which an ordinary, prudent person would conclude that a crime had occurred and evidence of the crime could be found at the location to be searched).

2. Discussion.

There was no reason not to take the defendant, Mr. Epps, at his word. He admitted he had firearms in pawn, *and* that he “still had firearms in a ‘safe’ place *because* he lived in the woods.” CP 44 (emphasis added). It is logical to interpret this admission as a statement that, because he lives in a secluded rural area, he needs some accessible firearm for protection. This is, certainly, a reasonable inference, as it was established that he did, indeed, live in the rural, wooded Clayton area. It is not necessary that this be the only possible interpretation. It is a reasonable one. The law gives great deference to the issuing judge’s assessment of probable cause and resolves any doubts in favor of the search warrant’s validity. *Chenoweth*, 160 Wn.2d at 477. The judicial officer issuing the warrant is entitled to make reasonable

inferences from the facts and circumstances set out in the affidavit. *Maddox*, 152 Wn.2d at 505.

There is an additional, but unnecessary fact, that no black stocked, silver barreled firearm had been pawned at the Deer Park Eagle One Pawn since the service of the TRO, yet, another firearm had been pawned at that establishment in that same short period. Appellant devotes most of his argument regarding the warrant to his claim that the affiant failed to check into other pawn stores in Stevens County or Spokane County for that particular firearm. However, there is a reasonable inference that had Mr. Epps pawned that firearm, he would have conducted business with the Deer Park Eagle One Pawn because he had done so in the past, and because of its proximity; Deer Park is the nearest large town and only a five-mile drive from the small community of Clayton - an indisputable fact subject to judicial notice. *See State v. Dennison*, 72 Wn.2d 842, 844, 435 P.2d 526, 528 (1967) (judicial notice will be taken of the location of a particular city or town in a particular county); *and see Fusato v. Washington Interscholastic Activities Ass'n*, 93 Wn. App. 762, 970 P.2d 774 (1999).²

² In *Fusato*, this Court noted:

Generally, judicially noticed facts are “not subject to reasonable dispute” in the sense that they are “generally known” or “capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” ER 201(b). Judicial notice may be taken of those “facts capable of immediate and

The trial court did not abuse its discretion in issuing the search warrant for firearms based upon the reasonable inferences derived from the defendant's admission that he still had firearms in a 'safe' place *because* he lived in the woods.

B. THE APPELLANT HAS FAILED TO ESTABLISH A CLAIM THAT HIS SIXTH AMENDMENT RIGHT TO COUNSEL WAS VIOLATED IN THIS CASE SOLELY BECAUSE HIS DEFENSE ATTORNEY SENT PICTURES OF TEXTS INVOLVING A SEPARATE CASE TO THE PROSECUTOR.

On Tuesday, February 12, 2019, *after the trial concluded* on the firearm possession case, and the day before the second trial was to commence³ on a separate case involving stolen property,⁴ the prosecutor stated:

Even more concerning, Judge, is on Friday [February 8, 2019] I received an email from Ms. Tereno with a screenshot of four different text messages that Mr. Epps sent to somebody by the name of Nathan which is referencing the trial that we're supposed to start tomorrow and in these text messages he's actively soliciting Nathan to go lobby the victim in that case to not cooperate and not testify. So, he's indicated that he's not gonna follow court orders where he's

accurate demonstration by resort to easily accessible sources of indisputable accuracy and verifiable certainty." *CLEAN v. State*, 130 Wn.2d 782, 809, 928 P.2d 1054 (1996)."

Fusato, 93 Wn. App. at 772.

³ Wednesday, February 13, 2019. RP 249.

⁴ Apparently a snowblower, RP 258.

prohibited from having contact with a victim in a case that's set for trial and he's actively trying to sabotage that case.

RP 245-46.

There is no indication as to whether the defendant was anticipating introducing these pictures of texts at that trial, what the texts actually stated, whether it was anticipated that "Nathan" was already a witness in that separate case, or was to be added as a witness in that case, whether "Nathan" had received the texts or whether the texts had been sent – or how the State could establish that the texts were authored by the defendant. Moreover, there is absolutely no indication that the defendant was not advised regarding the "text message" revelation and did not fully agree to it. Most importantly, the email of February 8, 2019, pertained to a separate stolen property case involving a snowblower, had no bearing on the gun case that had already *concluded*, and had been the subject of litigation since July 11, 2017.

This Court reviews whether circumstances demonstrate a conflict of interest de novo. *State v. Regan*, 143 Wn. App. 419, 428, 177 P.3d 783 (2008). This court will not find an actual conflict unless petitioner can point to specific instances in the record to suggest an actual conflict or impairment of their interest. *State v. James*, 48 Wn. App. 353, 366, 739 P.2d 1161 (1987); *United States v. Mers*, 701 F.2d 1321, 1328 (11th Cir. 1983). Where,

as here, 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. *Cuylar v. Sullivan*, 446 U.S. 335, 350, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). An "actual conflict" is a term of legal art, requiring a "conflict that affected counsel's performance - as opposed to a mere theoretical division of loyalties." *Regan*, 143 Wn. App. at 427-28 (quoting *Mickens v. Taylor*, 535 U.S. 162, 171, 122 S.Ct. 1237, 152 L.Ed.2d 291 (2002)). "Possible or theoretical conflicts of interest are 'insufficient to impugn a criminal conviction.'" *In re Gomez*, 180 Wn.2d 337, 349, 325 P.3d 142 (2014) (quoting *Sullivan*, 446 U.S. at 350). Until a petitioner shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance. *State v. Dhaliwal*, 150 Wn.2d 559, 573, 79 P.3d 432 (2003).

1. Discussion.

In *Mickens*, 535 U.S. 162, petitioner Mickens was convicted of the premeditated murder of Timothy Hall and was sentenced to death. The petitioner's attorney, Bryan Saunders, had represented Hall on assault and concealed-weapons charges *at the time of the murder*. The same juvenile court judge who dismissed the charges against Hall later appointed Saunders to represent petitioner. Saunders did not disclose to the court, his

co-counsel, or petitioner that he had previously represented Hall. The Court found that since this was not a case in which counsel or defendant made the court aware of a potential conflict it was at least necessary, to void the conviction, for petitioner to establish that the conflict of interest *adversely affected his counsel's performance*. Because the lower court found no such adverse performance, the petitioner's conviction was affirmed. *Mickens*, 535 U.S. at 173–74.

In *Dhaliwal, supra*, Dhaliwal was charged with murder of a fellow cab driver of Farwest Cab Company. Dhaliwal was represented at trial by attorney Salazar. On review, Dhaliwal argued that Salazar's performance was affected by his dual representation of Dhaliwal and Sohal⁵ because Salazar failed to object to various hearsay statements and testimony about Dhaliwal's prior bad acts during Sohal's testimony. Our State Supreme Court found the failure to object to testimony did not indicate Salazar was operating under a conflict because there are numerous tactical reasons for not objecting to testimony. 150 Wn.2d at 573. The Court noted that in its analysis of ineffective assistance of counsel claims, it had been reluctant to

⁵ Salazar was also simultaneously representing several of the State and defense witnesses in civil litigation involving Farwest. He had also previously represented two of the witnesses on an assault charge in which Dhaliwal had been a codefendant. *Dhaliwal*, 150 Wn.2d at 562.

find counsel's performance deficient solely on the basis of questionable trial tactics. *Id.*

In *Sullivan*, the United States Supreme Court found that the trial attorney's tactical decision to rest Sullivan's defense was a reasonable response to the weakness of the prosecutor's case rather than evidence of a conflict of interest. 446 U.S. at 347-48, 100 S.Ct. 1708. Similarly, Salazar's failure to object to testimony is a tactical decision that, without more, does not indicate that he was acting under a conflict of interest. This is not a case where the defendant's attorney utterly failed to make any objections, to cross examine the State's witnesses, or to mount a defense.

Under *Mickens* and *Sullivan*, the defendant bears the burden of proving that there was an actual conflict that adversely affected his or her lawyer's performance. *Mickens*, 535 U.S. at 174, 122 S.Ct. 1237; *Sullivan*, 446 U.S. at 350, 100 S.Ct. 1708. 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." *Id.* at 350, 100 S.Ct. 1708. Here, Dhaliwal has demonstrated the possibility that his attorney was representing conflicting interests. However, he has failed to establish an actual conflict because he has not shown how Salazar's concurrent representation of the witnesses involved in the shareholder action and his prior representation of Grewal affected Salazar's performance at trial.

Dhaliwal, 150 Wn.2d at 573.

Here, Epps fails to establish a conflict of interest. Properly viewed, the question here, then, is whether he has shown *both* that his attorney,

Ms. Tereno,⁶ had an actual conflict of interest *and* that it adversely affected her performance. This record does not show an actual conflict of interest. The prosecuting attorney never claimed one existed. Mr. Epps never claimed one existed. Ms. Tereno never raised a conflict claim. Indeed, the trial court never *sua sponte* suggested the possibility.

Instead, citing *Tatum*, a Fourth Circuit 1991⁷ case, Epps hypothesizes that Ms. Tereno “created an actual conflict of interest because she ‘actively represent[ed] conflicting interests’ when she provided the prosecution with evidence that exposed her client to potential additional prosecution.” Br. of Appellant at 16. However, speculation is not fact. There is no information about whether this possibility existed. There is no information about what advice Ms. Tereno gave Mr. Epps. There is no information about what circumstances may have motivated Ms. Tereno to send the prosecutor pictures of these texts; “pictures” which related to a separate, untried, snowmobile case. There is no information in the record establishing how many texts were involved, what the texts stated, or what

⁶ WSBA #43245.

⁷ *United States v. Tatum*, 943 F.2d 370, 375-76 (4th Cir. 1991), precedes *Mickens* by 11 years. It involves a labyrinth of conflicts between the defendant’s law firm in a bankruptcy case, and the same law firm representing him in the criminal case for bankruptcy fraud, a fraud that may have involved members of the firm. It is not helpful to the instant case.

witnesses would be called. What is known from the record is that Ms. Tereno fiercely advocated for Mr. Epps; she argued suppression motions, and, she was able to convince the jury that the second firearm found on Epps property was not within his dominion or control. Finally, she argued for and obtained the shortest standard range sentence possible for Mr. Epps. Her performance should be the subject of commendation, not condemnation. Indeed, the appellant has failed to uncover even one instance where Ms. Tereno's effective advocacy or performance was adversely affected during the firearm trial.

In other words, even if there were a conflict of interest, the defendant has failed to establish that the conflict adversely affected anything. Because of the lack any information necessary to adjudge the claim that there was an actual conflict of interest, there is no manifest error permitting review in this proceeding. *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995), *as amended* (Sept. 13, 1995); RAP 2.5.

Epps' claim has failed to establish but "a mere theoretical division of loyalties," *Regan*, 143 Wn. App. at 427-28. There was no actual conflict. Epps has not shown how Ms. Tereno's text or discovery response negatively affected her performance at the trial. This claim, if it exists, may best be examined by collateral review as the trial record often reveals only

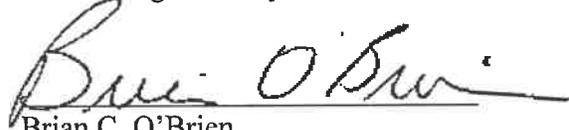
enigmatic symptoms of a more complicated set of relationships which cannot be adequately addressed on direct appeal.

V. CONCLUSION

The trial court did not abuse its discretion in issuing the search warrant for firearms located upon Epps' property based upon the reasonable inferences derived from the facts contained in the affidavit in support of the warrant. Epps' conflict of interest and ineffective assistance of counsel claim has failed to establish but "a mere theoretical division of loyalties." *Regan*, 143 Wn. App. at 427-28. There was no actual conflict, never mind one that adversely affected the defense attorney's trial performance.

Dated this 18 day of November, 2019.

TIMOTHY RASMUSSEN
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "Brian C. O'Brien", written over a horizontal line.

Brian C. O'Brien
Deputy Prosecuting Attorney
Attorneys for Respondent

Affidavit of Certification

I certify under penalty of perjury under the laws of the State of Washington, that I electronically filed a true and correct copy of the Brief of Respondent to the Court of Appeals, Division III, and e-mailed a true and correct copy to Skylar Brett, Attorney for Appellant @ skylarbrettlawoffice@gmail.com on November 18, 2019.



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STEVENS COUNTY PROSECUTOR'S OFFICE

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