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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2620-22

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

MAURICE HOWARD,

Defendant-Respondent.

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

RONNY PADEN,

Defendant,

and

DAVID D. ARMSTRONG,

Defendant-Respondent.

Argued September 11, 2023 – Decided September 25, 2023

Before Judges Sabatino and Chase.

On appeal from interlocutory orders of the Superior Court of New Jersey, Law Division, Burlington County, Indictment Nos. 20-01-0091 and 21-07-0727.

Jennifer B. Paszkiewicz, Assistant Prosecutor, argued the cause for appellant (LaChia L. Bradshaw, Burlington County Prosecutor, attorney; Alexis R. Agre, Assistant Prosecutor, of counsel and on the brief).

John S. Furlong argued the cause for respondents Maurice Howard and David D. Armstrong (Furlong and Krasny, attorneys; John S. Furlong, on the brief).

PER CURIAM

The State appeals the trial court's denial of its motion to disqualify John S. Furlong, Esquire as defense counsel. The alleged conflict concerns a situation in which defense counsel represents two separate defendants, under two separate indictments pending in the same county. The State contends there exists a conflict of interest for Furlong to represent two separately indicted defendants in these unrelated matters, where one defendant in a case may serve as a witness for the State at the other defendant's trial.

On January 23, 2020, a Burlington County Grand Jury returned an eight-count indictment (Indictment 2020-01-0091) against Maurice Howard. Count One charged Howard with financial facilitation of criminal activity, N.J.S.A.

2C:21-25(a). Count Two charged defendant with third-degree financial facilitation of criminal activity (structuring), N.J.S.A. 2C:21-25(e)(3). Count Three charged defendant with third-degree possession of a controlled dangerous substance with intent to distribute, N.J.S.A. 2C:35-5(a)(1) and (b)(11). Count Four charged defendant with fourth-degree possession of a controlled dangerous substance, N.J.S.A. 2C:35-10(a) and 10(a)(3). Counts Five and Six charged defendant with third-degree failure to pay taxes, N.J.S.A. 54:52-9(a). Counts Seven and Eight charged defendant with third-degree filing a fraudulent tax return, N.J.S.A. 54:52-10. On November 12, 2020, Furlong agreed to represent Howard in that case.

On July 22, 2021, the Burlington County Grand Jury returned a six-count indictment (Indictment 2021-07-0727) against co-defendants Ronny Paden and David Armstrong. Counts One and Two charged defendants with first-degree murder, N.J.S.A. 2C:11-3(a)(1) and 2C:11-3(a)(2). Count Three charged defendants with first-degree conspiracy to commit murder, N.J.S.A. 2C:5-2(a)(1), 2C:11-3(a)(1), and 2C:11-3(a)(2). Count Four charged defendants with second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a)(1). Count Five charged defendants with second-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b)(1). Count Six charged defendant Paden with second-degree certain persons not to have weapons and possession

of a firearm by convicted persons, N.J.S.A. 2C:39-7(b)(1). Furlong agreed to represent Armstrong on the same date of his indictment.

Armstrong and Paden are alleged to have murdered two victims at a birthday party in Edgewater Park. Through discovery it supplied at the detention hearing, the State provided text message evidence that had been transmitted amongst Howard, Paden, and Armstrong allegedly implicating Howard's involvement with, or at least knowledge, of the murders. The messages were between both Paden and Armstrong, and Paden and Howard. There was no evidence provided showing any texts exchanged between Howard and Armstrong. The texts were sent in the days surrounding the murders. This was the only evidence provided showing Howard's potential involvement in the murder as a perpetrator or witness.

Despite Furlong inquiring of the prosecutor's office via email in August of 2021 as to whether he had a conflict in regard to representing both Howard and Armstrong, the State took no position as to whether a conflict existed or may arise. The subject was never discussed again until February 2023. The State raised an issue with the trial court regarding Furlong's representation of both defendants, and then moved for this disqualification. Paden has not participated in this appeal as to whether such a conflict exists or has prejudiced him.

At the oral argument on the State's motion, Furlong voir dired both of his clients and obtained their written consent to represent one another in their separate criminal matters, with Furlong stating that Howard would invoke his Fifth Amendment privilege if called at Armstrong's trial. However, Furlong acknowledged that "if Mr. Howard were a material witness in this case [murder] and the State planned to call him, I could not in good conscience cross-examine him because he would be a concurrent client of mine."

On April 23, 2023, the trial court denied the State's motion to relieve Furlong as counsel in both Armstrong's and Howard's cases. In a three-page written opinion, the trial court reasoned that the State had merely indicated it might call Howard as a witness in the Armstrong matter. The court also noted that off-the-record conversations between the parties indicated that the State considered Howard an unindicted co-conspirator in the Armstrong matter, and that text message conversations between Howard and co-defendant Paden indicated that "Howard[,] if not directly involved in the homicides, was very much aware of [Paden's] interest in committing a homicide." The court further held that even if Howard waived his Fifth Amendment right not to testify, Howard's interest as a witness for the State in a homicide trial and Armstrong's interest as a defendant in that same trial were not significantly adverse to create a disqualifying conflict under the Rules of Professional Conduct (RPCs) 1.7 and

1.9. On leave granted, the State appeals from the April 23, 2023 order memorializing the decision.

I.

The State argues that Furlong's representation of both Howard and Armstrong amount to a concurrent violation of RPC 1.7. It contends that Furlong's representation of Armstrong is directly adverse to his representation of Howard under a separate indictment because the State plans on calling Howard as a State witness in Armstrong's trial. The State urges that, despite both clients' written consent to the simultaneous representation, defense counsel could not effectively cross-examine Howard in Armstrong's homicide trial should the State call Howard as its witness. The State poses the inevitable conundrum that counsel cannot have it both ways – either Howard is not material to the State's case or is materially involved to the level of having an identifiable Fifth Amendment privilege.

The State asserts that disqualifying defense counsel as to only one of his clients would still violate RPC 1.9 which prescribes an attorney's ongoing duty to former clients. It reasons that confidential information already learned about Howard during counsel's representation could harm either client. Therefore, the State submits the only fair remedy is disqualifying Furlong from representing both clients.

Lastly, the State posits that possible harm to Armstrong's co-defendant, Paden, may result if Furlong continues to represent both Armstrong and Howard. The State asks this court to further consider the impact of counsel's joint representation upon the fair administration of justice.

In response, Furlong argues that the State's motion to disqualify him is a strategic maneuver because the State had yet to subpoena Howard as a witness as of August 2023, and had not expressed an intent to do so in the two years since the text message discovery involving Howard was disclosed. Furlong asserts the State has not served a subpoena, nor ever attempted to interview Howard. When Furlong asked the State directly about its intention to call Howard as a witness shortly after viewing Howard's text message involvement at the beginning of the prosecution, and inquiring what that might mean for his representation of both clients, the State merely replied that the investigation was ongoing.

Howard was never charged in connection with the murders. Even if the State eventually intends to call Howard to the stand during Armstrong's murder trial, Furlong argues Howard's Fifth Amendment right not to testify will bar his testimony. In fact, Howard confirmed under oath at the disqualification motion that he would not agree to testify substantively at Armstrong's trial. With respect

to RPC 1.9, Furlong contends it has no relevance, unless and until he is disqualified from representing one of the defendants.

II.

An appellate court's review of rulings of law and issues regarding the applicability, validity or interpretation of laws, statutes, or rules is de novo. See In re Ridgefield Park Bd. of Educ., 244 N.J. 1, 17 (2020). Such rulings on the law, "and the legal consequences that flow from established facts are not entitled to any special deference." Rowe v. Bell & Gossett Co., 239 N.J. 531, 552 (2019) (quoting Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)).

Consistent with these general principles, a determination of whether counsel should be disqualified is one that is reviewed de novo. City of Atl. City v. Trupos, 201 N.J. 447, 463 (2010). Our "evaluation of an appeal from an order granting or denying a disqualification motion invokes our de novo plenary review in light of the fact that a decision on such a motion is made as a matter of law." Twenty-First Century Rail Corp. v. N.J. Transit Corp., 210 N.J. 264, 274 (2012) (citing Trupos, 201 N.J. at 463).

"[A] non-indigent defendant's Sixth Amendment right to counsel encompasses the right to be represented by the counsel of his [or her] choosing, as the Sixth Amendment 'commands . . . that the accused be defended by the

counsel he [or she] believes to be best.'" State v. Hudson, 443 N.J. Super. 276, 283 (App. Div. 2015) (quoting U.S. v. Gonzalez-Lopez, 548 U.S. 140, 146, (2006)). However, a defendant's right to choose counsel is not absolute. State v. Kates, 426 N.J. Super. 32, 45 (App. Div. 2012), aff'd, 216 N.J. 393 (2014). The "right to choose counsel is circumscribed by the court's power to guard against conflicts of interest, and to vindicate the court's independent interest in ensuring that the ethical standards of the profession and legal proceedings appear fair to all who observe them." Ibid. (quoting Wheat v. U.S., 486 U.S. 153, 160 (1988)). The court reviewing a motion for disqualification is required "to balance competing interests, weighing the 'need to maintain the highest standards of the profession' against 'a client's right to freely choose his [or her] counsel.'" Comando v. Nugiel, 436 N.J. Super. 203, 213 (App. Div. 2014) (quoting Dewey v. R.J. Reynolds Tobacco Co., 109 N.J. 201, 218 (1988)). A client's "right to retain counsel of his or her choice in criminal cases is limited in that 'there is no right to demand to be represented by an attorney disqualified because of an ethical requirement.'" Ibid. (quoting Dewey, 109 N.J. at 218). In such cases "the burden rests with the State to demonstrate a disqualifying conflict exists." Hudson, 443 N.J. Super. at 282.

Under the more recent version of the RPCs, the prohibition against the appearance of impropriety for attorneys is no longer a valid consideration.

Hudson, 443 N.J. Super. at 292. Even so, the prohibition against impairing the fair administration of justice remains strong. See Supreme Court of New Jersey, Administrative Determinations in Response to the Report and Recommendation of the Supreme Court Commission on the Rules of Professional Conduct, Commission Comment to RPC 1.7 (Sept. 10, 2003), reprinted in Kevin H. Michels, New Jersey Attorney Ethics, Appendix A1 at 1250 (2020) (noting that the appearance of impropriety provisions in the RPCs are no longer appropriate "[b]ecause of their vagueness and ambiguity," however, "courts have the independent authority, which they have exercised, to take corrective action when the risk of improper conflict threatens the administration of justice.").

In reviewing the relevant ethical rules, RPC 1.7 states in pertinent part:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer.

[RPC 1.7 (emphasis added).]

Our Supreme Court has addressed RPC 1.7, stating:

Our general rule in respect of conflicts of interest is clear: "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest." RPC 1.7(a). We countenance only one exemption from this general rule: dual representations involving conflicts of interest that are (1) waived in writing by the clients, based on informed consent after full disclosure; (2) based on the lawyer's reasonable belief that the dual representation can be undertaken competently and diligently; (3) not otherwise prohibited by law; and (4) not representations involving actual adversity, that is, the assertion of a claim by one client directly against the other client. RPC 1.7(b).

[In re Supreme Ct. Advisory Comm. on Pro. Ethics Opinion No. 697, 188 N.J. 549, 911 (2006). (emphasis added).]

RPC 1.7, comment 8 further explains:

The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

[RPC 1.7 cmt. 8 (emphasis added).]

In reference to informed consent, RPC 1.7, comment 22 explains:

If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved.

[RPC 1.7 cmt. 22.]

RPC 1.9 addresses a lawyer's duties to former clients and provides, in relevant part:

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

[RPC 1.9(a) (Emphasis added).]

Although there are no reported cases with facts identical to those presented in this case, there have been instances in which this court contemplated conflicts of interest pertaining to an attorney's dual representation of a criminal defendant and potential State witnesses. In State v. Faulcon, 462 N.J. Super. 250 (App. Div. 2020), "defense counsel, who formerly represented a State witness questioned in a murder investigation, was disqualified from representing defendant in the same case to ensure the fair administration of justice." In that case, the court reasoned that the attorney, having represented both a State witness and the defendant, during different stages of the same trial was in clear violation of Rule 1.9. Ibid.

By contrast, in Hudson, the Court held that an attorney's former and current clients' matters were not related enough to disqualify the attorney under

RPC 1.9. Hudson, 443 N.J. Super. at 282. In that case, the attorney had represented a former client ten years earlier in an administrative case relating to the client's employment. Ibid. The attorney's current client was a police officer facing official misconduct charges in which his former client stood as a potential State witness. Ibid. There, the court remanded the matter for further inquiry as to "whether the nature of the legal representation support a finding [the attorney] gained confidential information during the representation of [his former client], which could be used to his detriment during cross-examination were he to testify in the defendant's criminal case." Id. at 292. "The mere proffer of a witness who will not be called at trial may not be a basis to disqualify counsel." State v. Bruno, 323 N.J. Super. 322 (App. Div. 1999).

At oral argument before this court, the State for the first time manifested it planned to call Howard as a witness at trial, despite him having expressed an unwillingness to cooperate with the State. The trial court had recognized the possibility of a conflict but deemed it purely conjectural at that point because the State had made no effort in the past two years to try and obtain Howard's cooperation or testimony. The State had not yet decided that they were going to call Howard as a witness. We agree that there was a potential conflict, but it had not ripened.

While we are dismayed by the State's delay in making this decision, at this juncture, based on the State's assertion to call Howard as a witness as we noted above, the "likelihood that a difference in interests will eventuate" has arisen. See RPC 1.7, cmt. 8. There is now a conflict under RPC 1.7(a) and Furlong cannot represent both clients. Confidential information already learned about Howard and Armstrong during his representation could harm either client. It would be fundamentally unfair for either Armstrong or Howard to have counsel, through no fault of his own, that could not give full representation. There is a significant risk that the representation of one or both clients would be materially limited by the lawyer's responsibilities to the other. Their concurrent competing interests would make it difficult, if not impossible, for any counsel to represent them at the same time.

In addition, Furlong's continued dual representation could impede plea negotiations. For example, if the State decided to offer a favorable plea to Howard conditioned on his testimony against Armstrong, Furlong is hamstrung in giving Howard amnesty advice about whether to accept such a plea offer. Negotiations would be futile if Howard was offered a plea agreement to change his mind about not cooperating against Armstrong as a co-conspirator with Paden in the murders. Furlong would have a conflict to each and be materially limited.

We next turn to RPC 1.9 to determine whether there would be a conflict and perhaps offer of interest once Howard or Armstrong become Furlong's former client. In Hudson, the passage of ten years between two separate police disciplinary matters called into question the relevance of the confidential information the attorney might recall from his former representation of a now State witness. Similar questions do not remain in this case. Here, the attenuation of time is not present, and one is going to be called as a witness in the other's trial. Information that Furlong obtained from either client would preclude him from representing just one.

A written waiver of conflict is insufficient to remove the conflict as the attorney-client privilege continues even after the representation ends. See RPC 1.9. Moreover, Furlong cannot continue his representation of either defendant without potentially damaging his clients' ability to receive a fair trial. His ongoing obligations render that impossible.

On the current facts, the fair administration of justice requires this court to hold at this juncture, in light of the state's announcement on the record that it plans to call Howard in the murder trial, that Furlong cannot represent Howard or Armstrong. We therefore vacate the ruling and remand to the trial court to enter an order disqualifying Furlong in both cases, and to inquire if

either defendant needs the services of a public defender. We do not retain jurisdiction.

Vacated and remanded.

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



CLERK OF THE APPELLATE DIVISION