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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

Filed August 30, 1983

STATE OF IOWA,)

Plaintiff-Appellee,)

vs.)

LEON M. GETZ, III,) 3-33
67406

Defendant-Appellant.)

Appeal from Pottawattamie District Court, Keith E. Burgett, Judge.

The defendant appeals from his conviction and sentence for two counts of possession of cocaine with intent to deliver. REVERSED AND REMANDED.

Patrick R. Grady and Chris Odell, Assistant Appellate Defenders, for defendant-appellant.

Thomas J. Miller, Attorney General, and Marcia Mason, Assistant Attorney General, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, and Schlegel, JJ. Hayden, J., takes no part.

OXBERGER, C.J.

This is an appeal from an adverse judgment on a motion in arrest of judgment. Defendant Leon M. Getz III contends he was denied effective assistance of counsel, in contravention of sixth and the fourteenth amendment to the United States Constitution and article one, section ten of the Iowa Constitution, due to an alleged conflict of interest on the part of his privately retained counsel. The trial court found his claim to be without merit and denied relief. Getz also contends that his trial counsel was incompetent denying him his due process right to fair trial.

Getz and his fiancee, Grace Williams, were arrested on various drug and weapons charges. Getz retained William H. Cone, Jr., as trial counsel. At Getz's request Cone represented Williams as well. Getz pleaded guilty to two of the four counts against him. Pursuant to the plea bargain, charges against Williams were dismissed.

Prior to sentencing, Getz obtained new counsel who filed a motion of arrest of judgment. At the hearing on the motion, Cone testified that he did not advise Getz that it was a conflict of interest for him to represent Williams, too. He testified that he was not aware of any possible conflict until after Getz entered his plea of guilty. He was aware in a very vague way that the prosecution had previously offered to dismiss the charges against Williams in return for her promise to testify against Getz. He testified that it was possible that the best avenue of defense would be for Williams to testify in her defense that it was Getz, not she, who committed the criminal acts.

In Cuyler v. Sullivan, 446 U.S. 335, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980), the court said:

> "Glasser established that unconstitutional multiple representation is never harmless error. Once the court concluded that Glasser's lawyer had an actual conflict of

> interest, it refused "to indulge in nice calculations as to the amount of prejudice" attributable to the conflict. The conflict itself demonstrated a denial of "the right to have the effective assistance of counsel. . ." Thus, a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief. . . But until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance.

In this case there is no dispute that Cone actively represented both Williams and Getz. Nor is there any dispute there was a potential for conflict of interest in that Williams could have testified against Getz and received leniency from the State.

In Cosgrove v. State, 304 N.W.2d 184, (Iowa 1981), the court rejected the conflict of interest claim because the only defense claimed by the defendant was alibi. That defense was weakened by a codefendant's statement that both alibi witnesses were lookouts in the crime. Also the court said p. 187:

> "Moreover, it is undisputed that the authorities agreed not to pursue three other potential criminal charges against petitioner in return for his guilty plea. Without question, this concession was a persuasive factor in the collective decision to enter a plea of guilty."

In this case the real beneficiary of the "bargain" was Cone's other client Williams. Cone so testified. Cone further testified he told Getz about the plea bargain and he made a recommendation to Getz to think about it very strongly. Cone testified:

> It was then at that point after he thought about it that he decided that he wanted to terminate me as his counsel. . . . The judge would not release me as Mr. Getz's counsel. Lee asked for some more time out in the hall. We went out there again, had some perfunctory discussions about the proposed plea agreement, and Mr. Getz than said, "All right, we'll do it.". . . I would have to say while Mr. Getz was deliberating about whether or not to enter these pleas that his mind was in a state of confusion and that he probably—that he probably wasn't in a position to make a full and fair judgment about how the plea negotiations were going to affect him and to that extent the later entry of the plea may have been more autonomic[sic] than anything."

Thus, this case is distinguishable from Cosgrove. In Cosgrove the defendant's primary defense was severely weakened and the defendant sought and obtained the best "bargain" for himself under the circumstances. However, in this case Getz was angry at his lawyer, the judge refused to permit Getz to fire his lawyer and faced with proceeding under those circumstances Getz obtained the best bargain he could for his friend Williams. Cone was in a weakened position to give Getz independent judgment as to the wisdom of accepting the "bargain" because his other client Williams stood to benefit from the bargain.

We conclude that Getz was denied effective assistance of counsel. Therefore, his plea of guilty is set aside. He shall plead anew.

Because of our resolution of the conflict of interest issue, we find it unnecessary to reach the issue of incompetency of counsel.

REVERSED AND REMANDED.