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STATE OF WISCONSIN

COURT OF APPEALS DISTRICT I

Case No. 2018-AP-614-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL WADE,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION
ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT,
THE HONORABLE JANET PROASIEWICZ PRESIDING

BRIEF AND APPENDIX OF
DEFENDANT-APPELLANT

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ISSUES PRESENTED

Whether the Michael Wade's trial attorney had an actual conflict of interest in representing Wade because the trial attorney had previously represented the victim in Wade's criminal case.

STATEMENT ON PUBLICATION AND ORAL ARUGMENT

Wade does not request publication or oral argument. This case involves the application of well settled principles of law and the parties briefing will adequately address all issues.

STATEMENT OF THE CASE

On September 23, 2016, Wade was charged with one count of misdemeanor intimidation of a witness contrary to Wis. Stat. § 940.42 and two counts of knowingly violating a domestic abuse injunction contrary to Wis. Stat § 813.12(4) and (8)(a). (1:1-2) in Milwaukee County Case No. 2016-CM-3158. All three counts were charged with the habitual criminality repeater pursuant to Wis. Stat. §939.62(1)(a).

All three counts in 2016-CM-3158 stemmed from a pending case against Wade, Milwaukee County Case No. 2016-CM-2079. In the 16-CM-2079 case, Wade was charged with one count of knowingly violating a domestic abuse injunction. Wade was represented by Attorney Mark Tishberg in both matters. (42).

At all times relevant to this case, N.D.¹ had a restraining order against Wade that prevented him from contacting her or appearing at her residence. (6:1-4.) In 16-CM-2079, Wade was accused of contacting N.D. and appearing at her residence.

In 16-CM-3158, Wade was accused of calling N.D. from the Milwaukee County House of Correction and attempting to persuade her from appearing in court on 16-CM-2079. (1:1-4). Consequently, these calls were the basis

¹ The defendant-appellant uses N.D. to identify the victim. *See* Wis. Stat. § (Rule) 809.86.

for the violation of the domestic abuse injunction charges in 16-CM-3158. (1:1)

The cases were joined for the purposes of trial at a pretrial hearing on September 27, 2016. (40: 2-6).

Before the trial began, Attorney Tishberg notified the court that he had represented the victim in the past. (43: 4-5.) The court had a brief discussion with Wade and continued the case. *Id.* The trial began on October 19, 2016 with jury selection. (42.) Jury selection was completed late on October 19th. *Id.* Opening statements and testimony began on October 20th. Most of the testimony centered on the facts surrounding the allegations in 16-CM-2079.

The State's first witness was Thomas Koerner. (43:29.) Mr. Koerner is a 911 dispatcher with the City of West Allis. *Id.* He testified that he was working as a 911 dispatcher on June 20, 2016. The state used Mr. Koerner to place into evidence a 911 call allegedly made from the N.D. in the 16-CM-2079 case. (43:34.)

The State's second witness was City of West Allis Police Officer Jason Komorowski. (43:45.) Officer Komorowski testified that he was working as a City of West Allis Police Officer on June 20, 2016 and was dispatched to 2371 S. 92nd Street for a disturbance. (43:45-6.)

Officer Komorowski testified that he arrived at the residence at 8:34 p.m. (43:46.) When he arrived at the residence he spoke with N.D. and that N.D. would not let him into the residence. (43:48.) He finally testified that because N.D. would not let him into the residence he left. (43:49.)

Officer Kevin Schmidt was the State's next witness. (43:52.) Officer Schmidt testified that he arrived at 2371 S. 92nd Street at approximately 11:45 p.m. in response to a restraining order violation. (43:54.) He testified that he was given permission by N.D. to enter the residence and when he entered the residence he saw Wade. (43:54.) Officer Schmidt

also testified that there was a no contact restraining order in place preventing Wade from contacting N.D. (43:56.) Wade was taken into custody without incident. (43:55.)

The State's next witness was Officer Adam Schweitzer. Officer Schweitzer was with Office Schmidt when they responded to the call at N.D.'s residence at 11:45 p.m. (43:63.) Wade was then arrested for being at the residence. *Id.*

All of this testimony was referring to conduct related to the allegations in 2016-CM-2079.

For 2016-CM-3158, the State called several witnesses to present evidence for the intimidation and injunction charges in 2016-CM-3158. The State called two investigators to testify about collecting and listening to calls from the Milwaukee County House of Correction. (45.)

Jospeh Link, a witness protection investigator with the Milwaukee County District Attorney's office testified that on July 29, 2016, Wade made an inmate call to a number later identified as N.D.'s telephone number. (45:16-22.) Link stated that during the call N.D. identified Wade by his first and last name. (45:22.)

Wade's probation agent, Chad Schepp, testified that the male voice in the July 29, 2016 telephone calls was Wade's. (45:31-33.) Another witness, Megan McKinnon, testified that she also works for the State of Wisconsin and is familiar with N.D.'s voice. (45:38.). McKinnon testified that the female voice in the July 29, 2016 jail calls was N.D.'s voice (45:39.)

Wade testified in his defense, denied making any of the telephone calls referenced in this case and denied ever intimidating N.D. (46: 28-50.)

Wade was ultimately acquitted of the charge in 16-CM-2079, but found guilty of all three charges in 16-CM-3158. (47:39-40.) He was sentenced to 18 months of initial

confinement and 6 months of extended supervision on each count, consecutive to each other and consecutive to the sentence he was currently serving. (12:1-2.)

A timely notice of intent to seek postconviction relief was filed. (14.) Wade, through his postconviction counsel, filed a motion for a new trial based on an ineffective assistance of counsel claim. (19:1-4.) The claim was built around an affidavit of Wade's trial counsel, Attorney Tishberg. *Id.* In his affidavit, Attorney Tishberg stated that he had represented, the alleged victim in the case, N.D., in the past and that he had an actual conflict of interest in regard to his representation of Wade. (20:1-2.)

The circuit court denied Wade's motion for a new trial without an evidentiary hearing. (27:1-4.) Wade filed a timely notice of appeal and now asks this court to reverse the ruling of the circuit court and grant him a new trial. (36:1-2.)

ARGUMENT

I. Wade's Sixth Amendment right to effective assistance of counsel was violated because his trial attorney had an actual conflict of interest when representing Wade and that conflict of interest materially affected the representation.

A defendant has a constitutional right to effective assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitution, and Article I, § 7 of the Wisconsin Constitution. *State v. Smith*, 207 Wis. 2d 259, 273, 558 N.W.2d 379 (1997).

To establish a claim of ineffective assistance of counsel, a defendant must show (1) deficient performance, *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct.

App. 1979 and (2) prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

Whether a defendant was denied effective assistance of counsel due to a trial attorney's conflict of interest is a mixed question of law and fact. *State v. Love*, 227 Wis. 2d 60, 67, 594 N.W.2d 806 (1999). A reviewing court does not overturn the factual findings of the circuit court regarding the circumstances of the trial attorney's conduct unless those findings are clearly erroneous. *Id.* However, whether the facts constitute a constitutional violation of the sixth amendment right to effective assistance of counsel is something this Court reviews de novo. *Id.*

In a typical ineffective assistance of counsel case, prejudice is proven where there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Machner* 92 Wis.2d at 694. However, when a defendant is alleging ineffective assistance of counsel based on an actual conflict of interest, the "effect" is an effect on the attorney's performance and not on the outcome of the trial. *State v. Villarreal*, 2013 WI App 33, ¶10, 346 Wis.2d 690, 828 N.W. 2d 866.

In *Cuyler v. Sullivan*, 446 U.S. 335, 64 L. Ed. 2d 333, 100 S. Ct. 1708 (1980), the United States Supreme Court outlined the current standard for analyzing ineffective assistance of counsel claims based on an attorney's potential conflict of interest. The Court held that "the possibility of conflict is insufficient to impugn a criminal conviction. In order to demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance." *Id.* at 350.

When a defendant does not raise an objection to the attorney's potential conflict of interest prior to trial, the defendant must show that the actual conflict of interest

negatively affected the trial attorney's performance.
Villarreal, 2013 WI App 33 at ¶8 (*citing Cuyler* , 446 U.S. at 348.).

An attorney has a continued duty of good faith and loyalty to former clients. Wisconsin Supreme Court Rule 20:1.9(a) & (c) states:

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in a writing signed by the client.

...

(b) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter: (1) use information relating to the representation to the disadvantage of the former client except as these rules would permit or require with respect to a client, or when the information has become generally known; or (2) reveal information relating to the representation except as these rules would permit or require with respect to a client.

In his postconviction motion, Wade alleged that Attorney Tishberg had an actual conflict of interest because he had formerly represented the victim, N.D., in this matter. (21:1-5.)

It is undisputed that Attorney Tishberg formerly represented N.D. in a criminal matter. (20:1-2.) When

representing a client in a criminal matter, the lawyer is bound to learn details about the client's past that may be detrimental to client in the future. Such is the case here with Attorney Tishberg and his representation of N.D.

The record indicates that Attorney Tishberg knew certain facts about N.D. that could have been helpful to Wade. For instance, before Wade testified at the trial there was a statement made by the district attorney that the State and defense had agreed not to mention any prior or bad acts of N.D. (46:26.) This statement indicates that Attorney Tishberg and the district attorney discussed N.D.'s prior acts and made an agreement not to disclose those acts. *Id.*

In his affidavit supporting the defense's motion for a new trial, Attorney Tishberg indicated that he knew he had an actual conflict of interest and neither N.D. nor Wade gave informed consent to his representation in this matter. (20:1-2).

In its decision denying Wade's motion for a new trial, the circuit court noted that the trial judge had a discussion with Wade about Attorney Tishberg's prior representation of N.D. Wade acknowledged Attorney Tishberg's prior representation of N.D. and decided to continue. The circuit court treated Wade's decision as a waiver of the conflict. It is accepted law that a client's waiver of the conflict also waives the defendant's ineffective assistance claim. *State v. Demmerly*, 2006 WI App 181, ¶ 16, 296 Wis.2d 153, 722N.W. 2d 585.

Additionally, the Court in *State v. Kaye*, 106 Wis.2d 1, 315 N.W.2d 337 (1982), stated that trial courts must engage in a colloquy with the defendant to inform the defendant of the problems with conflicts of interest. *Kaye*, specifically dealt with the obvious conflict that occurs when a lawyer or law firm represents co-defendants in the same case. *Id.* at 14. *Kaye*, was partially overruled by *State v. Miller*, 160 Wis. 2d 646, 467 N.W.2d 118 (1991). The Court in *Miller* extended

the requirement that the circuit court conduct a colloquy to any criminal case where there is a question about a conflict of interest with the defendant's choice of counsel. *Id.* *Miller* and *Kaye* also require the circuit court to determine whether the defendant understands the potential conflict and determine if the defendant wants different counsel. *See Kaye*, 106 Wis.2d at 14; *See also Miller*, 160 Wis.2d at 660.

The circuit court's colloquy and Wade's decision to continue does not constitute a waiver. The circuit court did not advise Wade that a conflict existed. The court simply asked Wade if he was aware that Attorney Tishberg had represented N.D. in the past and whether Wade wanted to continue with Attorney Tishberg. There was no discussion on the record about Attorney Tishberg advising Wade about the positives and negatives of his representation. The court did not inquire of Attorney Tishberg whether the waiver was knowing, voluntary and intelligent. In fact, the court did not specifically state that a waiver existed.

Typically, a waiver of a conflict of interest must be in writing. *See Supreme Court Rule 20:1.7(b)*. There is no indication in the record that any written waiver was attained by Attorney Tishberg.

Moreover, Supreme Court Rule 20:1.6 states that the duty of confidentiality to clients continues even after the representation is terminated. Thus, Attorney Tishberg potentially would not be able to use information learned during his representation of N.D. that helped Wade, but was harmful to N.D. It is for this exact reason that attorneys are not allowed to represent individuals that have conflicting interests.

An actual conflict existed with Attorney Tishberg's representation of Wade and past representation of N.D. Moreover, the court record demonstrates that Attorney

Tishberg's performance was affected by his prior representation of N.D.

This conflict of interest rendered Attorney Tishberg's representation of Wade constitutionally ineffective.

CONCLUSION

For the foregoing reasons, Wade requests this court reverse the order of the circuit court denying Wade's motion for a new trial, vacate the judgment of conviction and remand the case back to the circuit court for further proceedings.

Dated this 26th day of September, 2018

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 2,687 words.

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**CERTIFICATE OF COMPLIANCE
WITH RULE 809.19(12)**

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court and Court of Appeals; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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