

2012 IL App (2d) 120115-U  
No. 2-12-0115  
Order filed December 24, 2012

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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THE PEOPLE OF THE STATE	)	Appeal from the Circuit Court
OF ILLINOIS,	)	of Du Page County.
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 09-CF-2856
	)	
DAVID L. BRIGGS,	)	Honorable
	)	George J. Bakalis,
Defendant-Appellant.	)	Judge, Presiding.

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JUSTICE ZENOFF delivered the judgment of the court.  
Justices Jorgensen and Spence concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* The trial court properly denied defendant's postconviction petition, which alleged that his trial counsel was acting under a conflict of interest: counsel's association did not satisfy any criterion for a *per se* conflict, and defendant did not allege an actual conflict.
- ¶ 2 Defendant, David L. Briggs, appeals the third-stage denial of his petition pursuant to the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2010)). He contends that he should be able to withdraw his guilty plea to theft by deception (720 ILCS 5/16-1(a)(2) (West 2008)) because his attorney labored under a *per se* conflict of interest. Specifically, defendant

contends that counsel had a relationship with the victim of an uncharged offense to whom the plea agreement required defendant to pay nearly \$153,000 in restitution. We disagree and affirm.

¶ 3 Defendant was charged with four counts of theft, six counts of deceptive practices, and one count of continuing financial enterprise. Each count alleged that the victim was Patricia Ridge except for two counts in which the victim was Heritage Harley-Davidson. Defendant pleaded guilty to count I, which alleged theft by deception. By agreement, the trial court sentenced him to four years' imprisonment. The agreement also provided that defendant would pay Ridge \$46,000 in restitution. The agreement, as explained by the prosecutor, also required defendant to pay \$152,562.06 in an uncharged case "in exchange not to indict the Defendant from November 8th, 2009, pertaining to those victims."

¶ 4 Defendant did not move to withdraw the plea or file a direct appeal. However, he filed a postconviction petition containing numerous claims. The trial court dismissed some claims at the second stage of postconviction review and advanced other claims to the third stage. However, defendant eventually withdrew all claims but one: that his trial attorney labored under a *per se* conflict of interest because he had an ongoing relationship with the restitution payee in the uncharged case. Both parties waived the opportunity to present live testimony and the court decided the issue on the basis of documents attached to defendant's petition and submitted by the State with its responsive pleadings.

¶ 5 The trial court's memorandum order summarizes the facts underlying defendant's conflict-of-interest claim as follows. Defendant was represented during the plea proceedings by Gene Ognibene. He retained Ognibene on the advice of Melissa DiBona, whose mother is Sally Reus. Ognibene had previously represented Reus's brother, Kenneth Schwerer, in a DUI case. He received a \$7,500

retainer from Schwerer, who died while the case was pending. Schwerer's estate sought to recoup some of the retainer. Reus was a beneficiary of the estate. After some discussion, it was decided that about \$500 might be due the estate. Ognibene agreed to represent DiBona in a pending criminal case for no additional fee rather than repay the estate any money. The estate "closed out" any claim against Ognibene sometime in April 2010.<sup>1</sup>

¶ 6 As part of the plea agreement in this case, the State agreed not to charge defendant based on allegations of theft from Reus, in exchange for defendant's agreement to pay Reus \$152,562.06 in restitution. Defendant was aware that this was part of the agreement. However, defendant was unaware of Ognibene's prior contact with Reus or his representation of DiBona, and did not waive any possible conflict of interest.

¶ 7 In his petition, defendant alleged that he was unaware that the plea agreement required the payment of restitution to Reus. He asserted that Reus was his friend and business partner and that the money he got from her consisted of loans to cover his gambling losses. However, in its supplemental response to the petition, the State submitted a recording of a conversation between defendant and his girlfriend several weeks before he entered the plea. In it, he acknowledged that the State was threatening to indict him for theft from Reus unless he agreed to pay her restitution. He further acknowledged that "\$153,000 is what I owe Sally total." Thus, the trial court's implicit rejection of defendant's claim that he did not know that restitution to Reus was part of the agreement is supported by the evidence. In his brief, defendant continues to adhere to his version of events, but

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<sup>1</sup>The State explains that a citation to discover assets that the estate filed against Ognibene was dismissed in that month.

does not explicitly contend that the trial court's contrary finding was against the manifest weight of the evidence.

¶ 8 The trial court found that these facts did not give rise to a *per se* conflict of interest. The court noted that Ognibene never directly represented Reus, that his representation of her family members had concluded prior to defendant's plea, and that any claim Reus may have had against Ognibene by virtue of being a beneficiary of Schwerer's estate had been settled. Thus, the court denied defendant's petition. Defendant timely appeals.

¶ 9 Defendant contends that the trial court erred in denying him relief. He maintains that the undisputed facts reveal that Ognibene was laboring under a conflict of interest. Defendant characterizes Ognibene as "house counsel" for Reus and her family. Not directly addressing the dismissal of the citation to discover assets, he characterizes the fee dispute with Ognibene as ongoing and, accordingly, speculates that Ognibene was motivated to secure restitution for Reus as a way of settling his debt to the estate. He further notes that DiBona referred him to Ognibene and that Reus paid part of his fee. Nonetheless, we agree with the State that the trial court correctly found that Ognibene's connection with Reus was simply too tenuous to support a finding of a conflict of interest.

¶ 10 The supreme court explained the *per se* conflict of interest rule in *People v. Hernandez*, 231 Ill. 2d 134 (2008). A defendant's sixth-amendment right to the effective assistance of counsel includes the right to conflict-free representation. *Id.* at 142; *People v. Morales*, 209 Ill. 2d 340, 345 (2004). In deciding whether a defendant received ineffective assistance of counsel based on an alleged conflict of interest, we first resolve whether counsel labored under a *per se* conflict. A *per se* conflict is one where " "facts about a defense attorney's status \*\*\* engender, by themselves, a

disabling conflict.”’ (Emphasis in original.)” *Hernandez*, 231 Ill. 2d at 142 (quoting *Morales*, 209 Ill. 2d at 346, quoting *People v. Spreitzer*, 123 Ill. 2d 1, 14 (1988)). When a defendant’s attorney has a tie to a person or entity that would benefit from a verdict unfavorable to the defendant, a *per se* conflict arises. *People v. Janes*, 168 Ill. 2d 382, 387 (1995). “ ‘[I]f counsel, unknown to the accused and without his knowledgeable assent, is in a duplicitous position where his full talents—as a vigorous advocate having the single aim of acquittal by all means fair and honorable—are hobbled or fettered or restrained by commitments to others,’ ” effective assistance of counsel is lacking. *People v. Stoval*, 40 Ill. 2d 109, 112 (1968) (quoting *Porter v. United States*, 298 F.2d 461, 464 (5th Cir. 1962)).

¶ 11 The court explained the justification underlying the *per se* rule in *Spreitzer*, noting that counsel’s knowledge that a result favorable to his other client or association would inevitably conflict with a defendant’s interest “might ‘subliminally’ affect counsel’s performance in ways [that are] difficult to detect and demonstrate.” *Spreitzer*, 123 Ill. 2d at 16. The court further noted the possibility that counsel’s conflict would subject him or her to “ ‘later charges that his representation was not completely faithful.’ [Citations.]” *Id.* at 17.

¶ 12 If a *per se* conflict exists, a defendant is not required to show that counsel’s “ ‘actual performance was in any way affected by the existence of the conflict’ ” *Morales*, 209 Ill. 2d at 345 (quoting *Spreitzer*, 123 Ill. 2d at 15). In other words, a defendant is not required to show actual prejudice when a *per se* conflict exists. *Stoval*, 40 Ill. 2d at 113. Unless a defendant waives his right to conflict-free counsel, a *per se* conflict is grounds for automatic reversal. *Morales*, 209 Ill. 2d at 345.

¶ 13 The supreme court has identified three situations where a *per se* conflict exists: (1) when defense counsel has a prior or contemporaneous association with the victim, the prosecution, or an entity assisting the prosecution; (2) when defense counsel contemporaneously represents a prosecution witness; and (3) when defense counsel was a former prosecutor who had been personally involved in the prosecution of the defendant. *Hernandez*, 231 Ill. 2d at 143-44.

¶ 14 If a *per se* conflict does not exist, a defendant may still establish a violation of his right to effective assistance of counsel by showing an actual conflict of interest that adversely affected his counsel's performance. *Morales*, 209 Ill. 2d at 348-49. To show an actual conflict of interest, a defendant must point to “ ‘some specific defect in his counsel's strategy, tactics, or decision making attributable to [a] conflict.’ ” *Id.* at 349 (quoting *Spreitzer*, 123 Ill. 2d at 18). In this situation, mere “[s]peculative allegations and conclusory statements are not sufficient to establish that an actual conflict of interest affected counsel's performance.” *Id.* (citing *People v. Williams*, 139 Ill. 2d 1, 12 (1990)).

¶ 15 The facts here do not fall within any of the three recognized categories of *per se* conflicts. It is undisputed that Ognibene never represented Reus, and DiBona was not a victim in any of defendant's cases resolved while Ognibene represented defendant. Furthermore, DiBona was not an “entity assisting the prosecution” or a prosecution witness. Defendant does not claim that Ognibene formerly prosecuted him.

¶ 16 Defendant makes much of the fee dispute between Ognibene and Schwerer's estate. However, he cites no authority for the proposition that a dispute between Ognibene and an estate of which Reus was merely one beneficiary and that involved, at most \$500, is the type of “association” that would create a *per se* conflict of interest. In any event, the trial court accepted the State's

assertion that the fee dispute had been settled, and defendant does not contend that its finding was against the manifest weight of the evidence.

¶ 17 Defendant cites *People v. Holmes*, 141 Ill. 2d 204 (1990), and *People v. Collins*, 382 Ill. App. 3d 149 (2008), for the proposition that a relationship with a family member of a victim can create a conflict of interest. Both cases are distinguishable, however. In *Collins*, there was no claim that the relationship created a *per se* conflict. The court did find that there was a potential for conflict, but the ongoing relationship between defense counsel and the son of a detective who was going to be a prosecution witness was much more extensive than that here. *Collins*, 382 Ill. App. 3d at 160. In *Holmes*, the court was concerned that defense counsel had represented a key prosecution witness in a number of criminal matters over the course of several years, may have had an “ongoing” relationship with the witness, and had possibly received privileged communications from the witness. *Holmes*, 141 Ill. 2d at 224-25. The court mentioned in passing that counsel had also represented the witness’s brother at some point.<sup>2</sup> The relationships between counsel and the potential witnesses in those cases were much greater than in this case, where Ognibene represented Reus’s daughter and deceased brother in two (apparently) relatively minor criminal matters and the representations had concluded before defendant’s plea in this case.

¶ 18 The trial court correctly concluded that no *per se* conflict existed. Defendant does not claim that there was an actual conflict. To do so, he would have to show “some specific defect in his

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<sup>2</sup>The facts of *Holmes* are somewhat unusual in that the prosecution successfully moved to bar the defendant’s chosen attorney from representing him, and the defendant, who had waived the conflict, insisted that the decision deprived him of his right to counsel of choice. *Holmes*, 141 Ill. 2d at 217-18.

counsel's strategy, tactics, or decision making attributable to [a] conflict." *Spreitzer*, 123 Ill. 2d at 18. Defendant does not attempt to do so and it is doubtful that he could. As noted, the State was prepared to charge him with the theft of more than \$100,000 from Reus, a Class 1 felony. See 720 ILCS 5/16-1(b)(6) (West 2008). As defendant acknowledged in the recorded conversation, if charged with theft of more than \$100,000, he faced a potential sentence greater than that for the offense to which he pleaded guilty. However, he escaped prosecution for that offense by agreeing to repay the money to Reus, which he was legally obligated to do anyway. We note that, regardless whether we accept the State's characterization of defendant's dealings with Reus as theft or defendant's characterization as a series of loans, Reus could have required him to pay her back at some point. Thus, defendant avoided prosecution on a potentially serious charge by agreeing to do something he had to do anyway. It is not at all clear that this was the result of a "specific defect" in strategy caused by counsel's alleged allegiance to another party.

¶ 19 Defendant did not establish that Ognibene was under a *per se* conflict of interest, and does not allege any specific acts or omissions demonstrating an actual conflict. Thus, the trial court did not err by denying his petition.

¶ 20 The judgment of the circuit court of Du Page County is affirmed.