2019 IL App (2d) 160217-U
No. 2-16-0217
Order filed June 21, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. DONNELL GREEN, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Lake County. No. 08-CF-264 Honorable George D. Strickland, Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Presiding Justice Birkett concurred in the judgment.
Justice McLaren concurred in part and dissented in part.

ORDER

¶ 1 *Held*: The trial court did not err in denying defendant's postconviction petition. Therefore, we affirmed. We also granted the State request that defendant be assessed $50 as costs for the appeal.

¶ 2 Following a jury trial, defendant, Donnell Green, was convicted of two counts of first-degree murder (720 ILCS 5/9-1(a)(1) and 5/9-1(a)(2) (West 2006)) under theories of accountability. The trial court sentenced defendant to 35 years' imprisonment.

¶ 3 Defendant now appeals from the trial court's order denying, after a third-stage evidentiary hearing, his petition filed pursuant to the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2016)). Defendant argues that the trial court erred by denying his petition because he established that his trial counsel had a *per se* conflict of interest, where counsel previously represented the intended victim of the murder and defendant neither knew about the conflict nor waived it. For the following reasons, we affirm.

¶ 4 The State also asks this court to assess costs against defendant for this appeal under section 2002(a) of the Counties Code (55 ILCS 5/4-2002(a) (West 2016)) and *People v. Nicholls*, 71 Ill. 2d 166 (1978). We grant the State's request pursuant to its cited authorities and the majority opinion in *People v. Knapp*, 2019 IL App (2d) 160162. We recognize that Justice McLaren dissented in that case, including on the issue of whether fees may be awarded to the State on an appeal from a postconviction petition. See *Knapp*, 2019 IL App (2d) 160162, ¶¶ 93-134 (McLaren, J., dissenting).

¶ 5 I. BACKGROUND

¶ 6 On October 18, 2007, Jimmie Lewis was killed while riding as a passenger in a Cadillac driven by Danny "Keeko" Williams. Defendant was charged by indictment with three counts of first-degree murder of Jimmie Lewis. Testimony at trial revealed that on the night of the shooting, defendant and his friends, Chappel Craigen, Jabril Harmon, and Emanuel Johnson, were driving together. Craigen was driving, with defendant in the front passenger seat, Johnson in the backseat behind defendant, and Harmon in the back seat behind Craigen. On their way to the liquor store, they passed the Cadillac being driven by Keeko. Keeko was part of a rival street gang, "the Moes," that was involved in a recent altercation with defendant and his group of friends, known as the "4 Corner Hustlers." When defendant and his friends saw the Cadillac,

they all said, "that's them, that's them," which meant, "that's the Moes *** that's Keeko." Craigen made a U-turn and followed the Cadillac, and everyone in the car "got excited." Defendant grabbed the gun from the middle console and said "I'll do it," meaning he would shoot at the Cadillac. However, defendant passed the gun to Johnson, who passed it to Harmon. When the car was pulled up on the right side of the Cadillac, Harmon shot multiple times, hitting Lewis and causing his death.

¶ 7 During closing argument, the prosecutor argued that, on the night of the shooting, defendant and his friends, "were after the Moes, either Jimmy Lewis or Keeko [Williams], it doesn't matter ***. It's called transfer of intent."

¶ 8 On direct appeal, defendant argued that the State failed to prove beyond a reasonable doubt that he was accountable for the murder of Jimmy Lewis. This court affirmed defendant's conviction. See *People v. Green*, 2012 IL App (2d) 101043-U.

¶ 9 On June 23, 2014, defendant filed a postconviction petition alleging, *inter alia*, that defense counsel, Robert Ritacca, was ineffective because he labored under a *per se* conflict of interest due to Ritacca's prior representation of the intended murder victim, Daniel "Keeko" Williams.

¶ 10 On November 19, 2015, a third-stage evidentiary hearing was held. Ritacca testified as follows. On July 23, 2009, Ritacca entered his appearance on behalf of defendant. Ritacca represented Daniel "Keeko" Williams from July 20, 2007, through March 14, 2008, in cases involving driving while license revoked and cannabis possession. Ritacca could not recall if he told defendant about his prior representation of Williams, but he did not disclose his prior representation of Williams to the trial court. Ritacca also represented Daniel Williams' brothers,

Joey and Brannon, prior to representing defendant. The parties stipulated that Brannon and Joey Williams were members of the "Moes" gang.

¶ 11 On February 26, 2016, the trial court denied defendant's petition. The trial court determined that Ritacca did not suffer under a *per se* conflict of interest based on his previous representation of Daniel "Keeko" Williams.

¶ 12 Defendant filed his notice of appeal on March 14, 2016.

¶ 13 II. ANALYSIS

¶ 14 Defendant argues that the trial court erred by denying his petition because he established that defense counsel had a *per se* conflict of interest where counsel previously represented the intended victim of the murder, and defendant neither knew about the conflict nor waived it.

¶ 15 A. Standard of Review

¶ 16 When a postconviction petition is advanced to the third-stage evidentiary hearing, where fact finding and credibility determinations are involved, we will not reverse the trial court's decision unless it is manifestly erroneous. See *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). However, "[w]hen the record shows that the facts are undisputed, the issue of whether a *per se* conflict exists is a legal question that [a reviewing court] reviews *de novo*." *People v. Fields*, 2012 IL 112438, ¶ 19. See also *People v. Rodriguez*, 402 Ill. App. 3d 932, 939 (2010) (review of the trial court's denial of postconviction petition after a third-stage evidentiary hearing is *de novo* where the issues are purely legal questions). Here, the record shows that the relevant facts are undisputed; therefore, our review is *de novo*. See *People v. Hernandez*, 231 Ill. 2d 134, 143 (2008).

¶ 17 B. *Per Se* Conflict of Interest

¶ 18 "The sixth and fourteenth amendments to the United States Constitution guarantee the right to effective assistance of counsel." *People v. Taylor*, 237 Ill. 2d 356, 374 (2010). "A criminal defendant's sixth amendment right to effective assistance of counsel includes the right to conflict-free representation." *Id.* There are two types of conflicts: *per se* and actual. *Fields*, 2012 IL 112438, ¶ 17. Whether a conflict of interest exists must be evaluated on the specific facts of each case. See *People v. Poole*, 2015 IL App (4th) 130847, ¶ 25. A *per se* conflict of interest arises where a defendant's attorney has a tie to a person or entity that would benefit from an unfavorable verdict for the defendant. *Hernandez*, 231 Ill. 2d at 142. If a *per se* conflict exists, the defendant is not required to show actual prejudice. *Id.* at 143. Unless a defendant waives his right to conflict-free counsel, a *per se* conflict is grounds for automatic reversal. *Id.*

¶ 19 Our supreme court has identified three situations in which a *per se* conflict exists: "(1) where defense counsel has a prior or contemporaneous association with the *victim*, the prosecution, or an entity assisting the prosecution; (2) where defense counsel contemporaneously represents a prosecution witness; and (3) where defense counsel was a former prosecutor who had been personally involved with the prosecution of defendant." (Emphasis added.) *Fields*, 2012 IL 112438, ¶ 18.

¶ 20 Defendant argues that defense counsel labored under the first category of *per se* conflict because he previously represented Daniel "Keeko" Williams, the intended victim of the shooting. The State contends that a *per se* conflict did not exist because Williams was not the actual victim. Both defendant and the State cite *Hernandez*, 231 Ill. 2d 134, to support their arguments.

¶ 21 In *Hernandez*, the defendant was charged with and convicted of the solicitation of murder for hire of Jaime Cepeda. *Id.* at 138, 139. Defense counsel had previously represented Cepeda. *Id.* The defendant filed a postconviction petition alleging that defense counsel's prior

representation of Cepeda constituted a *per se* conflict of interest. *Id.* at 139. The supreme court held that, although defense counsel's representation of the defendant and the alleged victim were not contemporaneous, a *per se* conflict existed and automatic reversal was required. *Id.* at 151-52. Here, defendant was charged with and convicted of the murder of Jimmy Lewis. Defendant was not charged with the murder of defense counsel's former client, Daniel Williams. Accordingly, this case is distinguishable from *Hernandez,* and the trial court properly determined that there was no *per se* conflict of interest.

¶ 22 Next, defendant urges us to recognize defense counsel's prior representation of the intended victim as a new fourth category of *per se* conflict of interest. Defendant quotes *People v. Spreitzer*, 123 Ill. 2d 1 (1988), to support his argument. Defendant contends that the justification for treating conflicts as *per se* is that "defense counsel in each case had a tie to a person or entity *** which would benefit from an unfavorable verdict for the defendant." *Id.* at 16. Defendant asserts that Williams obviously benefited from the guilty verdict for defendant.

¶ 23 However, defendant's use of the above-quoted language is overly broad and taken out of context. In *Spreitzer*, our supreme court explained that it had "invented" the term, "*per se* conflict," and that "[in] every case the conflict was created by the defense attorney's prior or contemporaneous association with either the prosecution or the *victim*." (Emphasis added.) *Id.* at 14. Thus, we reject defendant's interpretation of "the justification for the *per se* conflict rule as creating an additional, alternate basis for finding a *per se* conflict in this case. Pursuant to long-standing precedent, [our supreme] court has recognized three situations where a *per se* conflict of interest exists." *Fields*, 2012 IL 112438, ¶ 41. None of the recognized *per se* conflict situations apply to the facts at issue here. We believe if there is to be a fourth situation, it should

be up to the supreme court to formulate it. Accordingly, the trial court properly denied defendant's postconviction petition.

¶ 24 III. CONCLUSION

¶ 25 For the reasons stated, we affirm the trial court's denial of defendant's postconviction. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2016); see also *Nicholls*, 71 Ill. 2d at 179; *Knapp*, 2019 IL App (2d) 160162.

¶ 26 Affirmed.

¶ 27 JUSTICE McLAREN, concurring in part and dissenting in part:

¶ 28 I concur with the majority's affirmance of the trial court. However, I dissent from the assessment of the $50 appellate fee contained in section 4-2002 of the Counties Code (55 ILCS 5/4-2002 (West 2016)). In *Nicholls*, the supreme court affirmed the appellate court's assessment of the fee against defendant Nicholls, who had appealed from the dismissal of his postconviction petition; the supreme court recognized "a legislative scheme which authorizes the assessment of State's Attorney's fees as costs in the appellate court against an unsuccessful *criminal* appellant upon affirmance of his conviction." (Emphasis added.) *Nicholls*, 71 Ill. 2d at 174.

¶ 29 However, as I have demonstrated in *Knapp*, *Nicholls* was "based on the false premise that a postconviction petition is a criminal case." *Knapp*, 2019 IL App (2d) 160162, ¶ 97 (McLaren, J., dissenting). Postconviction proceedings are not criminal proceedings; they are civil, collateral proceedings. *People v. Ligon*, 239 Ill. 2d 94, 103 (2010). This well-established fact was recently reaffirmed in *People v. Johnson*, 2013 IL 114639, where all of the participants, including the State and the supreme court, recognized this fact. See, *i.e.*, *id.* at ¶ 12 ("The statutory provision that allows imposition of the $50 [*habeas corpus*] fee first appeared in the statute in a 1907

amendment, and has remained unchanged, despite the creation of *additional collateral proceedings* such as a section 2–1401 petition and a postconviction petition" (emphasis added); *Knapp*, 2016 IL App (2d) 160162, ¶ 133.

¶ 30 My dissent in *Knapp* provides a full exposition of the faulty premise of *Nicholls*, the illogic of its application to appeals from civil collateral proceedings, and the absurd results that may obtain from such application. The majority in *Knapp* declined to address *Nicholls*' faulty premise. The majority here follows suit. While acknowledging my dissent in *Knapp*, the majority cites to *Knapp* to support the assessment of the fee in this case without addressing, let alone reconciling, the counterfactual basis underlying the *Nicholls* decision. Suffice to say, the conclusion that appellate fees are collectible in collateral civil proceedings, such as postconviction proceedings, is not based in reality. *Nicholls* has no application to civil collateral proceedings since, by its own terms, it was adjudicating *criminal* proceedings, and it has been wrongly cited as support for the assessment of this fee for too long. As there is no basis for the assessment of the fee in this case, I dissent from its imposition.