IN THE COURT OF APPEALS OF IOWA

No. 0-240 / 99-915
Filed June 28, 2000

STATE OF IOWA,
Plaintiff-Appellee,

vs.

SHELLEY LYNN MERCURIO,
Defendant-Appellant.

FILED
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CLERK SUPREME COURT

Appeal from the Iowa District Court for Black Hawk County, Joseph Moothart, Walter W. Rothschild, and James D. Coil, District Associate Judges.

Shelly Lynn Mercurio appeals her convictions of third-degree attempted burglary and driving under suspension. **AFFIRMED.**

Linda De Gallo, State Appellate Defender, and John P. Messina, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Joel A. Dalrymple, Assistant County Attorney, for appellee.

Heard by Streit, P.J., and Zimmer and Hecht, JJ.

ZIMMER, J.

Defendant Shelly Lynn Mercurio[1] appeals her convictions of attempted burglary in the third degree and driving under suspension. We affirm.

On the morning of March 25, 1998, farmer Andy Schares observed a vehicle with three occupants drive past his property. Moments later, he saw it back out of a neighbor's driveway and leave with one occupant. Schares called police. Black Hawk County deputies quickly arrived and began a search of the area. The property had been vacant but authorities found the back door slightly ajar and observed pry marks on the door. A tracking dog picked up the scent of the intruders and trailed them into a nearby cornfield. The intruders were Clarence Weekley and Richard Tyler.

Meanwhile, the defendant and the suspect vehicle were located near a city park in Dunkerton, Iowa. Mercurio initially denied any knowledge of the matter, but eventually admitted she had dropped off Weekley and Tyler. Two deputies claimed she told them Weekley and Tyler had asked Mercurio to drop them at the vacant farm so they could gain entry into the house.

On May 7, 1998, defendant was formally charged by trial information with: attempted burglary in the third degree in violation of Iowa Code sections 713.2 and 713.6B (1997) (Count I); driving while license suspended in violation of Iowa Code section 321A.32 (Count II); and driving while license suspended in violation of Iowa Code section 321.218 (Count III). Clarence Weekley and Richard Tyler

[1] At some point prior to her sentencing, defendant married codefendant Richard Tyler. At sentencing, she is referred to as Mrs. Tyler. For purposes of this appeal, we continue to refer to defendant as Mercurio.

were Mercurio's codefendants on the burglary count. Their cases were severed from Mercurio's case for separate trials.

One attorney, Don Gottschalk, attempted to represent all three defendants on the burglary charge. On July 3, 1998, the State filed a motion to recuse Gottschalk from representation of all three, indicating the State's desire to plea bargain with Mercurio and arguing a conflict of interest resulted. Gottschalk resisted, pointing out the codefendants' awareness of and consent to the joint representation. Gottschalk also did not foresee a conflict based on the three defendants' personal relationships. Mercurio and Tyler had been living together for nine years and had children together. Weekley is Mercurio's first cousin. Mercurio indicated to Gottschalk she was not inclined to testify against her codefendants and she denied making the statements which deputies attributed to her regarding the intent to break into the farmhouse.

A hearing was held on the recusal matter on September 10, 1998. The district court pointed out many potential pitfalls of joint representation. However, all three defendants adamantly expressed consent to Gottschalk's joint representation. When the court pointed out the State was attempting to plea bargain with Mercurio, she stated she could not take the plea because it would require her to testify falsely–she denied making the inculpatory statements the deputies attributed to her. Finding a knowing and intelligent waiver of any conflict, the district court approved the joint representation.

On November 17, 1998, Mercurio filed written guilty pleas to the two driving charges. The attempted burglary charge proceeded to a jury trial on

March 2, 1999. The next day, the jury returned a guilty verdict against Mercurio. She was sentenced on April 16, 1999.

Mercurio appeals. She contends the trial court abused its discretion in permitting Gottschalk to represent multiple defendants in violation of DR 5-105(D) of the Iowa Code of Professional Responsibility. She also maintains she was denied effective assistance of trial counsel by reason of counsel's actual conflict of interest.

I. Scope of Review. We review decisions on the disqualification of counsel under an abuse of discretion standard. *State v. Thompson,* 597 N.W.2d 779, 782 (Iowa 1999); *State v. Vanover,* 559 N.W.2d 618, 627 (Iowa 1997). An abuse of discretion occurs when a court exercises its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *Thompson,* 597 N.W.2d at 782. In this context, we do give deference to the trial court's factual findings which lead to the legal conclusion there is or is not a conflict of interest. *Vanover,* 559 N.W.2d at 627. To the extent the disqualification issue implicates constitutional protections, however, we review the issue de novo. *Thompson,* 597 N.W.2d at 782.

II. Disqualification for Violation of DR 5-105(D). Mercurio argues because Gottschalk violated DR 5-105(D) of the Iowa Code of Professional Responsibility for Lawyers, the trial court abused its discretion in permitting Gottschalk to continue representing all three defendants. DR 5-105 provides in pertinent part:

> (B) A lawyer shall decline proffered employment if the exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the

> proffered employment, except to the extent permitted under DR 5-105(D).
>
> (C) A lawyer shall not continue multiple employment if the exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected by the representation of another client, except to the extent permitted under DR 5-105(D).
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> (D) in the situations covered by DR 5-105(B) and (C), a lawyer may represent multiple clients if it is obvious that the lawyer can adequately represent the interests of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of the lawyer's independent professional judgment on behalf of each. . . .

We find no abuse of discretion in the court's decision to permit Gottschalk's representation to continue. The trial court personally addressed all three defendants, obtained their consent to the joint representation, and ascertained whether Gottschalk could adequately represent the interests of each. The trial court's thorough colloquy informed Mercurio's consent and apprised her of the potential dangers of joint representation. The trial court explained that each defendant had a right to "unconflicted" counsel. It detailed the advantage to Mercurio of taking the State's proffered plea bargain. The trial court also noted the potential for conflicts of interest would continue through sentencing and pointed out Mercurio may be waiving future claims against Gottschalk if she grew dissatisfied with his representation. Despite the trial court's admonitions, all three defendants repeatedly asserted their approval. Mercurio also stated she was unable to take the State's plea bargain because it involved testifying against her cousin and boyfriend and would require her to perjure herself. New counsel could not have changed her inability to accept the plea bargain. We find no abuse of discretion in permitting the joint representation to go forward.

We concede this is a close case and a different trial court could have reached a different result. However, the United States Supreme Court accords

district courts broad discretion to rule on disqualifications, for they "face the prospect of being 'whipsawed' by assertions of error no matter which way they rule." *Wheat v. United States*, 486 U.S. 153, 161, 108 S. Ct. 1692, 1698, 100 L. Ed. 2d 140, 150 (1988). If the district court disqualifies the attorney, then the defendant could claim denial of the sixth amendment right to counsel of choice. *Id.* (citation omitted). If the district court permits the representation, the defendant could claim ineffective assistance, as was the case here. *Id.* The district court must also consider the defendant's right, albeit a limited one, to representation by counsel of his choice. *See id.* at 158-59, 108 S. Ct. at 1696-97, 100 L. Ed. 2d at 148-49. The Supreme Court concluded that although district courts presented with the same case could reach opposite conclusions with equal justification, that does not mean one conclusion is "right" and the other "wrong." *Id.* at 164, 108 S. Ct. at 1700, 100 L. Ed. 2d at 152. According the district court required wide latitude, we cannot say its decision was "wrong."

III. Ineffective Assistance of Counsel. The Sixth Amendment right to counsel includes the right to conflict-free representation. *United States v. Reed*, 179 F.3d 622, 624 (8th Cir. 1999) (citations omitted). Mercurio claims an actual conflict of interest impaired Gottschalk's ability to represent her effectively, in violation of the Sixth Amendment.

An ineffective-assistance-of-counsel claim predicated on an alleged conflict of interest involves a somewhat different standard from the usual, two-part determination of whether trial counsel breached an essential duty and prejudice resulted. *See Thompson*, 597 N.W.2d at 782 (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 696

(1984)). Prejudice is presumed if the defendant can show an actual conflict of interest adversely affected the adequacy of the trial lawyer's performance.[2] *Id.* at 783-84 (citing *Strickland,* 466 U.S. at 692, 104 S. Ct. at 2067, 80 L. Ed. 2d at 696-97)). An actual conflict of interest exists where an attorney abandons or pursues a course of action that would help one client and hurt another. *See Thompson,* 597 N.W.2d at 784-85 (citation omitted); *In re J.C.,* 560 N.W.2d 33, 35 (Iowa App. 1996). If counsel made no such choice, the conflict remained hypothetical and thus, "'insufficient to impugn a criminal conviction.'" *Thompson,* 597 N.W.2d at 785 (citation omitted).

We find no evidence the alleged conflict progressed beyond the hypothetical. Gottschalk did not have to make a choice between alternative courses of action to the detriment of Mercurio—he had no other course of action. The State's offer was not a viable alternative. Mercurio was incapable of accepting the plea because to do so would require her to commit perjury. She indicated she did not want to testify against Weekley and Tyler and she saw no conflict of interest in Gottschalk's joint representation. The provision of separate trials also reduced the potential for divergence in the codefendants' interests. *See Thompson,* 597 N.W.2d at 783.

We also find no effect on the adequacy of Gottschalk's performance. Joint representation did not prevent effective plea bargaining in this situation. Even if

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[2] In certain other Sixth Amendment contexts that have no applicability here, prejudice may be presumed. *Atley v. Ault,* 191 F.3d 865, 869 (8th Cir. 1999) (citation omitted). If the trial court had been alerted to the potential for a conflict of interest and had failed to make an adequate inquiry into the matter, we would presume prejudice. *See id.* at 870 (citing *Holloway v. Arkansas,* 435 U.S. 475, 489, 98 S. Ct. 1173, 1181, 55 L. Ed. 2d 426, 437-38 (1978) (holding a trial court that is aware of potential for conflict of interest has an obligation to inquire whether the risk of conflict is too remote to warrant separate counsel)). Clearly, the trial court was aware of Gottschalk's potential conflict and Mercurio does not contend the court's inquiry was inadequate

Gottschalk had represented only Mercurio, he could not have negotiated a plea for her because she claimed to have no testimony to offer the State. Other courts have found an absence of prejudice in the joint representation situation where the defendant denies an interest in cooperating with the government or claims to have no testimony to offer in exchange for a deal. *See, e.g., Reed,* 179 F.3d at 625 (finding no evidence of prejudice where defendant himself disavowed any interest in cooperating with government before trial but on appeal argued counsel's joint representation of drug boss provided incentive to discourage defendant from cooperating with government); *Smith v. Newsome,* 876 F.2d 1461, 1463-64 (11th Cir. 1989) (holding defendant failed to show ineffective assistance stemming from attorney's participation in plea negotiations on behalf of codefendant, but not defendant, where defendant repeatedly claimed to have no testimony to offer State); *Guaraldi v. Cunningham,* 819 F.2d 15, 17 (1st Cir. 1987) (same). Mercurio fails to establish Gottschalk's performance was adversely affected. Because there was no actual conflict and no effect on Gottschalk's performance, we affirm.

AFFIRMED.