

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2019-KA-01289-COA

**DEANDRE BALL A/K/A DEANDRE DASHAUN
ANTONIO BALL A/K/A DEANDRE D. BALL**

APPELLANT

v.

STATE OF MISSISSIPPI

APPELLEE

DATE OF JUDGMENT: 05/16/2019
TRIAL JUDGE: HON. ROGER T. CLARK
COURT FROM WHICH APPEALED: HARRISON COUNTY CIRCUIT COURT,
FIRST JUDICIAL DISTRICT
ATTORNEY FOR APPELLANT: OFFICE OF STATE PUBLIC DEFENDER
BY: HUNTER NOLAN AIKENS
ATTORNEY FOR APPELLEE: OFFICE OF THE ATTORNEY GENERAL
BY: BARBARA WAKELAND BYRD
DISTRICT ATTORNEY: JOEL SMITH
NATURE OF THE CASE: CRIMINAL - FELONY
DISPOSITION: AFFIRMED - 12/08/2020
MOTION FOR REHEARING FILED:
MANDATE ISSUED:

BEFORE BARNES, C.J., GREENLEE AND WESTBROOKS, JJ.

GREENLEE, J., FOR THE COURT:

¶1. Deandre Ball was convicted of first-degree murder and sentenced to life in the custody of the Mississippi Department of Corrections. On appeal, Ball claims that the trial court erred by granting the State's motion to disqualify his counsel of choice. Finding no error, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2. In a multi-count indictment, Ball was charged with the first-degree murder of Trevues Martin. Kalisha Crockett was charged in the same indictment with accessory after the fact

to murder. Michael Crosby entered an appearance as counsel in Crockett's case in June 2017, and he subsequently entered an appearance in Ball's case. Thereafter, in September 2018, the State filed a motion to disqualify Crosby, asserting that a conflict of interest existed based on the fact that Crosby was representing both Ball and Crockett. Ball subsequently signed a "Waiver of Conflict of Interest" in October 2018.

¶3. At the hearing on the State's motion, the State proffered that Crockett had implicated Ball as the suspect who killed Martin. The State also represented that it intended to call Crockett as a witness at Ball's trial.

¶4. The trial court recognized Ball's right to counsel, which extends to counsel of choice, but noted that the right was not without limitations. The court considered the State's proffer and concluded that an actual conflict of interest existed. The court found that the conflict could "seriously impact [Crosby's] ability to act as a zealous advocate" and that Crosby's duty to each client may require him to use "information gleaned from one client . . . against another." For example, the court suggested that Crosby's cross-examination of Crockett at Ball's trial could be adversely affected by dual representation.

¶5. After concluding that an actual conflict existed, the court analyzed whether to accept Ball's waiver of the conflict of interest. The court questioned Ball and determined that his waiver was knowingly and intelligently made. Then the court then considered the following factors:

1. whether the relevant conflict gravely imperil[ed] the prospect of a fair trial;
2. whether the prosecution [was] in its early stages;

3. whether continued representation would violate an applicable rule of professional conduct;
4. whether the representation would result in proceedings that would appear unfair or improper;
5. whether there [were] available means for mitigating the conflict; and
6. whether the [State] sought to manufacture the conflict.

As a basis for those six factors, the court cited to *United States v. Avant*, No. 4:15-CR-73-11, 2016 WL 6440608, at *7 (N.D. Miss. Oct. 28, 2016). After considering each factor, the trial court declined to accept Ball's waiver. Ultimately, the court entered an order disqualifying Crosby as defense counsel.

¶6. At trial, Ball was represented by Michael Hester. The State presented evidence that on September 13, 2016, Martin was in a vehicle in his grandmother's driveway selling marijuana while he and his girlfriend, Deandrea Cohea, were smoking marijuana. Cohea testified that she was lying back in the passenger's seat when gunshots entered the vehicle. Martin was shot in the head, causing his death. Cohea said she did not see the shooter.

¶7. Ball's co-indictee, Crockett, testified that she picked up Ball, Jermonte Barnes, and Melton Lowe earlier that day. According to Crockett, Ball had an attitude and told her that he and his girlfriend, Shanae Moore, had broken up. Likewise, Lowe testified that Ball seemed frustrated. Around 9:00 p.m., while they were at Crockett's house, they saw a car across the street in Martin's grandmother's driveway. Ball and Barnes discussed going to purchase marijuana from Martin, but they did not.

¶8. Instead, Crockett began to take Ball, Barnes, and Lowe home. One street over, Ball

told Crockett to stop driving. Ball exited the vehicle, stating that he was going to get some marijuana from Martin. At some point, Barnes also got out of the vehicle. According to Barnes, he saw Ball standing by a bush with a gun. He thought Ball was waiting for someone to bring him the marijuana, so he started walking back toward the vehicle. Then Barnes heard gunshots and ran home. Crockett and Lowe testified that they also heard gunshots and saw Ball running back toward the vehicle. According to Crockett, Ball was panicked when he got into the vehicle but did not tell them what happened. Later, Crockett told her boyfriend over the phone that Ball “just did something” and “I can’t tell you.”

¶9. Crockett then dropped off Ball and Lowe. Several hours later, Crockett went to the police station to give a statement. According to Detective Jennifer Krump of the Gulfport Police Department, Crockett identified Ball as the shooter. Crockett indicated that Ball believed Martin was having a sexual relationship with his former girlfriend Moore. Crockett pled guilty to hindering a prosecution for driving Ball after the shooting and not reporting the gunshots.

¶10. Barnes and Lowe also went to the police station and gave statements the next morning. They corroborated the time-line that Crockett had given Detective Krump. And Detective Krump testified that text messages corroborated Crockett’s statement that Ball and Martin were both having a sexual relationship with Moore.¹

¶11. After considering the evidence presented at trial, the jury found Ball guilty of first-degree murder.

¹ Lowe testified that he did not have any issues with Martin, and Barnes testified that he did not know Martin.

DISCUSSION

¶12. We must decide whether the trial court erred by granting the State’s motion to disqualify Ball’s counsel of choice, Michael Crosby.

¶13. “In all criminal prosecutions, the accused shall enjoy the right . . . to have Assistance of Counsel for his defence.” U.S. Const. amend. VI; *see also* Miss. Const. art. 3, § 26 (“In all criminal prosecutions the accused shall have a right to be heard by himself or counsel, or both . . .”). “[T]he Sixth Amendment right to counsel encompasses a right to effective assistance from an attorney who is conflict-free.” *Yarbrough v. State*, 139 So. 3d 143 (Miss. Ct. App. 2014) (quoting *McCaleb v. State*, 743 So. 2d 409, 411 (¶9) (Miss. Ct. App. 1999)).

¶14. This Court has held that there are two types of conflicts of interest: actual conflicts of interest and potential conflicts of interest. *Gregory v. State*, 96 So. 3d 54, 57 (¶10) (Miss. Ct. App. 2012). Our supreme court has noted that other “courts have rightly held that when a defense attorney contemporaneously represents a prosecution witness, there is a per se, actual conflict of interest.” *Kiker v. State*, 55 So. 3d 1060, 1067 (¶19) (Miss. 2011); *see also Yarbrough*, 139 So. 3d at 148 (¶11). Here, the State intended to (and did) call Crockett as a witness at Ball’s trial. Therefore, the court correctly determined that an actual conflict of interest existed.

¶15. However, a defendant may waive an actual conflict of interest. *Yarbrough*, 139 So. 3d at 149 (¶14). This Court has held that “[a] finding of an actual conflict is not the end of the analysis because a knowing and intelligent waiver of that conflict can cure the issue.” *Id.* “In order for a defendant effectively to waive his right to conflict-free counsel, the trial

judge should affirmatively participate in the waiver decision by eliciting a statement in the narrative form from the defendant indicating that he fully understands the nature of the situation and has knowingly and intelligently made the decision to proceed with the challenged counsel.” *Kiker*, 55 So. 3d at 1066 (¶15) (quoting *Littlejohn v. State*, 593 So. 2d 20, 25 (Miss. 1992)). After questioning Ball, the court determined that he had knowingly and intelligently waived the conflict of interest of Crosby representing Crockett too.

¶16. Then the trial judge considered whether to accept Ball’s waiver. The United States Supreme Court has noted that “the district court must be allowed substantial latitude in refusing waivers of conflicts of interest” *Wheat v. United States*, 486 U.S. 153, 163 (1988). This authority is derived from the district court’s “independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and appear fair to all who observe them.” *United States v. Vasquez*, 955 F.2d 40, 42 (5th Cir. 1993) (quoting *Wheat*, 486 U.S. at 160). Likewise, our supreme court has held that “it is incumbent upon courts which confront and which are alerted to possible conflicts of interest to take the necessary steps to ascertain whether conflict warrants separate counsel.” *Armstrong v. State*, 573 So. 2d 1329, 1332 (Miss. 1990) (citing *Wheat*, 486 U.S. at 160). And trial judges are “imbued with the responsibility of insuring trials are conducted within the ethical confines of the profession and that legal proceedings are just and fair to the interested as well as the uninterested observer.” *Id.* at 1333.

¶17. In determining whether to accept Ball’s waiver, the court considered:

1. whether the relevant conflict gravely imperil[ed] the prospect of a fair trial;

2. whether the prosecution [was] in its early stages;
3. whether continued representation would violate an applicable rule of professional conduct;
4. whether the representation would result in proceedings that would appear unfair or improper;
5. whether there [were] available means for mitigating the conflict; and
6. whether the [State] sought to manufacture the conflict.

Avant, 2016 WL 6440608, at *7.

¶18. With respect to the first factor—whether the relevant conflict gravely imperiled the prospect of a fair trial—the trial judge noted that the conflict in this case was “the most . . . significant” in his opinion. The State had represented that Crockett implicated Ball as the shooter and could be compelled to testify at Ball’s trial. The court held that this factor weighed in favor of denying the waiver.

¶19. As to the second factor—whether the prosecution was in its early stages—the court noted that a trial date had not been set, and neither side appeared to be ready for trial. The court held that this factor also weighed in favor of denying the waiver.

¶20. With respect to the third factor—whether continued representation would violate an applicable rule of professional conduct—the court noted that Mississippi Rule of Professional Conduct 1.7 was applicable. Rule 1.7 provides, in relevant part, that “[a] lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless the lawyer reasonably believes: (1) the representation will not adversely affect the relationship with the other client; and (2) each client has given knowing and

informed consent after consultation. . . .” However, according to the court, consent would not cure the conflict. The court held that this factor weighed in favor of denying the waiver.

¶21. As to the fourth factor—whether representation would result in proceedings that would appear unfair or improper—the court noted that Ball’s and Crockett’s cases would likely be severed. The court noted, however, there were “still other considerations which would appear unfair or improper,” such as Crosby cross-examining his client, Crockett. The court held that on the whole, this factor weighed in favor of denying the waiver.

¶22. With respect to the fifth factor—whether there were available means for mitigating the conflict—the trial judge did not think that associating counsel would ameliorate the conflict. The court held that this factor also weighed in favor of denying the waiver.

¶23. Finally, as to the sixth factor—whether the State manufactured the conflict—the court found that it was Crockett’s statement that created the conflict, not the State’s actions. The court held that this factor weighed in favor of denying the waiver. We further note that “the prosecution has an obligation to notify the trial court when it becomes aware that the defense attorney has an actual conflict of interest in his representation of the accused.” *Kiker*, 55 So. 3d at 1066 (¶15) (citing *Littlejohn*, 593 So. 2d at 25).

¶24. Ultimately, the trial court denied Ball’s waiver of the conflict of interest. We cannot say that this decision was erroneous given the trial court’s duty to ensure that defendants receive a fair trial. “An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the *trial is fair*.” *Littlejohn*, 593 So. 2d at 23. Additionally, a trial court must insure that trials “are conducted within the ethical

confines of the profession and that legal proceedings are just and fair to the interested as well as the uninterested observer.” *Armstrong*, 573 So. 2d at 1332. Accordingly, we find that the circuit court acted appropriately in disqualifying Ball’s original counsel of choice.

¶25. **AFFIRMED.**

**BARNES, C.J., CARLTON AND WILSON, P.JJ., WESTBROOKS,
McDONALD, LAWRENCE AND McCARTY, JJ., CONCUR.**