

NO. 44099-7-II

**IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON,**

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

EDWIN MICHAEL CECIL HILL,

Appellant.

BRIEF OF RESPONDENT

**SUSAN I. BAUR/WSBA 15221
Prosecuting Attorney
SEAN BRITTAIN
W.S.B.A #36804
Deputy Prosecutor
for Respondent**

**Hall of Justice
312 SW First
Kelso, WA 98626
(360) 577-3080**

TABLE OF CONTENTS

	PAGE
I. ISSUES.....	1
II. SHORT ANSWERS.....	1
III. FACTS	1
IV. ARGUMENTS.....	1
THE TRIAL COURT DID NOT ERR IN REFUSING TO ALLOW THE APPELLANT'S ATTORNEY TO WITHDRAW; THEREFORE, THE APPELLANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.....	1
V. CONCLUSION	7

TABLE OF AUTHORITIES

	Page
Cases	
<i>Cuyler v. Sullivan</i> , 446 U.S. 335, 100 S.Ct.1708, 64 L.Ed.2d 333 (1980) .	2
<i>In re Personal Restraint of Richardson</i> , 100 Wn.2d 669, 675 P.2d 209 (1983).....	3
<i>Mickens v. Taylor</i> , 535 U.S. 162, 122 S.Ct. 1237, 152 L.Ed.2d 291 (2002)	2, 3
<i>State v. Davis</i> , 141 Wash.2d 798, 10 P.3d 977 (2000)	2
<i>State v. Dhaliwal</i> , 150 Wn.2d 559, 571 P.3d 432 (2003)	3, 4
<i>State v. Ramos</i> , 83 Wn. App. 622, 922 P.2d 193 (1996)	5
<i>Wood v. Georgia</i> , 450 U.S. 261, 101 S.Ct. 1097, 67 L.Ed.2d 220 (1981) .	2
Other Authorities	
Sixth Amendment to the United States Constitution	1

I. ISSUES

1. Was the Appellant denied effective assistance of counsel when the Trial Court refused to allow the Appellant's attorney to withdraw?

II. SHORT ANSWERS

1. No. The Appellant received effective assistance of counsel because the Appellant's attorney did not establish that an actual conflict existed and the Trial Court properly addressed any potential conflict by appointing a second attorney.

III. FACTS

The State agrees, for the most part, with the factual and procedural history as set forth by the appellant. Where appropriate, the State's brief will point to specific facts in the record regarding the issues before the Court.

IV. ARGUMENTS

THE TRIAL COURT DID NOT ERR IN REFUSING TO ALLOW THE APPELLANT'S ATTORNEY TO WITHDRAW; THEREFORE, THE APPELLANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.

The Sixth Amendment to the United States Constitution provides that "[in] 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 includes the right to the assistance of an attorney who is free

from any conflict of interest in this case. *Wood v. Georgia*, 450 U.S. 261, 271, 101 S.Ct. 1097, 67 L.Ed.2d 220 (1981); *State v. Davis*, 141 Wash.2d 798, 860 P.3d 977 (2000). The defendant bears the burden of proving that there was an actual conflict that adversely affected his or her lawyer's performance. *Mickens v. Taylor*, 535 U.S. 162, 172, 122 S.Ct. 1237, 152 L.Ed.2d 291 (2002).

The possibility of a conflict is not enough to warrant reversal of a conviction. Instead, a defendant must show that his counsel actively represented conflicting interests. *Cuyler v. Sullivan*, 446 U.S. 335, 100 S.Ct.1708, 64 L.Ed.2d 333 (1980). “[A]n actual conflict of interest [means] precisely a conflict that affected counsel’s performance-as opposed to a mere theoretical division of loyalties.” *Mickens*, 535 U.S. at 171, 122 S.Ct. 1237.

In the present matter, the Appellant argues that he was denied effective assistance of counsel because his trial attorney, Mr. Baldwin, was currently representing a witness for the State, Mr. Alston. The Appellant claims that his attorney established that an actual conflict existed, thereby requiring the trial court to grant his motion to withdraw. The record simply does not support the Appellant’s argument.

The Appellant bases much of his position upon the holding in *In re Personal Restraint of Richardson*, 100 Wn.2d 669, 675 P.2d 209 (1983).

In doing so, he ignores the fact that *Richardson* was abrogated by *State v. Dhaliwal*, 150 Wn.2d 559, 571 P.3d 432 (2003). In *Dhaliwal*, the defendant argued that his attorney had a conflict of interest because he was also representing some of the State's witnesses in other matters and that his attorney's performance was negatively affected. *Id.* at 567. In one instance, his attorney represented a State's witness in a previous assault case. *Id.* Because of that previous representation, the defendant argued that his attorney was unable to effectively cross-examine the witness in regards to that specific case. *Id.*

The Court began by recognizing that under *Mickens* "reversal is not mandated when a trial court knows of a potential conflict but fails to inquire." *Id.* 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.'" *Id.* at 573 (*quoting Sullivan*, 446 U.S. at 350, 100 S.Ct. 1708). The Court ultimately concluded that although the defendant had presented the possibility of a conflict of interest, he failed to prove an actual conflict by failing to demonstrate how his attorney's representation of the State's witnesses in other matters affected his performance at trial. *Dhaliwal*, 150 Wn.2d at 573.

Here, following the rationale of *Dhaliwal*, the Appellant must prove that an actual conflict existed that adversely affected his attorney's performance. That standard cannot be met for three reasons. First, the "conflict" in this case is not as obvious as the Appellant claims it is. Mr. Baldwin notified the court of a potential conflict with Mr. Alston due to the fact he represented him on two unrelated felony drug matters. Mr. Baldwin mentioned numerous times that he had obtained privileged information from Mr. Alston in regards to the Appellant's case that would have been favorable to the Appellant and detrimental to Mr. Alston. However, Mr. Baldwin did not provide any additional information to the court about the nature of the conflict. Even after the State pointed out that the Mr. Alston's cases occurred one year after the Appellant's case was first investigated and *were completely unrelated* to the Appellant's case, Mr. Baldwin simply stated:

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.

RP at 6.

Simply put, this is only a perceived conflict, not an actual conflict. Beyond claiming that he had privileged information, Mr. Baldwin did

nothing to establish that his representation of Mr. Alston for unrelated felony drug charges that occurred a year after the Appellant's case created an actual conflict. In fact, from the record, it is obvious that Mr. Baldwin's main concern was being placed in an adversarial position against Mr. Alston. Representation of an adverse witness does not, by itself, constitute an actual conflict of interest. *See State v. Ramos*, 83 Wn. App. 622, 922 P.2d 193 (1996).

The second reason why the Appellant's claim fails is that the Appellant himself did not perceive an actual conflict. At the State's request, the court asked the Appellant whether he felt there was a conflict. The Appellant main concern was having as much time to spend with his newborn daughter. RP at 10. At no time did the Appellant agree with Mr. Baldwin's perceived conflict.

Finally, even if an "actual" conflict existed, the trial court remedied the matter. The court, without determining if an actual conflict did in fact exist, appointed separate counsel for the sole purpose of cross-examining Mr. Alston. Mr. Baldwin's concerns about being placed in an adversarial position with Mr. Alston were thus alleviated. Mr. Baldwin even went so far as to acknowledge that this exact procedure has occurred in previous cases with similar facts. RP at 8.

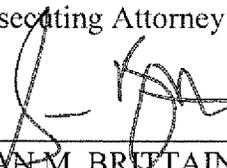
The Appellant attempts to circumvent this remedy by suggesting to the court that even with separate counsel being appointed, Mr. Baldwin could not effectively cross-examine all of the witnesses or make an effective closing argument. The Appellant fails to mention that Mr. Baldwin had an opportunity to cross-examine each of the State's witnesses about their testimony. The Appellant also fails to mention that Mr. Baldwin was present the courtroom as Mr. Alston testified and cross-examined. He was able to listen to Mr. Alston's testimony and incorporate that information into his arguments. The Appellant simply repeats his position that an actual conflict existed, thereby preventing Mr. Baldwin from adequately doing his job.

V. CONCLUSION

The Appellant has failed to demonstrate that any “actual,” let alone perceived, conflict had any effect on Mr. Baldwin’s performance. As these claims are without merit, the Court should dismiss this appeal.

Respectfully submitted this 23 day of August, 2013

SUSAN I. BAUR
Prosecuting Attorney

By 
SEAN M. BRITTAIN
WSBA #36804
Deputy Prosecuting Attorney
Representing Respondent

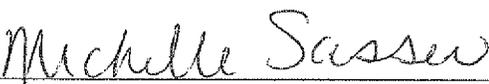
CERTIFICATE OF SERVICE

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

Mr. John Hays
Attorney at Law
1402 Broadway
Longview, WA 98632
jahayslaw@comcast.net

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on August 23rd, 2013.



Michelle Sasser

COWLITZ COUNTY PROSECUTOR

August 23, 2013 - 12:57 PM

Transmittal Letter

Document Uploaded: 440997-Respondent's Brief.pdf

Case Name: State of Washington v. Edwin M. C. Hill

Court of Appeals Case Number: 44099-7

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Michelle Sasser - Email: sasserm@co.cowlitz.wa.us

A copy of this document has been emailed to the following addresses:
jahayslaw@comcast.net