

RECEIVED

11-30-2018

STATE OF WISCONSIN
COURT OF APPEALS

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

DISTRICT I

Appeal Case No. 2018AP000614-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

MICHAEL WADE,

Defendant-Appellant.

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

BRIEF OF PLAINTIFF-RESPONDENT

John Chisholm
District Attorney
Milwaukee County

Ken Olstinski
Assistant District Attorney
State Bar No. 1105854
Attorneys for Plaintiff-Respondent

District Attorney's Office
821 West State Street, Room 405
Milwaukee, WI 53233-1485
(414) 278-4646

TABLE OF CONTENTS

	Page
ISSUES PRESENTED	1
STATEMENT ON ORAL ARGUMENT AND PUBLICATION	2
STATEMENT OF THE CASE	2
STANDARD OF REVIEW	5
ARGUMENT	5
I. ATTORNEY TISHBERG DID NOT HAVE AN ACTUAL CONFLICT OF INTEREST IN REPRESENTING WADE AND THUS WAS NOT INEFFECTIVE.....	5
II. WADE WAIVED ANY POTENTIAL CONFLICT ON THE RECORD AND IS PRECLUDED FROM CLAIMING INEFFECTIVE ASSISTANCE OF COUNSEL BASED ON THAT POTENTIAL CONFLICT	8
CONCLUSION	10

TABLE OF AUTHORITIES

CASES CITED

	Page
<i>Cuyler v. Sullivan</i> , 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980).....	6
<i>State v. Cobbs</i> , 221 Wis. 2d 101, 584 N.W.2d 709 (Ct. App. 1998)	6, 7, 9, 10
<i>State v. Demmerly</i> , 2006 WI App 181, 296 Wis. 2d 153, 722 N.W.2d 585	8
<i>State v. Kaye</i> , 106 Wis. 2d 1, 315 N.W.2d 337 (1982).....	9
<i>State v. Love</i> , 227 Wis. 2d 60, 594 N.W.2d 806 (1999).....	5, 6
<i>State v. Medrano</i> , 84 Wis. 2d 11, 267 N.W.2d 586 (1978).....	6, 7
<i>State v. Miller</i> , 160 Wis. 2d 646, 467 N.W.2d 118 (1991).....	9
<i>State v. Owen</i> , 202 Wis. 2d 620, 551 N.W.2d 50 (Ct. App. 1996).....	6
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)	5

WISCONSIN STATUTES CITED

§ 813.12	2
----------------	---

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Appeal Case No. 2018AP000614-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

MICHAEL WADE,

Defendant-Appellant.

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

BRIEF OF PLAINTIFF-RESPONDENT

ISSUES PRESENTED

- I. Did Attorney Tishberg have an actual conflict of interest in representing Wade, when he had previously represented N.D.?

Trial Court answered: No.

- II. Did Wade waive any potential conflict of interest that Attorney Tishberg may have had with prior representation of N.D.?

Trial Court answered: Yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. The briefs in this matter can fully present and meet the issues on appeal and fully develop the theories and legal authorities on the issues. *See* Wis. Stat (Rule) 809.22(1)(b). Further, as a matter to be decided by one judge, this decision will not be eligible for publication. *See* Wis. Stat (Rule) 809.23(1)(b)4.

STATEMENT OF THE CASE

On July 29, 2016 a request was made to the witness security unit of the Milwaukee County District Attorney's Office to monitor and review the jail calls of Wade. Analyst J.P. found two jail calls on July 29, 2016 from Wade to N.D. (R1:3; R46:6).

At the start of the first jail call, N.D. was upset with Wade and told him he was guilty. (R1:3). Wade told her to keep the kids in the house in case someone came to the house to try to serve her a subpoena. (R1:3; R46:10-11)

Early in second the jail call, N.D. referred to the inmate as Michael Wade. (R1:3). Wade then told her to continue "stayin' out of the limelight from these people." *Id.* She then told him to relax because his hearing wasn't until August 26th. *Id.*

Wade was subject to the conditions of the Domestic Abuse Injunction, issued pursuant to Wis. Stat. § 813.12 on November 16, 2015, in Milwaukee County, Court Case No.: 2015FA007191, which remains effective until November 16, 2019, which names N.D. as petitioner, and Wade, as respondent. (R1:3; R4:1-2). The injunction prohibits, among other things, Wade from contacting N.D. *Id.* Milwaukee County Sherriff records indicate, and Wade stipulated during trial, that Wade was personally served with a copy of the above-described injunction on November 16, 2015. (R1:3; R44:28).

Wade's probation agent, C.S., listened to the above referenced calls and positively identified the inmate voice as Wade's voice based on his years of supervision of Wade. (R45:31). Wade was subsequently charged with one count of witness intimidation and two counts of violating a domestic abuse injunction in Milwaukee County Circuit Court Case Number 16CM3158. (R1:1-2).

On the morning of Wade's speedy jury trial, after the case was first passed, Attorney Tishberg approached Attorney Lewand and, for the first time, disclosed that he formerly represented N.D. (R43:5). Attorney Lewand and Attorney Tishberg had an in-chambers discussion with the Honorable Judge Janet Protasiewicz. (R43:4). Attorney Tishberg advised the Court and the State that he had formerly represented N.D. Id. Attorney Tishberg further advised that both N.D. and Wade had waived any conflict of interest. (R43:4-5).

The prior representation had occurred in 2001, in Milwaukee County Court Case No. 2001CM000764, in which Tishberg represented N.D. (R20:1).

When the case was recalled, prior to beginning the trial, the court addressed, on the record, the earlier disclosure about Attorney Tishberg formerly representing N.D. (R43:5). The court then conducted a colloquy to ensure that Wade was aware of Attorney Tishberg's prior representation of N.D. The court engaged in the following colloquy:

The Court: All right. We did have some conversations in chambers about the fact that the alleged victim in their case—[N.D.'s name omitted]. Mr. Wade, are you aware that Attorney Tishberg at one point represented her in some criminal matters?

The Defendant: Yes, I'm aware.

The Court: And I want to make sure that it's okay with you that he continues to represent you, given the fact that in the past he has represented her.

The Defendant: Yes.

The Court: Is that acceptable to you?

The Defendant: Yes.

The Court: And did you talk to him about this, Attorney Tishberg?

Mr. Tishberg: Yes. He knew about it for quite a while and I did discuss it with him earlier today.

The Court: And what's the State's position in that regard?

Ms. Lewand: You Honor, the State will not object to Attorney Tishberg remaining on the case. He did inform me this morning that he had previously represented N.D. and that [N.D.] was aware of the situation and she was not objecting to it either and neither is his client currently. So the State therefore, will not take issue.

(R43:4-5).

Attorney Tishberg represented as an officer of the court that there was no issue in proceeding with the continued representation of Wade. (R43:4). Both the State and the court relied upon Attorney Tishberg's representations, and the matters proceeded to trial. N.D. was not present to testify and Attorney Tishberg used that as an opportunity to attack N.D.'s credibility at trial. (R44:25).

Wade was found guilty of the three counts in 2016CM003158 on October 21, 2016. (R12:1) The court sentenced Wade to two years on each count in the Wisconsin State Prison—in a bifurcated sentence of one year and six months initial confinement and six months extended supervision on each count. *Id.* The sentences on each count were consecutive to each other and to Wade's current violation of probation hold. *Id.*

N.D. filed a crime victim impact statement. (R10:1). In that statement, N.D. stated that she did not want Wade to receive any additional jail time. *Id.* At sentencing, N.D. stated that she did not want to appear for the jury trial because she hates going to the court that courtroom. (R48:14; R21:5)

Wade filed a post-conviction motion requesting a new trial because he alleged that his attorney had a conflict of interest because Attorney Tishberg had previously represented

N.D. (R21). In support of that post-conviction motion, Wade attached a signed and sworn affidavit from Attorney Tishberg. (R20). The affidavit states that Attorney Tishberg represented N.D. in the prior 2001 case. *Id.*

The circuit court, presided over by the Honorable Judge Michael Hanrahan, ruled on Wade's postconviction motion. (R27:1). The circuit court found that any potential conflict was waived. (R27:2). The circuit court also found that no actual conflict existed. (R27:3).

STANDARD OF REVIEW

In criminal cases, conflict of interest claims involving attorneys are treated analytically as a subspecies of ineffective assistance of counsel. *State v. Love*, 227 Wis. 2d 60, 68, 594 N.W.2d 806, 810 (1999) (citing *Strickland v. Washington*, 466 U.S. 668, 691–92, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

On a claim of ineffective assistance of counsel, [a]n appellate court will not overturn a trial court's findings of fact concerning the circumstances of the case and the counsel's conduct and strategy unless the findings are clearly erroneous. However, whether counsel's performance was deficient and whether the deficient performance prejudiced the defense are questions of law which this court decides without deference to the court of appeals or the circuit court. When the pertinent facts are not in dispute, whether the facts establish a constitutional violation is a question of law which an appellate court reviews *de novo*.

Love, 227 Wis. 2d at 67, 594 N.W.2d at 810 (internal citations omitted).

ARGUMENT

I. ATTORNEY TISHBERG DID NOT HAVE AN ACTUAL CONFLICT OF INTEREST IN REPRESENTING WADE AND THUS WAS NOT INEFFECTIVE.

In order to establish a claim of ineffective assistance of counsel based on a claim of conflict of interest, the defendant must demonstrate that an actual conflict of interest adversely affected his attorney's performance. In *Cuyler v. Sullivan*, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980), the United States Supreme Court set the current standard for analyzing ineffective assistance of counsel claims based on an attorney's potential conflict of interest. *Cuyler* involved two attorneys' multiple representation of three defendants charged with murder. In three separate trials, Sullivan was convicted, while his co-defendants were acquitted. *Id.* at 338, 100 S.Ct. 1708. After his conviction, Sullivan alleged that he was denied the effective assistance of counsel because his attorneys represented conflicting interests. *Id.* 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, 100 S.Ct. 1708. At least, "a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Id.* at 348,

An actual conflict of interest exists when the defendant's attorney was actively representing a conflicting interest, so that the attorney's performance was adversely affected. *Love*, 227 Wis. 2d at 71. Once an actual conflict of interest has been established, the defendant need not make a showing of prejudice because prejudice is presumed. *Id.* Counsel is considered *per se* ineffective once an actual conflict of interest has been shown. *Id.*

To establish "an actual conflict," it is not sufficient to "show that a mere possibility or suspicion of a conflict could arise under hypothetical circumstances." *State v. Medrano*, 84 Wis. 2d 11, 28, 267 N.W.2d 586, 593 (1978). "An actual conflict of interest exists only when the attorney's advocacy is somehow adversely affected by the competing loyalties." *State v. Owen*, 202 Wis. 2d 620, 639, 551 N.W.2d 50, 58 (Ct.App.1996)

The present case shares similarities with *State v. Cobbs*, 221 Wis. 2d 101, 103, 584 N.W.2d 709, 710 (Ct. App. 1998).

In *Cobbs*, Cobbs was represented by an attorney that had prosecuted Cobbs in past cases. *Id.* at 104. The Court found that no actual conflict or serious potential of a conflict existed. *Id.* at 107. Cobbs' attorney had not worked as a prosecutor for over five years and there were no competing loyalties for the attorney. *Id.* The Court found that any argument that the attorney was biased toward the State would be pure conjecture. *Id.* Similarly, Attorney Tishberg had not represented N.D. since the 2001 case. Nearly fifteen years had passed between Attorney Tishberg representing N.D. and Wade. The main difference between *Cobbs* and this case is the fact that Wade's case did go to trial instead of resolving via a guilty plea.

Still, there were no active competing loyalties for Attorney Tishberg. Attorney Tishberg's affidavit in support of Wade's post-conviction motion does not state in what manner he had an active competing loyalty to N.D. (R20:1). He only stated that he had represented N.D. in the past and was currently representing Wade. *Id.* at 2. Attorney Tishberg provided no examples of ways that his representation of Wade was limited by having represented N.D. Attorney Tishberg never stated in what manner he has an active loyalty to N.D. Based upon N.D.'s crime victim impact statement, her wishes were not adverse to Wade. (R10:1) N.D. did not want any additional jail time for Wade. *Id.* Based on Tishberg's affidavit, any conflict of interest is mere conjecture.

This mere suspicion that a conflict could arise under a hypothetical circumstance is not sufficient to establish an actual conflict. *See, Medrano*, 84 Wis. 2d at 28, 267 N.W.2d at 593. The present circumstances show no actual manner in which Attorney Tishberg had an active competing loyalty to N.D, only that he had a loyalty in the past. Wade also points to Attorney Tishberg's duty of confidentiality toward N.D. and how there is potential that Attorney Tishberg would not be able to use information learned during that representation. This, however, is mere speculation and conjecture.

Wade alleges that the State and Attorney Tishberg were aware of prior bad acts and agreed not to bring those facts up prior to Wade testifying. (R46:26-7). The State made a record for the court to inform Wade that he was not to bring up any prior bad acts by N.D. because no other acts motions were filed

by Wade. *Id.* There was no timely motion to admit any prior acts made by N.D. and the State made it clear that it did not want Wade bringing up any alleged acts that would not be relevant and could cause a mistrial. *Id.* This was not a scheme by the State and Attorney Tishberg to hide certain facts that Attorney Tishberg may know about N.D., this was to bar Wade from attempting to introduce prejudicial and irrelevant facts of which he may have been aware and may attempt to bring up during his testimony. There is nothing in the record to show what those other acts may have been.

Though Wade is not required to show prejudice in support of an ineffective assistance of counsel claim based on an actual conflict of interest, it is worth noting that there was no prejudice. The State used Wade's probation agent to identify the identity of the voices on the jail calls. (R45:31) Had N.D. been present for the trial, the State would have been able to use N.D. to establish the identity of the voices on the jail calls. N.D. could either confirm or deny the voice, but the jury would be able to hear N.D.'s voice and compare it to the jail calls. In his appeal brief, Wade suggests that Attorney Tishberg should have called N.D. to impeach her on the use of 33 prior names, however, N.D. and Wade's probation agent would be used to identify both of the voices on the jail calls had N.D. been present. All of this going to the fact that Wade was not lawfully allowed to contact N.D. Attacking N.D.'s credibility would not undo the statements that Wade made in the jail calls which were the bulk of the damning evidence to support Wade's conviction.

II. WADE WAIVED ANY POTENTIAL CONFLICT ON THE RECORD AND IS PRECLUDED FROM CLAIMING INEFFECTIVE ASSISTANCE OF COUNSEL BASED ON THAT POTENTIAL CONFLICT

A defendant who validly waives his right to conflict-free representation also waives the right to claim ineffective assistance of counsel based on the conflict. *State v. Demmerly*, 2006 WI App 181, ¶ 16, 296 Wis. 2d 153, 165, 722 N.W.2d 585, 591.

Wade cites *State v. Kaye*, 106 Wis. 2d 1, 315 N.W.2d 337 (1982) to suggest that courts must engage in a colloquy with the defendant to inform the defendant of any potential conflict. *Kaye* refers to an attorney's representation of codefendants on the same case. In Wade's case, N.D. was not a codefendant of Wade. Attorney Tishberg's representation of N.D. was historical and not during a concurrent case.

A circuit court should make inquiry as directed in *Kaye* when counsel represents codefendants in the same criminal case or when a question of conflict of interest is raised in any criminal case about an accused's counsel of choice. *State v. Miller*, 160 Wis. 2d 646, 660–61, 467 N.W.2d 118, 123 (1991).

The waiver in the present case is similar to the waiver in *Cobbs*. In *Cobbs*, Cobbs was represented by an attorney who had prosecuted Cobbs in past cases. *Id.* at 104. Cobbs' attorney brought this to the attention of his client and the court. *Id.* at 103-04. The court conducted a brief inquiry with Cobbs and asked Cobbs if he would like to continue with his attorney. *Id.* Cobbs said that he wanted to keep the same attorney. *Id.* The court in *Cobbs* found that the brief inquiry was sufficient. *Id.* at 106. In addition to the brief inquiry, the court considered that Cobbs' attorney privately told him that he had prosecuted him a number of times in the past, the attorney brought up the summation of the conversation to the circuit court, and the court conducted a brief inquiry with Cobbs. *Id.* The court found that the inquiry satisfied the spirit of *Miller*. *Id.* The court acknowledged that the trial court did not conduct a colloquy as directed in *Miller* but the factors stated above were enough for the court to find a sufficient colloquy and that Cobbs knowingly and voluntarily waived any conflict of interest claim. *Id.*

In the present case, Attorney Tishberg represented N.D. in the past. (R43:4-5). Attorney Tishberg brought up the fact that he represented N.D. in the past to Wade in a private conversation. *Id.* The court asked Wade if he was aware that Attorney Tishberg represented N.D. in the past. *Id.* The court asked Wade if he was okay with Attorney Tishberg representing him despite having represented N.D. in the past. *Id.* Wade stated that he was and this situation was acceptable to him. *Id.* The court also confirmed with Attorney Tishberg that

he spoke to Wade about his past representation of N.D. *Id.* The facts are fairly similar to Cobbs. Both instances deal with an attorney's prior representations, the attorney brought up the circumstances of the prior representation to the court and the client, and the court conducted a brief inquiry to make sure that the client still wanted to go forward with that specific attorney, and the client confirmed that he wanted to go forward with the same attorney. Judge Hanrahan, ruling on Wade's postconviction motion, found that this was a sufficient waiver of a conflict if one existed. (R27:2). Therefore, with the similar circumstances it should follow that Wade waived any potential conflict and should be precluded from claiming ineffective assistance on any potential conflict.

CONCLUSION

For the reasons stated, the State respectfully requests that this court uphold the circuit court's decision denying Wade postconviction relief.

Dated this _____ day of November, 2018.

Respectfully submitted,

JOHN CHISHOLM
District Attorney
Milwaukee County

Ken Olstinski
Assistant District Attorney
State Bar No. 1105854

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19 (8) (b) and (c) for a brief produced with a proportional serif font. The word count of this brief is 2,880.

Date

Ken Olstinski
Assistant District Attorney
State Bar No. 1105854

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 s. 809.19 (12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of 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.

Date

Ken Olstinski
Assistant District Attorney
State Bar No. 1105854

P.O. Address:

Milwaukee County District Attorney's Office
821 West State Street- Room 405
Milwaukee, Wisconsin 53233-1485
(414) 278-4646
Attorneys for Plaintiff-Respondent.