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Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000341-MR

DARRYL M. SAMUELS — APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE CRAIG Z. CLYMER, JUDGE
ACTION NO. 08-CR-00377

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; JONES AND MAZE, JUDGES.

JONES, JUDGE: This case arises out a decision from the McCracken Circuit Court finding that the Appellant, Darryl M. Samuels, did not raise an actual conflict of interest at trial. We AFFIRM, but for a different reason than articulated by the trial court.

I. Background

The events giving rise to this action took place in July of 2008 while Samuels was being held at the McCracken County Jail as a pretrial detainee. On July 9, 2008, Samuels became involved in a verbal dispute with another inmate, Christopher Gravett. The dispute soon turned physical. During the physical altercation, Samuels allegedly struck Gravett in the face and head several times, jumped on Gravett's back, and then bit his left ear completely off. Samuels maintains that he acted in self-defense at all times.

On September 12, 2008, the McCracken County Grand Jury indicted Samuels for committing the offense of second-degree assault, a class C felony. Attorney Carolyn Keeley from the Paducah office of the Kentucky Department of Public Advocacy (hereinafter "DPA") was appointed to represent Samuels.[1] A trial was originally set for April 21, 2009, but was continued by agreement to May 20, 2009.

On the morning of the trial, the court held a pretrial hearing in chambers. During the conference, Keeley informed the trial court that she believed Gravett was represented by other attorneys at the Paducah DPA; she also indicated she represented two potential prosecution witnesses who were also inmates at the time of the alleged assault. Keeley stated that she was concerned that this could present a potential conflict of interest.

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[1] As noted above, Samuels was being held in the McCracken County Detention Center on other charges. Keeley was already representing Samuels in connection with those pending charges.

Keeley presented Samuels with a document setting forth the reasons for the potential conflict and requested that he sign it to waive the conflict. Samuels refused to sign the document or otherwise waive the conflict. Samuels indicated that he believed the conflict would adversely affect Keeley's ability to try his case. The trial court questioned Samuels further about the matter.[2] The trial court ultimately concluded that there was no conflict and ordered the case to proceed to trial with Keeley representing Samuels.

The case was tried before a jury in a single day. The jury returned a guilty verdict on the assault charge. On July 23, 2009, the trial court sentenced Samuels to ten years' incarceration. Keeley continued to represent Samuels through the final sentencing hearing.

With the assistance of new counsel, Samuels appealed his conviction to our Court. On appeal, Samuels argued that his rights under the United States Constitution were deprived because of Keeley's conflicts of interest as related to Gravett and the two prosecution witnesses. We determined that Keeley's representation could have amounted to a conflict of interest, but found the factual record incomplete to enable us to meaningfully review the issue. *Samuels v. Commonwealth*, 2011 WL 846180 (Ky. App. 2011)(2009-CA-001420-MR). We remanded Samuels's case to the trial court with directions to conduct a full evidentiary hearing on the conflict issue. *Id.* We held as follows:

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[2] The trial court questioned Samuels regarding how the conflict could affect his case. However, the dialogue is not audible due to a poor quality tape.

> A defendant's right to counsel is guaranteed by the Sixth Amendment. A conflict of interest occurs when one attorney represents two clients with conflicting interests. This is not limited to the realm of codefendants. In *Beard v. Commonwealth*, 302 S.W.3d 643 (Ky. 2010), the Kentucky Supreme Court held that an attorney who was representing one client who was testifying against another client had a conflict of interest. In that case, the Court reversed Beard's conviction.
>
> In the case at hand, defense counsel believed that there may be a conflict of interest to the point that she requested Samuels sign a document that would waive any objection. Because a conflict of interest is such a pivotal question, we find that a new hearing is required, complete with findings of fact and conclusions of law. The trial court should determine if the two witnesses and victim were being actively represented by Samuels' defense counsel or the Paducah DPA in general and whether or not there was a conflict of interest.

Id. at *1.

As instructed, on remand, the trial court conducted an evidentiary hearing.[3] Several witnesses testified at the hearing, including Keeley and John Johnson, Gravett's attorney. The facts adduced on remand indicated that both Keeley and Johnson were employed by the Paducah DPA and that their representations of Samuels and Gravett overlapped.

The DPA had previously represented Gravett in connection with a felony that he pleaded guilty to on July 5, 2007. Gravett was on probation for this conviction when he faced parole revocation in early 2008. On June 30, 2008, the court conducted a parole revocation hearing. Gravett was sanctioned to serve

[3] On remand, Samuels abandoned his arguments concerning the two other prosecution witnesses; his argument focused entirely on the Paducah DPA's representation of Gravett and himself. Therefore, only the conflict as related to Gravett is before us on appeal.

ninety days in jail for violating his parole. Gravett was serving out his sanction when the alleged assault occurred on July 9, 2008.

Gravett served out his ninety-day sanction for the parole violation and was presumably released sometime in September of 2008. On January 9, 2009, Gravett was indicted on additional felony charges. The additional charges also led to Gravett's parole being revoked. Johnson was appointed to represent Gravett on both the new charges and the parole revocation. Gravett pleaded guilty to the new charges on April 8, 2009, and was sentenced to serve four years. On May 8, 2009, Johnson filed motions for shock probation with respect to both the prior sentence for which Gravett’s parole had been revoked and the new sentence arising out of his guilty plea. The court denied those motions on May 12, 2009, eight days before Samuels's trial was to commence.

The trial court first noted that there was no simultaneous representation because Johnson stopped representing Gravett eight days before Samuels's trial began. It characterized this situation as one where "the defense counsel has only previously represented an adverse witness." The trial court also concluded that Samuels's and Gravett's interests at trial were not adverse to one another because Gravett's interests would not be impacted by his testimony against Samuels. Lastly, the trial court concluded that even if there was a conflict, Samuels could not prevail because he failed to show any deficient performance by Keeley. The trial court stated: "at the evidentiary hearing, no showing was made that Ms. Keeley was unable to give her best representation to the Defendant." For

these reasons, the trial court concluded that Samuels had failed to show that a conflict of interest existed that deprived him of his Sixth Amendment right to counsel.

II. Standard of Review

In reviewing this matter, we must first determine whether the trial court's findings are supported by substantial evidence. *Adcock v. Commonwealth*, 967 S.W.2d 6, 8 (Ky. 1998) (citing *Ornelas v. United States*, 517 U.S. 690, 697, 116 S.Ct. 1657, 1662, 134 L.Ed.2d 911 (1996)). If the trial court's factual findings are not clearly erroneous, then we conduct a *de novo* review of the trial court's application of the law to the facts. *Id.*

III. Analysis

The Sixth Amendment, which applies to the states through the Fourteenth Amendment, guarantees a defendant "the right ... to have the Assistance of Counsel for his defence." U.S. Const. amend. VI.; *Benton v. Maryland*, 395 U.S. 784, 794, 89 S.Ct. 2056, 2062, 23 L.Ed.2d 707 (1969). "[I]t has long been recognized that the right to counsel is the right to the effective assistance of counsel." *U.S. v. Cronic*, 466 U.S. 648, 654, 104 S.Ct. 2039, 2044, 80 L.Ed.2d 657 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771, n. 14, 90 S.Ct. 1441, 1449, 25 L.Ed.2d 763 (1970)). In turn, effective counsel means conflict-free

counsel. *Burger v. Kemp*, 483 U.S. 776, 796-97, 107 S.Ct. 3114, 3127, 97 L.Ed.2d 638 (1987); *Bartley v. Commonwealth*, 400 S.W.3d 714, 719 (Ky. 2013).

A. *Holloway* Standard

In evaluating a Sixth Amendment challenge predicated on counsel's alleged conflict of interest, it is of paramount importance to recognize that there are two different standards. *Beard v. Commonwealth*, 302 S.W.3d 643 (Ky. 2010). Which standard applies depends on whether the conflict was raised for the first time at (or before) trial or at some later point during post-conviction proceedings. *Id.*

As the *Beard* court explained, if the defendant or his counsel raises the alleged conflict at or before trial, we follow the standard set out in *Holloway v. Arkansas*, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978). *Holloway* instructs us that to prevail on a Sixth Amendment challenge based on a conflict of interest that was raised at or before trial, a defendant need only show that his counsel had a conflict of interest. *Id.* Where the defendant shows that his counsel had a conflict, reversal is automatic. *Id.* The defendant is *not* required to make any showing that the conflict actually prejudiced him or impacted his counsel's performance. *Beard*, 302 S.W.3d at 645-47.

For unpreserved objections (*i.e.,* objections not raised until after trial) to conflicted counsel, we follow the more stringent standard set out in *Cuyler v. Sullivan*, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980), and *Mickens v. Taylor*, 535 U.S. 162, 172, 122 S.Ct. 1237, 152 L.Ed.2d 291 (2001). *See Bartley*

v. Commonwealth, 400 S.W.3d 714, 719 (Ky. 2013). Under this standard, the defendant is required to prove both the existence of a conflict and that the conflict actually prejudiced him. *Id.*; *Kirkland v. Commonwealth*, 53 S.W.3d 71, 75 (Ky. 2001).

While the trial court cited the *Holloway* standard, it made and appeared to rely on findings related to Keeley's performance. Specifically, the trial court's findings of fact state:

> At the evidentiary hearing, no showing was made that Ms. Keeley was unable to give her best representation to the Defendant. No showing was made that Ms. Keeley took steps or omitted actions that would have helped either the Defendant or Mr. Gravett. No complaint has been made at her attempts to cross-examine Mr. Gravett at the Defendant's trial. No complaint has been made that Ms. Keeley revealed confidential information about either the Defendant or Mr. Gravett. No showing has been made that an actual conflict of interest existed at trial.

Samuels raised his objections regarding the conflict before the start of trial. In keeping with *Holloway*, the trial court should have limited its inquiry to determining whether a conflict of interest existed. As explained by the United States Supreme Court, the reason for this is that it is often difficult, if not impossible, to determine whether a conflict impacted counsel's performance throughout the course of the criminal proceedings:

> But in a case of joint representation of conflicting interests the evil—it bears repeating—is in what the advocate finds himself compelled to *refrain* from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process. It may be

> possible in some cases to identify from the record the prejudice resulting from an attorney's failure to undertake certain trial tasks, but even with a record of the sentencing hearing available it would be difficult to judge intelligently the impact of a conflict on the attorney's representation of a client. And to assess the impact of a conflict of interests on the attorney's options, tactics, and decisions in plea negotiations would be virtually impossible. Thus, an inquiry into a claim of harmless error here would require, unlike most cases, unguided speculation.

Holloway, 435 U.S. at 490-91, 98 S.Ct. at 1182.

Had the trial court concluded that a conflict existed, it would have been required to automatically reverse Samuels's conviction irrespective of its opinion that the conflict did not detrimentally impact Keeley's performance at trial. Thus, the remainder of our discussion will be limited to whether the trial court correctly found that no conflict existed.

B. Timing of Representation

Although not entirely clear, the trial court appears to have based its conclusion that no conflict existed partially on the fact that there was no simultaneous representation when Samuels's case went to trial. To this end, the trial court explicitly found that the DPA's representation of Gravett terminated on May 12, 2009, eight days before Samuels's trial began. It characterized Samuels's case as one "wherein the defense counsel has only previously represented an adverse witness."

The Sixth Amendment right to counsel attaches long before trial. It "attaches during 'the initiation of adversary judicial criminal proceedings.'"

Montejo v. Louisiana, 556 U.S. 778, 802, 129 S.Ct. 2079, 2094, 173 L.Ed.2d 955 (2009) (quoting *Rothgery v. Gillespie County*, 554 U.S. 191, 128 S.Ct. 2578, 2583, 171 L.Ed.2d 366 (2008)). "[T]o deprive a person of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself." *Maine v. Moulton*, 474 U.S. 159, 170, 106 S.Ct. 477, 484, 88 L.Ed.2d 481 (1985).

If an actual conflict existed during the critical investigatory phase of Samuels's trial, it could not have been erased by the mere fact that the simultaneous representation ceased on the eve of trial. *See, e.g.*, *State v. Watson*, 620 N.W.2d 233, 240 (Iowa 2000) (rejecting the state's characterization as one of past representation where it was undisputed that counsel represented both the witness and the defendant during "some portion of the pre-trial period"). The determinative inquiry within the context of the Sixth Amendment must focus on whether there was simultaneous representation throughout critical points of the criminal proceedings.

Samuels's case involved a claim of self-defense. Interviewing other witnesses and investigating Gravett's background would have been critical for Samuels to mount a successful defense at trial. If an actual conflict did exist during this pretrial period, it could not have been remedied by ceasing the dual representation immediately prior to trial. The damage would have already taken place. Accordingly, we conclude that the trial court erred when it found that Samuels's case raised only an issue of past representation.

C. Adverse Interests

In analyzing the adverse interest element, the trial court focused almost entirely on whether Samuels's trial could impact the charges against Gravett. It concluded that since Gravett had already pleaded guilty and had been denied shock probation, he had nothing to gain from seeing Samuels convicted. We believe that the trial court took a far too narrow view.

A conflict during representation arises from competing interests or duties that create the potential for prejudice. *Beard*, 302 S.W.3d at 647. Our Supreme Court recognized in *Beard* that simultaneous representation of both a prosecution witness and a criminal defendant could create a conflict of interest that violates the Sixth Amendment. *Id.* Here, we add an extra layer because not only was Gravett the main prosecution witness, he was also the victim.

"The victim of a crime is not a detached observer of the trial of the accused." *Castillo v. Estelle*, 504 F.2d 1243, 1245 (5th Cir. 1974). This is especially true in the Commonwealth of Kentucky where we have a victim's rights statute, Kentucky Revised Statutes (KRS) 421.500, which requires, among other things, for the prosecution to consult with the victim "on the disposition of the case including dismissal, release of the defendant pending judicial proceedings, any conditions of release, a negotiated plea, and entry into a pretrial diversion program." KRS 421.500(6). Moreover "[a] victim has the right to submit a 'victim impact statement' pursuant to KRS 421.520, and the trial court must consider that statement 'prior to any decision on the sentencing ... of the defendant.'" *Hoskins v. Maricle*, 150 S.W.3d 1, 26 (Ky. 2004). Under KRS 532.032, the trial court also

has the authority to order the convicted defendant to pay restitution to the victim in criminal cases.[4]

We believe that there are few interests more adverse in the criminal justice system than those of the accused and the victim. Our statutes place the victim on special footing. Furthermore, in a case like the present where the defendant is claiming self-defense, the victim's credibility is directly adverse to the defendant. Within the context of our criminal justice system, we believe that the victim's interests are inherently so adverse and hostile to the defendant's interests that it would be impossible for a single lawyer to simultaneously represent both the victim and the defendant even in unrelated matters. It is impossible to see how a single attorney could give both the defendant and the victim the type of undivided loyalty required for effective representation.

As the Missouri Court of Appeals explained: "Where counsel's representation of a defendant may be hampered by the duty of loyalty and care to two competing interests, as when counsel represents both the defendant and the defendant's alleged victim, the defendant is precluded from receiving the advice and assistance sufficient to afford the defendant the quality of representation the Sixth Amendment guarantees." *State ex rel. Horn v. Ray,* 325 S.W.3d 500, 510 (Mo. App. E.D. 2010).

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[4] Restitution is defined as "any form of compensation paid by a convicted person to a victim for counseling, medical expenses, lost wages due to injury, or property damage and other expenses suffered by a victim because of a criminal act[.]" KRS 532.350(1)(a).

Thus, we conclude that the trial court erred to the extent it found that Samuels and Gravett did not have adverse interests. Gravett was more than a prosecution witness; he was the victim. A victim's interests in a criminal prosecution are so inherently adverse to the defendant's interests that we are hard pressed to imagine any scenario where a single lawyer could fulfill his duties to both parties simultaneously.

D. Conflict Imputation

We believe that the interests of Samuels and Gravett were adverse enough to one another that a single lawyer could not have permissibly represented both at the same time. However, the facts adduced at the evidentiary hearing showed that a single lawyer did not represent both Samuels and Gravett. Samuels was represented by Keeley. Gravett was represented by Johnson. However, Keeley and Johnson were both attorneys working out of the same DPA office in Paducah.

In support of his argument, Samuels argued at the remand hearing that Kentucky Rules of Professional Conduct (Rules of the Supreme Court [SCR] 3.130) are determinative of this issue. He particularly relied on SCR 3.130(1.10), which governs the imputation of conflicts of interest. It provides:

> (a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the

representation of the client by the remaining lawyers in the firm.

Id. Samuels maintains that because Keeley and Johnson were both employed by the Paducah DPA office, this Rule imputes their individual conflicts to another.

To date, our appellate courts have not decided whether and to what extent public defender organizations are to be deemed “firms” for the purposes of SCR 3.130(1.10).[5] *Bartley*, 400 S.W.3d at 719, fn.5. While this issue is certainly a weighty one, we do not see fit to weigh in on it today for one simple reason--this is not a lawyer discipline case. Violations of the Rules of Professional Conduct can give rise to judicial ethics proceedings against lawyers. *Rose v. Winters, Yonker & Rousselle, P.S.C.*, 391 S.W.3d 871, 874 (Ky. App. 2012). The Rules of Professional Conduct, however, are not constitutional guideposts. *See, e.g., State v. Montgomery*, 997 N.E.2d 579, 590 (Ohio App. 2013); *Spence v. Commonwealth*, 727 S.E.2d 786, 794 (Va. App. 2012).

In analyzing constitutional claims, like the present, "a court must be careful not to narrow the wide range of conduct acceptable under the Sixth Amendment so restrictively as to constitutionalize particular standards of professional conduct and thereby intrude into the state's proper authority to define and apply the standards of professional conduct applicable to those it admits to practice in its courts." *Nix v. Whiteside,* 475 U.S. 157, 165, 106 S.Ct. 988, 993, 89

[5] The states that have done so are divided on the issue. *Compare Anderson v. Commissioner of Correction*, 15 A.3d 658 (Conn. App. 2011), *with Richard B. v. State, Dept. of Health and Social Services, Div. of Family and Youth Services*, 71 P.3d 811 (Alaska 2003).

L.Ed.2d 123 (1986). In deciding a nearly identical case, the Supreme Court of Colorado, explained:

> In affirming the court of appeals, however, we express no opinion regarding which ethics rule applies to these public defenders—Colo. RPC 1.10 (the general imputation rule) or Colo. RPC 1.11 (the special conflicts of interest rule for government employees). Nor do we hold that conflicts of interest are always imputed to other public defenders, either between or within regional offices. Our role here is "not to enforce the Canons of Legal Ethics, but to ... assure vindication of the defendant's Sixth Amendment right to counsel." *Mickens*, 535 U.S. at 176, 122 S.Ct. 1237; *see also Nix v. Whiteside*, 475 U.S. 157, 165 [106 S.Ct.988, 993]. . . ("[B]reach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel."). An attorney's ethical obligations do not dictate the scope of the Sixth Amendment right to conflict-free counsel. Were it otherwise, this court could redraw the boundaries of the Sixth Amendment each time the Rules of Professional Conduct are revised.

West v. People, 341 P.3d 520, 531 (Colo. 2015).

Keeley's and Johnson's ethical obligations vis-à-vis SCR 3.130(1.10) do not define the scope of Samuels's rights under the United States Constitution. Instead, we must look at Samuels's individual case to determine whether his counsel had an actual conflict for the purpose of the Sixth Amendment. The facts adduced at the remand hearing were clear that Keeley never represented Gravett, knew nothing about the details of his case, and had no duty or loyalty to him directly. Likewise, Johnson had never worked on Samuels's case, knew nothing about the details of his case, and owed no duty or loyalty directly to Samuels.

The facts show that two different DPA attorneys working independently of one another happened, for a period of time, to represent both the victim, Gravett, and the defendant, Samuels. Without a showing that the two collaborated or were involved in each other's cases during the relevant time period, we do not believe that the mere fact that they both worked for DPA is sufficient to prove that an actual conflict of interest existed under the Sixth Amendment.[6] It is for this reason that we affirm the trial court's ultimate conclusion.

IV. CONCLUSION

For the reasons set forth above, we AFFIRM the McCracken Circuit Court.

ALL CONCUR.

[6] Whether these facts created a professional ethics issue under SCR 3.130(1.10) is a separate issue that is not before us for resolution today. We reiterate that we are not attempting to interpret or modify Rule 1.10 in anyway. We believe that any clarification or amendment of this Rule should be accomplished by the Supreme Court of Kentucky in its rulemaking capacity and not by judicial decision under the Sixth Amendment. *See, e.g., In re Formal Advisory Opinion 10-1*, 744 S.E.2d 798, 801 (Ga. 2013) ("We do not endorse any particular alternative to Rule 1.10(a), but we also do not foreclose the possibility that Rule 1.10(a) could be amended so as to adequately safeguard high professional standards and the constitutional rights of an accused—by ensuring, among other things, the independent judgment of his counsel and the preservation of his confidences—and, at the same time, permit circuit public defender offices more flexibility in the representations of co-defendants.").

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