

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 11, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2008AP536-CR

Cir. Ct. No. 2003CF1395

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

THOMAS L. McCANTS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: DAVID T. FLANAGAN, III, Judge. *Affirmed.*

Before Dykman, Lundsten and Bridge, JJ.

¶1 PER CURIAM. Thomas L. McCants appeals from the amended judgment of conviction and the order denying his motion for postconviction relief. McCants argues that the circuit court violated his Sixth Amendment right to counsel of choice when it disqualified his defense counsel, Attorney

Joseph Sommers, and when it denied his motion to reinstate Sommers. He also argues that the circuit court erred when it denied his motion for postconviction relief because the circuit court improperly excluded evidence, did not allow him to explain the relevance of certain evidence, and did not conclude that he received ineffective assistance of counsel for the reinstatement motion. We conclude that the circuit court's decisions to disqualify Attorney Sommers and to deny the motion to reinstate him did not violate McCants' Sixth Amendment rights, and that the circuit court did not err when it denied his motion for postconviction relief. We further conclude that McCants did not receive ineffective assistance of counsel for the reinstatement motion. Consequently, we affirm the judgment and order of the circuit court.

BACKGROUND

¶2 In June 2003, McCants was charged with the first-degree intentional homicide of Lizette Fountain. Fountain was shot to death on December 4, 2002. At the time of McCants' arrest on this charge, Sommers represented him in another matter. Sommers agreed to represent him in this case as well.

¶3 In August 2003, the State moved to disqualify Sommers as McCants' attorney in this case, because of an actual or potential conflict of interest. The State supported its motion with the affidavit of Detective Todd Stetzer. The affidavit stated that an inmate in the Dane County Jail, Steven Collins, claimed to know who killed Fountain.¹ Detective Stetzer later interviewed Collins, and Collins told Stetzer that someone named "Packey" had

¹ Collins offered to reveal who had killed Fountain in exchange for, among other things, the State dropping the charges pending against him.

pulled a gun on Collins and said that he would shoot Collins with the same gun he had used to kill Fountain. Stetzer later learned that Packey was the street name of Rovar Pollard.

¶4 Around the same time, Collins contacted the state public defender and asked to have Sommers appointed to represent him. Collins wanted to be represented by Sommers because Sommers was McCants' attorney, and the State was not interested in the information Collins had about McCants' case. Sommers agreed to represent Collins.²

² Sommers sent Collins two letters that set out their agreement. The first, dated June 4, 2003, stated in relevant part:

[I]t is my understanding that you want me to remain as your attorney in the above-captioned matters even though you are aware that I am the attorney for Thomas McCants who is a suspect in the murder of Lizette Fountain. It is also my understanding that you have information to who pulled the trigger in regards to Ms. Fountains [sic] death, and you desire to possibly utilize this information in order to receive leniency from the state. Lastly, it is my further understanding that the information you have in regards to Ms. Fountain's murder does not indicate that Thomas McCants was involved, and you are not aware of any information that involves him in Ms. Fountain's murder.

In the second letter, dated June 20, 2003, Sommers stated:

[I]t is my understanding that you are aware that Thomas McCants was charged with first degree intentional homicide today in Dane County Circuit Court, and that I am representing him on that matter. It is my further understanding that this does not change your position and you still desire that I remain your attorney in the above-captioned cases. In addition, it is my understanding that you have freely and voluntarily given me permission to utilize the information you have in regards to the death of Lizette Fountain in my defense of Thomas McCants.

¶5 McCants' preliminary hearing was held on July 18, 2003. Sommers subpoenaed Pollard to appear at the hearing, but Pollard did not come. Sommers made an offer of proof as to what Pollard would say, and also told the court that he had a witness who claimed that Pollard had admitted to shooting Fountain. The court bound McCants over for trial, but agreed the hearing could be opened again if Pollard or another witness was produced to testify. Sommers eventually told the court that he no longer planned to call Pollard or to ask for the preliminary hearing to be reopened.

¶6 After the preliminary hearing, Detective Stetzer spoke to Pollard. Pollard denied that he had killed Fountain, or that he had made any incriminating statements to Collins. Pollard said that he and Collins had been in a fight while in jail, but that he did not know Collins in any other context. Stetzer then spoke with Collins about what Pollard had said. Collins changed his story, admitted he had been lying about Pollard, and said that McCants had actually admitted that he had killed Fountain.

¶7 Based on all of this information, the State moved to disqualify Sommers as McCants' counsel. The circuit court, by the Honorable Gerald Nichol, held a hearing on the State's motion on September 16, 2003. This was the first of three hearings in the circuit court on this issue.

¶8 At the hearing, the State noted that Sommers had moved to withdraw from representing Collins. The State argued, however, that Sommers should nevertheless be disqualified from representing McCants because of the potential "to taint the adversarial process." The State made essentially three arguments in support of its motion: (1) it would not be fair to McCants to allow Sommers to continue to represent McCants because if Collins testified at McCants' trial, the

State would argue that Sommers put him up to it; (2) there was the potential that Sommers would be a witness at McCants' trial; and (3) although McCants was indigent, Sommers had not been appointed by the state public defender, so there was the possibility that Sommers would not see the trial through to its completion.

¶9 Sommers argued against the motion. He told the court that he did not believe Collins was a credible witness and did not intend to call him at trial. Sommers also argued that the State had reason to "fear" him and did not want him to represent McCants, because he was a formidable adversary. Sommers also argued that McCants wanted Sommers to remain his attorney.

¶10 The circuit court granted the State's motion, finding that there was a potential conflict of interest that could cause problems with the trial if Sommers continued to represent McCants. The court concluded that Sommers' representation could jeopardize McCants' right to a fair trial and that there was "just too much at stake when we talk about first degree intentional homicide to risk" that possibility.³

¶11 McCants was subsequently represented by a series of attorneys, but apparently was not satisfied with the representation he received. In January 2005, before McCants' trial began, Sommers wrote to the circuit court asking to be reinstated as McCants' counsel. In the motion, Sommers noted that the State's witness list did not include Collins. Sommers also included a statement from McCants saying that he waived "any complaint on my part."

³ McCants petitioned for leave to appeal from this order. We denied the petition.

¶12 The circuit court appointed Attorney T. Christopher Kelly to represent McCants on this motion. The court, this time by the Honorable David Flanagan, held the second hearing on this issue, and denied Sommers' motion on two grounds. The court first considered whether the motion established grounds for relief from the court's previous order disqualifying Sommers. The court found that Sommers' representation of both McCants and Collins created a serious potential for a conflict of interest, and that once Collins claimed that McCants had admitted committing the crime, there was "an absolute irreconcilable and highly substantial conflict." The court concluded that McCants had not shown an adequate basis to grant relief from the disqualification order. The court ruled in the alternative that if the motion were considered as one to allow Sommers to represent McCants, the court would also deny it, given all that had gone on before.

¶13 McCants went to trial represented by an attorney, and was convicted. He then filed a motion for postconviction relief alleging that the circuit court had erred both times it considered whether Sommers should be disqualified. McCants also alleged that the State had manufactured the conflict of interest, and that Attorney Kelly had provided ineffective assistance of counsel when he did not present any evidence to this effect at the second hearing. In September 2007, the circuit court held the third hearing on this issue. The circuit court once again denied the motion.

ANALYSIS

¶14 The issue presented by this appeal is whether the circuit court's repeated refusal to allow Attorney Sommers to represent McCants at trial violated

McCants' Sixth Amendment right to the counsel of his choice.⁴ We review a circuit court's decision to disqualify defense counsel on the grounds of a serious potential for a conflict of interest for an erroneous exercise of discretion. *State v. Miller*, 160 Wis. 2d 646, 654, 467 N.W.2d 118 (1991). A defendant has a qualified right to representation by counsel of choice. *Id.* at 652. An accused may make a "knowing and voluntary waiver of the right to conflict-free representation." *Id.* Such a waiver, however, does not foreclose further judicial inquiry. *Id.* at 652-53. The presumption in favor of counsel of choice and a conflict waiver may both be overcome if "the State demonstrates 'the defense attorney's actual conflict of interest or shows 'a serious potential for conflict.'" *Id.* at 653 (citing *Wheat v. United States*, 486 U.S.153, 164 (1988)).

¶15 When an actual or potential conflict exists, "legitimate countervailing institutional interests overcome the presumption in favor of the accused's counsel of choice." *Id.* These institutional interests include "ensuring that 'criminal trials are conducted within the ethical standards of the profession,'" that "legal proceedings appear fair to all who observe them," and that the court's judgments stay intact and are "free from future attacks over the adequacy of the waiver or fairness of the proceedings." *Id.* at 653 n.2 (citing *Wheat*, 486 U.S. at 160-61).

¶16 When considering whether an actual or potential conflict exists, circuit courts should be "alert to the possibility that the government may seek to

⁴ The State in its brief focuses extensively on the Rules of Professional Conduct, and argues that those rules justified the decision to disqualify Sommers. It is not our role to decide whether Sommers' conduct violated these rules. Rather, we must determine whether the actions of the circuit court violated McCants' Sixth Amendment right to counsel.

‘manufacture’ a conflict to eliminate a formidable lawyer as an adversary.” *Id.* at 654. The circuit courts should “be sensitive to the motives of the prosecutors” and explore this issue in the exercise of its discretion. *Id.* If the circuit court does not adequately explain its exercise of discretion, we may examine the record to determine whether the facts support the court’s exercise of discretion. *Id.* at 656.

THE MOTION TO DISQUALIFY COUNSEL

¶17 We conclude that the circuit court properly exercised its discretion when it granted the State’s motion to disqualify Sommers on the basis of an actual or potential conflict of interest. We agree with the circuit court’s finding that Sommers’ representation of both Collins and McCants created the potential for a conflict of interest, and that once Collins identified McCants as the killer, an actual conflict was created.

¶18 The court stated that the dual representation had placed Sommers “in a bind and that bind could jeopardize [McCants’] right to a fair trial.” While the parties agree that it was unlikely that Collins would become a witness in the case, the circuit court judge has the discretion to remove an attorney from the case when the attorney’s involvement with another party might create a situation in which the trial is interrupted or a mistrial is declared. At the time Sommers was disqualified, there was at least the potential that Collins, or Sommers himself, would be called to testify about what Collins had said about the homicide. Thus, the court’s decision to disqualify Sommers was a reasonable exercise of discretion. In addition, although the court did not specifically address at the initial hearing whether the State had manufactured the conflict, our review of the record satisfies us that the State did not do so.

THE MOTION TO REINSTATE COUNSEL

¶19 We also conclude that the circuit court did not err when it denied Sommers' motion to be reinstated. The circuit court addressed the motion both as a motion to vacate or reverse a previous order, and as a stand-alone motion to reinstate Sommers as McCants' attorney. The State suggests that Sommers could only be reinstated if Judge Nichol's original order was vacated or reversed. We are not convinced that this is an appropriate way to view the issue. No matter which judge actually heard the motion, the circuit court was free to revisit the issue, especially in light of the new information that the State had not included Collins on any of its witness lists.

¶20 As we have noted, the circuit court has the discretion to remove an attorney when there is a potential that the attorney's involvement with someone else might taint the adversarial process. When the court first heard the disqualification motion, there was the potential that Collins would become a witness. When Sommers asked to be reinstated, although it was unlikely that Collins would be called as a witness, it was still a possibility that Collins or Sommers would have to testify at some point. McCants asserted that he had waived the conflict. The court found, however, that McCants was not able to articulate either what Sommers had actually told him about the potential conflict, or demonstrate an understanding of the disadvantages that would flow from the conflict.

¶21 The court further found that the fact that neither side had listed Collins as a potential witness did not mean that he would not actually be a witness. The court once again found that as of May 30, 2003, there was a potential for conflict, and as of July 24, 2003, when Collins told Stetzer that McCants had

admitted to the crime, there was an actual conflict that was substantially related to Sommers' representation of McCants. The court concluded that Judge Nichol had a "solid basis" for disqualifying Sommers. The court concluded in the alternative that even if the motion were a straight-forward request to allow Sommers to represent McCants, the court would deny it on those same grounds.

¶22 We conclude that the circuit court properly exercised its discretion when it denied the motion to reinstate Sommers. Because we conclude that the court's decision on both motions was a proper exercise of discretion, we need not address McCants' argument that Sommers' disqualification was a structural error that is not subject to a harmless error argument.

THE POSTCONVICTION MOTION

¶23 McCants also argues that the circuit court erred when it denied his motion for postconviction relief. McCants argued at this hearing that the State had manufactured the conflict in order to have Sommers removed from the case because of his reputation for being a formidable adversary, and that Kelly, his attorney at the time, was ineffective for failing to raise this issue at the motion to reinstate. McCants first argues that the court violated his right to due process when it would not allow him to ask Kelly questions about whether Kelly considered Sommers to be a formidable adversary. The postconviction court ruled that the evidence was not relevant. "A trial court's decision to admit or exclude evidence is a discretionary determination that will not be upset on appeal if it has 'a reasonable basis' and was made 'in accordance with accepted legal standards and in accordance with the facts of record.'" *State v. Jenkins*, 168 Wis. 2d 175, 186, 483 N.W.2d 262 (Ct. App. 1992). We are not convinced that the circuit court erred when it would not allow this testimony.

¶24 The circuit court found that the testimony of Detective Stetzer at the previous hearings was credible, but that McCants' testimony was not. The court further concluded that its earlier decision to deny Sommers' motion for reinstatement was a proper exercise of discretion. The court noted that when deciding the reinstatement motion, the court had acknowledged the need to guard against the State manufacturing a conflict of interest. The court also noted that Attorney Kelly had argued that the State should not be allowed to manufacture a conflict.

CONCLUSION

¶25 For the reasons discussed above, we conclude that the circuit court properly granted the initial motion to disqualify Sommers, and properly denied Sommers' request to be reinstated. We also agree with the circuit court that McCants did not establish that he received ineffective assistance of counsel for the reinstatement motion. We therefore conclude that the circuit court properly denied McCants' motion for postconviction relief, and we affirm the judgment and order of the court.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

