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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4256-14T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

THOMAS WOLFE,

Defendant-Appellant.

Submitted December 6, 2016 – Decided February 27, 2017

Before Judges Fasciale and Kennedy.

On appeal from the Superior Court of New
Jersey, Law Division, Atlantic County,
Indictment No. 90-12-3578.

Thomas Wolfe, appellant pro se.

Diane Ruberton, Acting Atlantic County
Prosecutor, attorney for respondent (Mario C.
Formica, Special Deputy Attorney General/
Acting Assistant Prosecutor, of counsel and
on the brief).

PER CURIAM

Defendant Thomas Wolfe appeals an order denying his second post-conviction relief (PCR) application, as well as an order denying his motion to reconsider his sentence. We affirm.

We briefly recount the procedural history and the facts of this case to the extent necessary to provide context for our decision. A fuller statement of facts is set forth in our prior opinion, see State v. Wolfe, No. A-3773-91 (App. Div. Dec. 8, 1994), certif. denied, 142 N.J. 449 (1995), and will not be repeated here.

On December 5, 1990, the Atlantic County Grand Jury returned an indictment charging defendant, then 23 years of age, with the knowing and purposeful murder of 72 year-old Dorothy Bigger on September 23, 1990. The indictment also charged defendant with felony murder, burglary, robbery, and two weapons charges. Ms. Bigger's body had been discovered in her home on the morning of September 24, 1990. State witnesses at trial testified that the home had been ransacked, and that Bigger had been repeatedly stabbed with a knife and choked. Her death was ascribed to a combination of exsanguination and asphyxia through strangulation.

At trial, defendant testified that he had been intoxicated, and had ingested large amounts of alcohol and drugs, rendering him incapacitated and unable to form the requisite mental state for murder. On October 9, 1991, the jury returned its verdict, finding

defendant guilty on all counts. The trial court thereafter sentenced defendant to an aggregate term of life imprisonment plus twenty years, with a total of thirty-seven years without parole.

On March 30, 1992, defendant filed a notice of appeal, and on December 8, 1994, we affirmed defendant's conviction and sentence. See Wolfe, supra, A-3773-91. The New Jersey Supreme Court denied defendant's petition for certification on January 25, 1995. See Wolfe, supra, 142 N.J. at 449.

On October 28, 1996, defendant filed his first petition for PCR, alleging that trial counsel's failure to inform the court of a juror's comments overheard on break during the trial, an allegation reported to him by defendant's mother and sister-in-law, constituted ineffective assistance of counsel. Following a hearing wherein defendant's mother, sister-in-law, and his trial counsel, Henry Zerella (hereinafter "Zerella"), testified, Judge Michael R. Connor denied defendant's petition on November 7, 1997.

On January 5, 1998, defendant filed a notice of appeal, arguing, in part, that the PCR court failed to address several issues, including the argument defendant currently asserts, that his trial counsel's partner, Vincent Pancari (hereinafter "Pancari"), served as a special municipal prosecutor in 1991, and that was a violation of the attorney-client privilege and a conflict of interest.

On June 29, 1999, we affirmed the PCR court's denial of defendant's petition. See State v. Wolfe, No. A-2595-97 (App. Div. June 29, 1999). At the conclusion of our opinion, we addressed defendant's claims that the PCR court failed to resolve certain issues, stating:

There is a reference [by Judge Connor] that these "[o]ther PCR issues were previously dealt with." However, as the State points out, no transcript of other proceedings have been provided to us on appeal. We are, therefore, not in a position to perform our reviewing function, if in fact these points were addressed. If, however, there has been an omission to deal with these issues then defendant should be permitted to present them without prejudice and within a reasonable time.

[Wolfe, supra, A-2595-97 (slip op. at 5-6) (alteration in original).].

On July 28, 2003, defendant filed a second PCR petition, referencing his filing as, "Refiling petition for post-conviction relief per Opinion of Appellate Division, Doc. No. A-2595-97T4, remanding to Law Division." On October 28, 2003, the Superior Court of Atlantic County stamped his brief "Filed," and on January 9, 2004, Judge Michael Donio denied defendant's second PCR petition.

On July 16, 2012, defendant, through counsel, moved for "reconsideration and reduction of sentence pursuant to Rule 3:21-10(b)(3)," as well as "application for post-conviction relief

pursuant to Rule 3:22-2(a) and [] Rule 3:22-2(c)." On reconsideration, defendant argued the following: (1) his trial counsel's partner, Vincent Pancari, was a special municipal prosecutor in 1991, thereby giving rise to a per se violation of the attorney-client privilege and a conflict of interest on the part of his attorney; (2) the decision not to request lesser included offenses be charged regarding the first degree murder charges constituted ineffectiveness of counsel; and (3) the imposition of consecutive sentences by the trial judge was a violation of the Code of Criminal Justice.

On January 22, 2015, Judge Donio denied defendant's motion for reconsideration, reasoning, "[d]efendant has already had two PCR denials on the same issues raised in this matter." This appeal followed.

On appeal, defendant raises the following argument:

POINT I

THE CONFLICT OF INTEREST CREATED BY DEFENDANT'S ATTORNEY VINCENT J. PANCARI AND HIS FIRM SIMULTANEOUSLY WORKING FOR THE NEW JERSEY ATTORNEY GENERAL AND DEFENDANT, WHILE DEFENDANT'S CASE WAS BEING PROSECUTED AND TRIED BY THE ATLANTIC COUNTY PROSECUTOR, WHO WAS ALSO WORKING FOR THE NEW JERSEY ATTORNEY GENERAL, VIOLATED DEFENDANT'S RIGHTS TO DUE PROCESS OF LAW, A FAIR TRIAL AND THE RIGHT TO HAVE AN ATTORNEY WITH UNDIVIDED LOYALTIES, CONTRARY TO THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I, PARAGRAPH 10 OF THE NEW JERSEY CONSTITUTION.

For the reasons set forth herein, we are unpersuaded by this argument and affirm.

Generally, we review the PCR court's findings of fact under a clear error standard, and conclusions of law under a de novo standard. State v. Harris, 181 N.J. 391, 420–21 (2004), cert. denied, 545 U.S. 1145, 125 S. Ct. 2973, 162 L. Ed. 2d 898 (2005). However, where, as in this case, "no evidentiary hearing has been held, we 'may exercise de novo review over the factual inferences drawn from the documentary record by the [PCR judge].'" State v. Reevey, 417 N.J. Super. 134, 146–47 (App. Div. 2010) (alteration in original) (quoting Harris, supra, 181 N.J. at 421), certif. denied, 206 N.J. 64 (2011).

A PCR court need not grant an evidentiary hearing unless "a defendant has presented a prima facie [case] in support of post-conviction relief." State v. Marshall, 148 N.J. 89, 158 (alteration in original) (quoting State v. Preciose, 129 N.J. 451, 462 (1992)), cert. denied, 522 U.S. 850, 118 S. Ct. 140, 139 L. Ed. 2d 88 (1997). "To establish such a prima facie case, the defendant must demonstrate a reasonable likelihood that his or her claim will ultimately succeed on the merits." Ibid.

Initially, we observe that at the end of our June 29, 1999 decision, we stated that defendant would be permitted to present his arguments, with respect to issues that Judge Connor stated he

had previously entertained, "without prejudice and within a reasonable time." We explained that we were provided with neither transcripts nor a clear record of the prior hearings, if any, and thus we were unable to adequately review the issues at that time.

Here, defendant did not file a renewed PCR claim regarding these remaining issues until July 28, 2003, and he did so without a further developed record. Accordingly, the State argues that defendant should be precluded from pursuing this appeal on the ground it is untimely.

However, we choose not to address the procedural issue because it is so clear that defense counsel had no conflict of interest at the time of defendant's trial.

Our courts employ a two-tiered approach when analyzing "whether a conflict of interest has deprived a defendant of his state constitutional right to the effective assistance of counsel." State v. Cottle, 194 N.J. 449, 467 (2008) (citing State v. Norman, 151 N.J. 5, 24-25 (1997)). First, in cases that the court finds a per se conflict, prejudice is presumed in the absence of a valid waiver, and the reversal of a conviction is mandated. See ibid.; State v. Bellucci, 81 N.J. 531, 543 (1980). Per se conflicts on constitutional grounds generally involve private attorneys who simultaneously represent co-defendants. Cottle, supra, 194 N.J. at 467 (citing Norman, supra, 151 N.J. at 24-25).

A per se conflict of interest was also found, for example, where an attorney and his client were contemporaneously under indictment in the same county, and the client had not waived the conflict. Id. at 473.

Additionally, and directly applicable to the factual circumstances here, in State v. Clark, 162 N.J. 201, 206-07 (2000), overruled on other grounds by State v. Rue, 175 N.J. 1 (2002), the Supreme Court exercised its supervisory authority over the practice of law to amend Rule 1:15-3(b), governing the limitations on the practice of attorneys, to bar a municipal prosecutor from representing a defendant in any municipal court or Superior Court in the same county in which the attorney serves as a municipal prosecutor.

In Clark, the defendant learned, subsequent to the entry of the judgment of conviction, that his defense counsel worked as a part-time municipal prosecutor within the same county at the time of his trial. Id. 204. On direct appeal, the defendant argued that these dual roles "deprived him of his right to effective assistance of counsel and a fair trial." Ibid. We agreed and reversed defendant's convictions, finding that "it is impermissible for a part-time municipal prosecutor in a municipality located in the county where defendant is tried to

represent a criminal defendant." State v. Clark, 324 N.J. Super. 178, 183 (App. Div. 1999).

However, following certification, the Supreme Court reinstated the defendant's conviction. In doing so, the Court reasoned:

When defendant was tried in January 1994 and sentenced on November 7, 1994, neither the existing Court Rules nor decisional law precluded defendant's trial attorney from serving as municipal prosecutor and representing a defendant in the Superior Court of the same county. The pertinent part of Rule 1:15-3(b) provided then and now, excepting changes that made it gender neutral, that "[a] municipal attorney of any municipality shall not represent any defendant in the municipal court thereof." The pertinent portion of the source Rule was practically identical to the present Rule and provided that "an attorney shall not represent any defendant in the municipal court of the municipality of which he is the municipal attorney." R. 1:26-63(c).

The only relevant case decided under either version of the rule is State v. Zold, 105 N.J. Super. 194, 251 A.2d 475 (Law Div. 1969), affirmed o.b., 110 N.J. Super. 33, 264 A.2d 257 (App. Div.), certif. denied, 57 N.J. 131, 270 A.2d 34 (1970). That case held that a municipal attorney, who served as a municipal prosecutor, was not precluded by the rule from representing a defendant in the Superior Court or the former County Court located in the same county in which he or she served as a municipal prosecutor. 105 N.J. Super. at 203, 251 A.2d 475. In this case, because [defense counsel's] representation of defendant did not violate either Rule 1:15-3(b) or Zold, and because there was no actual conflict or prejudice to defendant, no basis existed to reverse

defendant's conviction. The judgment of conviction is therefore reinstated.

[Id. at 204-05.]

Although the Court's decision amended Rule 1:15-3(b) to prohibit a municipal prosecutor from representing a defendant in the Superior Court in the county in which he serves, that amendment did not take effect until January 19, 2000. Id. at 208. With respect to retroactive application, the Court expressly exercised its inherent power to preclude any retroactivity, citing "justifiable reliance on the old Rule and on State v. Zold." Ibid.

Here, defendant was tried in 1991, and thus subject to the pre-existing rule and the common law principles found in Zold, supra, 105 N.J. Super. 194. Significantly, defendant was not actually represented in Atlantic County Superior Court by a municipal prosecutor serving in Atlantic County, but rather it was defendant's counsel's partner, Pancari, who served as a part-time "special prosecutor" in Atlantic City.

While defendant asserts that he was represented by Pancari, in our decision on defendant's first PCR petition, Wolfe, supra, A-2595-97, we affirmed Judge Connor's denial of defendant's first PCR petition and were provided a record that clearly identified Zarella as defendant's trial counsel. We are unpersuaded by defendant's imaginative effort to show that Pancari provided representation.

Defendant adverts to a complaint filed in Cumberland County by the law firm seeking unpaid attorney's fees. However, plaintiff in that action is the law firm and the complaint itself is signed by Zerella. Additionally, the initial retainer agreement executed between defendant and the law firm is, again, signed by Zerella. The record before us fails to support defendant's allegation that Pancari undertook any tasks on behalf of defendant. Given the record, we find that Zerella's representation of defendant violated neither Rule 1:15-3(b), as it existed at the time, nor Zold, and therefore, no per se conflict of interest arises.

Next, in the absence of a per se conflict, "the potential or actual conflict of interest must be evaluated and, if significant, a great likelihood of prejudice must be shown in that particular case to establish constitutionally defective representation of counsel." Cottle, supra, 194 N.J. at 467-68 (quoting Norman, supra, 151 N.J. at 25). When determining whether a conflict of interest arises from any attorney's relationship with another attorney, the court must consider three factors: (1) whether there is ready access to confidential information among the attorneys; (2) whether the attorneys share a financial interest; and (3) whether "public confidence in the integrity of the Bar would be eroded if" the representation were permitted. Bellucci, supra, 81 N.J. at 541.

Here, although Pancari and Zerella were partners, there is no evidence in the record supporting a theory that Pancari had access to any confidential information. In fact, according to the Press of Atlantic City article provided by defendant in support of the present appeal, dated July 20, 1991, Pancari served merely as Atlantic City's "special prosecutor." As such, Pancari's sole responsibility was "representing the city in any Municipal Court cases that pose[d] a potential for conflict for the regular city prosecutor." Pancari's role was extremely limited – drastically reducing the likelihood of any prejudice.

Next, Zerella and Pancari's relationship at their law firm would have no financial impact regarding defendant's representation. Pancari served the public in his role as special municipal prosecutor, and therefore, he secured no additional financial benefit if defendant was convicted. This is further buttressed by defendant's complete lack of involvement with the municipal court system in Atlantic County.

Lastly, Zerella's representation of defendant did not threaten the public's confidence in the integrity of the legal profession. As discussed above, the representation was clearly permitted by the court rules, as well as the common law principles, at that time.


In fact, Zerella's representation of defendant also would have been permitted under the court's current rules. Rule 1:15-4(c), which extends the limitations of Rule 1:15-3(b) to the partners of a municipal prosecutor states, in full:

As applied to partners, employers, employees, office associates, shareholders, and members, the limitations imposed on the practice of law by municipal prosecutors by R. 1:15-3(b) shall extend only to matters that have occurred in the municipality in which the prosecutor serves and any matters that involve law enforcement personnel or other material witnesses from that municipality.

Given that defendant's criminal charges did not stem from actions within the municipality of Atlantic City and did not involve law enforcement personnel or other material witnesses from that municipality, Zerella's representation would have also been permitted under the current rules. Defendant was not prejudiced, and therefore, no conflict of interest existed that would substantiate a claim for ineffective assistance of counsel.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION