

NO. 44099-7-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

EDWIN MICHAEL HILL,

Appellant.

BRIEF OF APPELLANT

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ASSIGNMENT OF ERROR

Assignment of Error

The trial court's refusal to allow defendant's attorney to withdraw based upon an actual conflict of interest denied the defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment.

Issues Pertaining to Assignment of Error

Does a trial court's refusal to allow a defendant's attorney to withdraw based upon an actual conflict of interest deny that defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment?

STATEMENT OF THE CASE

By information filed February 9, 2012, the Cowlitz County Prosecutor charged the defendant Edwin Michael Cecil Hill with one count of failure to register as a sex offender. CP 1-2. The information alleged that he was out of registration for the time period “between June 22, 2011, and December 29, 2011.” *Id.* The information listed six witnesses for the state, including a person by the name of Andrew Alston. *Id.* The defendant was later arrested and brought before the court for his first appearance April 30, 2011. CP 59. At that time the court found the defendant indigent and appointed the Cowlitz County Office of Public Defense (CCD) to represent him. CP 59. Three days later an attorney from CCD by the name of Joshua Baldwin appeared with the defendant for arraignment and informed the court that he had been assigned to represent the defendant. CP 60, RP 1-11. The case then proceeded through omnibus, one amendment to the information and one continuance with Mr. Baldwin as the defendant’s appointed attorney. CP 7-8, 9-10, 12-13.

On September 28, 2011, Mr. Baldwin brought the defendant before the court and moved to withdraw based upon the fact that he had discovered an actual conflict of interest in representing the defendant. CP 18-19. Specifically, he informed the court of the following: (1) that he was then representing the state’s witness Andrew Alston as his appointed attorney on

two separate matters; (2) that based upon his confidential communications with Mr. Alston, he was privy to information that would be favorable to the defendant in his case; (3) that the information was detrimental to Mr. Alston in his cases, and (4) that his duty of confidentiality to Mr. Alston prevented him from revealing or using this information for the defendant's benefit. CP 18-19; RP 1-10. Mr. Baldwin's exact words were as follows:

The situation is, there is an actual conflict. The concern, though, I can't speak to the substance in part because of client confidence and also because without the testimony, it's kind of hard to say. There is the strong potential that during examination of Mr. Alston, somebody I represent, information I have in my representation of him could be beneficial to Mr. Hill and detrimental to Mr. Alston, putting me in a direct conflict, having to withdraw from both parties.

At this point, the best way to handle the conflict, according to our office, is to withdraw from Mr. Hill. I apologize to the Court for not noticing it before the arraignment hearing yesterday. I really should've addressed this prior, but the names just didn't match up until yesterday afternoon in my head. That's where we are.

. . .

And then, I'm not sure, I think also if the case were to proceed and it would be renewed at the time of trial, additional statements. I mean, my position, as the Court indicated, the time frame is, to me, less of a concern than the fact that a client of mine is going to be called to testify and I'm going to be obligated to cross-examine at this point, a very direct adverse witness to Mr. Hill, putting me in a position to have to be adversarial to an existing client, which creates a conflict, I think, without question.

How to approach that, the Court has the discretion in deciding. My concern, without being able to go into details about client confidences with Mr. Alston, is the situation could arise where I have information that would require me to cross-examine him that

wouldn't otherwise be available to me, but for our contact, putting me in a direct conflict with both Mr. Hill and Mr. Alston. I want to avoid that.

I agree with the State, I should have caught this sooner, and I admit that to the Court. In my haste reviewing the file, the name didn't just register until yesterday.

CP 2-3, 6-8.

At the state's suggestion, the court proposed appointing a second counsel to cross-examine Mr. Alston when the state called him to testify. RP 4-9. The defense opposed this motion, arguing that there was no prejudice to the state in appointing new counsel and resetting the trial date. RP 4-9. Ultimately, the trial court denied Mr. Baldwin's request to withdraw and appointed an attorney by the name of Kevin Blondin to cross-examine Mr. Alston at the defendant's trial. RP 10-11.

On October 3, 2012, six days after Mr. Baldwin's unsuccessful motion to withdraw, the court called the case. RP 12. Just prior to the beginning of trial the defendant waived his right to a jury, stipulated that he had a conviction for a sex offense, and stipulated that during the times listed in the information he was required to register as a sex offender. RP 12-17; CP 20-21. The case then proceeded to trial with the state calling five witnesses: Andrew Alston, Officer John Reeves, Officer Olga Lozano, Juanita Stewart, and Christine Taff. RP 17, 29, 33, 42, 51.

In his testimony, Mr. Alston claimed that during the second half of

2011 he and the defendant were living together in the Hudson Hotel Annex, although only Mr. Alston's name appeared on the rental agreement. RP 17-18. He further testified that the defendant would occasionally spend nights away. RP 19-20. According to Mr. Alston, during the end of September or the beginning of October of 2011 he left the Hudson Hotel Annex and moved to Kelso without the defendant. RP 21-23. He didn't know if the defendant stayed at the Hudson Hotel Annex. *Id.* Mr. Blondin cross-examined Mr. Alston on behalf of the defendant. RP 25-26, 28.

Officer Reeves and Lozano were the state's second and third witnesses. RP 29, 32. They testified that during the summer and fall of 2011 they went to the Hudson Hotel Annex on a number of occasions and spoke with Andrew Alston, who stated that the defendant was not then present. RP 29-32, 33-42. The state's fourth witness was Juanita Stewart. RP 42-51. Ms Stewart stated that she was a substitute manager for the Hudson Hotel Annex and that in the summer of 2011 Mr. Alston was registered in Unit 1 and then Unit 4, that the defendant was not registered in those units, and that no one other than registered guests was supposed to live in the units. RP 43-46. However, she did admit on cross-examination that she did not know whether or not the defendant was living with Mr. Alston or anyone else as she did not check the apartments. RP 48. The state's final witness was Christine Taff. RP 51-65. Ms Taff testified that she works for the Cowlitz County Sheriff's

Office in the sex offender registration unit and that during the relevant time periods the defendant was registered at 1316 11th Avenue Unit 1 in Longview, known locally as the Hudson Hotel Annex. RP 51-65.

At this point the state rested its case. RP 64. The defense then rested its case without calling any witnesses and the state presented its closing argument. RP 65, 65-69. Mr. Baldwin then presented closing argument for the defense, including argument as to the effect of his client Mr. Alston's testimony. RP 69-73. Mr. Blondin did not present any argument on behalf of the defendant because he was not in the courtroom. CP 63. In fact, the court had excused him from the proceedings after Mr. Alston testified. *Id.* This occurred at 1:30:33 pm on the day of trial. CP 63 ("Witness steps down - is excused - Mr. Blondin also excused").

Following closing argument the court found the defendant guilty, stating as follows in its oral verdict:

October 11, 2011, Mr. Alston moves out. The Defendant's statement to the sheriff's office was that he was living there as a roommate with Mr. Alston. Mr. Alston testified the Defendant didn't have a key. That makes it pretty difficult for him to continue to reside there after Mr. Alston is gone, and I don't see any circumstance under which he could.

So I would find that the State has proven beyond a reasonable doubt that for the period after October 11th of 2011, Mr. Alston (sic) was not registered at the address where he in fact resided and would find him guilty based on that.

RP 78.

The court later entered the following findings of fact and conclusions of law in support of its verdict:

Findings of Fact

1. On May 31, 2011, based upon a previous conviction for a sex offense, the Defendant registered with the Cowlitz County Sheriff's Office (CCSO) his home address as 1316 11th Ave Apt #1, Longview, Washington. The apartment is part of the Hudson Hotel Annex. The Defendant informed CCSO that he would be living with Andrew Alston.

2. The Hudson Hotel Annex is more akin to a hotel rather than a traditional apartment complex.

3. Apt #1 is a studio apartment that is furnished with a bunk bed and a couch. Mr. Alston was the only resident of Apt #1 that had a rental agreement with the Hudson Hotel. The Defendant did not have key to Apt #1.

4. On June 22, 2011, Longview Police Department Sergeant John Reeves went to 1316 11th Ave Apt #1 to verify the Defendant's address. Sgt. Reeves was unable to make contact with the Defendant. Sgt. Reeves contacted Mr. Alston who indicated that the Defendant was out looking for employment.

5. On June 28, 2011, Longview Police Department Investigator Olga Lozano went to 1316 11th Avenue Apt #1 to verify the Defendant's address. Inspector Lozano was unable to make contact with the Defendant or Mr. Alston. Inspector Lozano left a business card at the Defendant's residence that instructed the Defendant to contact her. Inspector Lozano was not contacted by the Defendant.

6. On July 12, 2011, Inspector Lozano went to 1316 11th Ave Apt #1 to verify the Defendant's address. Inspector Lozano was unable to make contact with the Defendant. Inspector Lozano made contact with Mr. Alston, who indicated the Defendant was out looking for employment.

7. On August 15, 2011, Inspector Lozano made contact with

Juanita Stewart, an employee of the Hudson Hotel. Ms. Stewart informed inspector Lozano that the Defendant had not entered into any rental agreements with the Hudson Hotel Annex.

8. On August 26, 2011, Mr. Alston and the Defendant moved from Apt #1 to Apt #4. The Defendant did not inform CCSO of his new residence address.

9. Apt #4 is a studio apartment that is furnished with a single bed and a couch. Mr. Alston slept on the bed. The Defendant slept on the couch, which contained a pull-out bed. The Defendant did not have a key to Apt #4.

10. On October 11, 2011, Mr. Alston vacated Apt #4 and moved to an address in Kelso, Washington. The Defendant did not move to Kelso with Mr. Alston. The Defendant did not enter into a rental agreement with the Hudson Hotel.

11. On December 29, 2011, Inspector Lozano requested a bench warrant be issued for the Defendant's arrest. In April 2012, the Defendant was arrested in Tigard, Oregon on the bench warrant. The Defendant was released from custody in June, 2012. Upon his release, the Defendant registered with CCSO an address in Tigard, Oregon.

CONCLUSIONS OF LAW

1. The Defendant was required to register as a sex offender.

2. Between May 31, 2011 and December 29, 2011, the Defendant was registered as a sex offender with the Cowlitz County Sheriff's Office.

3. The Defendant resided at 1316 11th Ave Apt #1, Longview, Washington, which is the address the Defendant registered with the Cowlitz County Sheriff's Office.

4. To establish "residence" a person merely needs to show intent to make it their home. It is not an unreasonable circumstance that the Defendant was not at his residence for a few weeks while looking for employment.

5. On October 11, 2011, when Mr. Alston vacated Apt #4, the Defendant could not have continued to reside at the Hudson Hotel Annex. The Defendant had not entered into a rental agreement nor did he have a key to Apt #4.

6. The Defendant failed to notify the Cowlitz County Sheriff's Office within three business days after moving from 1316 11th Ave, Longview, Washington.

7. The Defendant is guilty of failing to register as a sex offender.

CP 23-25.

The court later sentenced the defendant within the standard range, after which the defendant filed timely notice of appeal. CP 27-40, 42.

ARGUMENT

THE TRIAL COURT'S REFUSAL TO ALLOW THE DEFENDANT'S ATTORNEY TO WITHDRAW BASED UPON AN ACTUAL CONFLICT OF INTEREST DENIED THE DEFENDANT EFFECTIVE ASSISTANCE OF COUNSEL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 22, AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT.

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.” *Wheat v. United States*, 486 U.S. 153, 158, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988). Similarly, Washington Constitution, Article 1, § 22, provides that “[i]n criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel” *State v. Chase*, 59 Wn.App. 501, 799 P.2d 272 (1990). These constitutional guarantees include both the right to retain an attorney of one’s choice, as well as the right to be represented by an attorney who is “free from conflicts of interest.” *Wheat*, 486 U.S. at 159; *Chase*, 59 Wn.App. at 506. Although a trial court “must recognize a presumption in favor of petitioner’s counsel of choice . . . that presumption may be overcome not only by a demonstration of actual conflict but by a showing of a serious potential for conflict.” *Wheat*, 486 U.S. at 164.

An actual conflict of interest exists when a defense attorney owes duties to a party whose interests are adverse to those of the defendant. *State*

v. White, 80 Wn.App. 406, 411-12, 907 P.2d 310 (1995), *review denied*, 129 Wn.2d 1012 (1996). For example, in *State v. MacDonald*, 122 Wn.App. 804, 95 P.3d 1248 (2006), a defendant appealed his conviction for two counts of rape, arguing, *inter alia*, that he was denied an attorney free from conflicts of interest because his trial attorney had represented the mother of one of the complaining witnesses. The court of appeals agreed and reversed his conviction, holding as follows:

Here, Yoseph attempted to represent a client accused of raping the daughter of one of his other clients. MacDonald argues that Yoseph has not worked on L.P.'s mother's case for more than one year, but Yoseph was still the attorney of record for L.P.'s mother when he agreed to represent MacDonald on the rape charges. Like the trial court, we believe that this presents a conflict of interest and requires Yoseph's disqualification.

State v. MacDonald, 122 Wn.App. at 813.

A conflict of interest can also exist when a defendant's interests are adverse to those of defense counsel himself. *In re Personal Restraint of Benn*, 134 Wn.2d 868, 890, 952 P.2d 116 (1998). When a defense attorney asserts to the trial court that he has a potential conflict of interest, the court must appoint substitute counsel or take adequate steps to ascertain whether the risk of a conflict of interest is too remote to warrant substitute counsel. *See Holloway v. Arkansas*, 435 U.S. 475, 484, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978). The court's failure to take these steps deprives defendant of the guarantee of assistance of counsel. *Holloway*, 435 U.S. at 484, 98 S.Ct.

1173. Our Supreme Court has stated the rule as follows:

[A] trial court commits reversible error if it knows or reasonably should know of a particular conflict [of interest] into which it fails to inquire.

In re Personal Restraint of Richardson, 100 Wn.2d 669, 677, 675 P.2d 209 (1983).

For example, in *In re Richardson, supra*, the defendant brought an action for collateral relief from his conviction for second degree assault. The original charge had arisen out of a fight outside a bar. The defendant argued, among other things, that he was denied his right to effective assistance of counsel because his appointed attorney also represented one of the state's witnesses in other legal matters, although the exact extent of the representation was never ascertained.

In addressing this argument, the court first reviewed the United States Supreme Court's decisions in three cases: *Holloway v. Arkansas, supra*; *Cuyler v. Sullivan*, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980); and *Wood v. Georgia*, 450 U.S. 261, 101 S.Ct. 1097, 67 L.Ed.2d 220, 1097 (1981). In *Holloway*, the court held that (1) a trial court's failure to either ascertain whether or not an actual conflict existed after being put on notice of its possibility *per se* deprived the defendant of effective assistance of counsel, and (2) that the error cannot be deemed harmless because prejudice is conclusively presumed. In *Sullivan*, the court held that while there is no

duty to enquire if the court has no notice, a defendant who shows that a conflict of interest adversely affected his attorney's performance is also entitled to relief regardless of a showing of prejudice. Finally, in *Wood*, the court held that when a court "knows" or "reasonably should know" that a conflict of interest exists, then failure to inquire mandates reversal.

After examining these three cases, the court in *Richardson* summarized as follows:

Taken together, *Holloway*, *Sullivan*, and *Wood* create two rules. First, a trial court commits reversible error if it knows or reasonably should know of a particular conflict into which it fails to inquire. Second, reversal is always necessary where a defendant shows an actual conflict of interest adversely affecting his lawyer's performance. In neither situation need prejudice be shown.

In re Richardson, 100 Wn.2d at 677.

In the case at bar there is no question that the defendant's trial attorney had a conflict of interest. As he candidly explained to the court in his motion to withdraw (1) he was then representing Andrew Alston on two other felony matters, (2) that as a result of his privileged communications with Mr. Alston he had information that was favorable to the defendant but adverse to Mr. Alston, and (3) revealing or using this information to the defendant's benefit as was his duty to the defendant would necessarily violate his duty of confidentiality to Mr. Alston. This goes well beyond the potential conflict that existed in *In re Richardson* and constituted an actual

conflict of interest.

In this case the trial court tried to work around Mr. Baldwin's conflict of interest by appointing other counsel to "cross-examine" Mr. Alston on behalf of the defendant. However, this action did little to alleviate Mr. Baldwin's conflict. First, in order to effectively represent the defendant, Mr. Baldwin had the duty to effectively cross-examine all of the witnesses about all facts favorable to the defendant, including using his confidential information he received from Mr. Alston. In other words, he had the duty to attack the veracity and accuracy of Mr. Alston's testimony by eliciting information from the other witnesses that was adverse to Mr. Alston. However, he could not do so without breaching both his general duty to Mr. Alston as well as his specific duty to keep Mr. Alston's confidences.

In addition, the trial court's solution of appointing a second attorney to "cross-examine" Mr. Alston ignored the fact that regardless of how effective this second counsel was, representing a defendant involves a lot more than merely cross-examining a witness. Rather, it also involves such critical duties as effectively presenting closing argument attacking the state's witness and effectively using the fruits of cross-examination. In this case this did not happen because the court excused the second counsel from any apparent involvement in the case at the end of the cross-examination. Thus, the defendant was left with an attorney who had a conflict of interest in

effectively presenting closing argument in regards to the lack of veracity or accuracy of Mr. Alston's testimony.

One might rhetorically ask the following questions: (1) How could Mr. Baldwin present effective closing argument attacking the testimony of the state's critical witness when he was then actively representing that witness on two separate felony charges? (2) How could Mr. Baldwin effectively cross-examine the other witnesses in a way to attack Mr. Alston's claims when he was then actively representing Mr. Alston on two separate felony charges? These questions are rhetorical because the answer to each is obvious. No attorney could provide effective representation in this situation because the existence of an actual conflict of interest, as Mr. Baldwin had, is the antithesis of effective representation under both the federal and state constitutional guarantees of effective assistance of counsel. Since prejudice is conclusively presumed, the trial court's refusal to grant Mr. Baldwin's motion to withdraw in this case denied the defendant effective assistance of counsel and he is entitled to a new trial.

CONCLUSION

The trial court's refusal to appoint new counsel after the defendant's attorney revealed that he had an actual conflict of interest denied the defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment. As a result, the defendant is entitled to a new trial.

DATED this 2nd day of May, 2013.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

WASHINGTON CONSTITUTION ARTICLE 1, § 22

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station of depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

UNITED STATES CONSTITUTION, SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

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

STATE OF WASHINGTON,
Respondent,

NO. 44099-7-II

vs.

AFFIRMATION OF
OF SERVICE

EDWIN M. HILL,
Appellant.

Cathy Russell states the following under penalty of perjury under the laws of Washington State. On May 2nd, 2013, I personally placed in the United States Mail and/or E-filed the following document with postage paid to the indicated parties:

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