IN THE COURT OF APPEALS 01/14/97

OF THE

STATE OF MISSISSIPPI

NO. 94-KA-00600 COA

KENNETH BYRD A/K/A KENNETH RAY BYRD

APPELLANT

v.

STATE OF MISSISSIPPI

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. RICHARD T. WATSON

COURT FROM WHICH APPEALED: ADAMS COUNTY CIRCUIT COURT

ATTORNEYS FOR APPELLANT:

ROBERT C. BOYD

GAIL S. AKIN

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: CHARLES W. MARIS, JR., SPECIAL ASSISTANT ATTORNEY GENERAL

DISTRICT ATTORNEY: FORREST A. JOHNSON, JR.

NATURE OF THE CASE: CRIMINAL(FELONY)

TRIAL COURT DISPOSITION: DEFENDANT BYRD CONVICTED OF CT I, FORCIBLE RAPE-20 YRS IN MDOC; CT II, AGG ASS.-6 YRS IN MDOC; CT III, KIDNAPING-6 YRS IN MDOC; ALL SENTENCES CONSECUTIVE

BEFORE McMILLIN, P.J., KING AND PAYNE, JJ.

McMILLIN, P.J., FOR THE COURT:

Kenneth Byrd was convicted in a three-count indictment by a jury in the Adams County Circuit Court of forcible rape, aggravated assault, and kidnaping. Byrd appeals to this Court, raising nine issues for consideration. We conclude that there is substantial merit in one issue that will require reversal of his conviction and a remand for a new trial. With the exception of one other issue that may arise on retrial, our decision renders the remaining issues moot, and they will not be discussed.

We reverse the conviction because this Court finds that defendant's trial counsel had a substantial conflict of interest due to his representation of another suspect indicted as a participant in the alleged crime. Because of the conflicting interests of these two defendants, we conclude that trial counsel's conduct of Byrd's defense denied Byrd the effective assistance of counsel guaranteed to him under the Sixth Amendment.

I.

Facts

On the night of November 17, 1992, a young woman was raped, beaten, and thrown from a van which she occupied with several men in Adams County. Four men, including Byrd, were indicted for aggravated assault, kidnaping, and rape based upon an investigation of the incident.

Byrd was granted a severance on the basis that his defense was inconsistent with the remaining defendants. The remaining defendants apparently did not deny their presence in the van with the victim, but based their defenses on other grounds. Byrd, however, claimed that he was not in the van at any time on the night the event occurred. Byrd was tried and convicted of all three counts and sentenced to serve a total of thirty-two years. The charges against the remaining defendants had not been resolved at the time of Byrd's trial. The record reflects that Byrd's counsel was also acting as retained counsel for Shannon Wise, one of the remaining defendants.

II.

Ineffective Assistance of Counsel

After his conviction, Byrd obtained new counsel, who filed a new trial motion that charged, among other things, that Byrd's original counsel at trial did not effectively represent him because of the conflict arising out of his representation of his codefendant, Shannon Wise. In an affidavit filed in support of the motion, Byrd alleged that he urged his counsel to call Shannon Wise as a witness, but

that his counsel refused. He also alleged that his counsel did not explain to him the potential conflicts that existed by virtue of the attorney's representation of both him and Wise. No evidence was presented by the State in opposition to that assertion. The trial court denied the new trial motion.

We begin our consideration by acknowledging that one attorney may represent multiple criminal defendants on charges arising out of the same incident without necessarily violating any of the defendants' Sixth Amendment rights. *Littlejohn v. State,* 593 So. 2d 20, 25 (Miss. 1992) (citations omitted). Nevertheless, our review of the case law clearly indicates that appellate courts generally view the practice with disfavor. By way of example, our supreme court, in the case of *Armstrong v. State*, quoted with apparent approval from the comments to the Mississippi Rules of Professional Conduct that "the potential for conflict of interest in representing multiple defendants in a criminal case is so grave, that ordinarily a lawyer should decline to represent more than one co-defendant." *Armstrong v. State,* 573 So. 2d 1329, 1332 (Miss. 1990) (quoting Mississippi Rule of Professional Conduct 1.7 cmt.).

Whether such practice is permitted in certain circumstances or not, the law is clear that when a conflict of interest arising out of multiple representation renders the assistance of counsel ineffective, the defendant has been denied a fair trial under applicable constitutional principles. *Cuyler v. Sullivan,* 446 U.S. 335, 348-50 (1980). The prejudice to the defendant arising out of the conduct of his counsel must be real and not merely hypothetical. *United States v. Alvarez,* 580 F.2d 1251, 1255 (5th Cir. 1978). However, "prejudice is presumed if the defendant demonstrates that counsel actively represented conflicting interests and that an actual conflict of interest adversely affected his lawyer's performance." *Armstrong,* 573 So. 2d at 1333 (citations omitted). A defendant who has been denied the effective assistance of counsel guaranteed to him under the Sixth Amendment has been denied due process of law under the Fourteenth Amendment. *Gideon v. Wainwright,* 372 U.S. 335, 343-44 (1963).

The trial court, in considering the issue, concluded that Byrd could show no prejudice since, in all likelihood, if Wise had been subpoenaed as a witness, he would have exercised his rights under the Fifth Amendment to refuse to testify. While, as a practical matter, that may be extremely likely, it is not necessarily the case. Even were that the probable result, the answer itself illustrates the hopelessly conflicting duties owed by Byrd's counsel, since he was the one who would have advised Wise to invoke his Fifth Amendment rights against testifying, while at the same time acting as the attorney whose primary aim was to pursue any available means to obtain Wise's testimony.

There was a possibility that Wise could have provided information that would have been helpful to Byrd's defense. Byrd's defense was quite simple. He contended that, whatever may have occurred in the van on the night in question, he was not there at the time. There is some indication, on the other hand, that Wise was present in the van at the critical times, and the nature of his defense was either that the crime was not committed or that, if a crime was committed, he did not participate in its commission. Since Wise's defense was not in the nature of an alibi, he could have provided probative evidence on the critical issue of Byrd's assertion that he was not present.

In vigorously pursuing an alibi defense for Byrd, his counsel had an affirmative duty to investigate all possible avenues of proof to show he was not in the van. This certainly included the necessity of determining whether others, unquestionably in the van, would testify that Byrd was not there. If

counsel, in the course of preparing the case, determined with some degree of certainty that some van occupant was willing to so testify, then he had the added obligation to pursue all available means to get that testimony before the jury. One possibility would have been to attempt, by legitimate means, to delay Byrd's trial until after the others had been tried. At that point, whether the remaining suspects were acquitted or convicted, the Fifth Amendment impediment to their testimony in Byrd's trial would seem to have been removed. However, any attempt to delay Byrd's trial carried with it the necessary corollary that it served to possibly advance Wise's trial date. This alone seems to put defense counsel in a situation where his loyalties and obligations are in serious conflict.

It may be that Byrd's counsel was aware, through information derived under circumstances that were protected by the attorney-client privilege between Wise and him, that Wise's testimony would incriminate Byrd, and that it was advantageous to try Byrd before the Fifth Amendment barriers to Wise's testimony were removed. It is just as likely that he was aware that Wise could provide exculpatory testimony, but, that in doing so, Wise might reveal matters that could damage his own defense. The hopelessly conflicting loyalties owed by Byrd's counsel to his two clients prevents any meaningful inquiry into the question. It leaves the Court with the conclusion that it is impossible to conclude with any certainty that Byrd obtained the defense guaranteed him under the Sixth Amendment. *See, e.g., Gideon,* 372 U.S. at 343-44. Any doubt on the matter must be resolved in favor of a retrial.

For essentially the same reasons that Byrd was entitled to a severance of his trial from that of the other defendants, we conclude that he was equally entitled to representation by counsel committed to pursue every available source of evidence that would exonerate him. When the possibility of obtaining the testimony of an eye-witness who could potentially exonerate the defendant is foreclosed -- not because the witness is unavailable, but because defense counsel cannot call that witness without violating a fiduciary duty owed to that witness -- the defendant has not received the treatment at the hands of the judicial system that he is entitled to under the Constitution.

It is no answer that Byrd consented to the dual representation. On the facts of this case, we conclude that the conflict of interest created by this dual representation could not be the subject of a waiver without credible evidence of full disclosure and a knowledgeable waiver by Byrd, or some intervention on the part of the trial court to ensure that the waiver was intelligently given. *See Littlejohn,* 593 So. 2d at 25. One of the primary purposes of having professional representation is so that the defendant may be fully advised of all of his rights. That advice must come from counsel having a singleness of purpose not evidenced in this proceeding. It is for the attorney, not the client, to determine when a hopeless conflict of interest has arisen and to resolve the conflict appropriately.

IV.

Admission of Video-Taped Confession of Green

The victim in this case gave a statement to police shortly after the incident which was videotaped. During cross-examination of the victim, defense counsel sought to impeach her testimony by showing that she had made a prior statement identifying her attackers that did not mention Byrd. Subsequently, during the testimony of an investigating officer, the defense proposed to play for the

jury the videotaped statement to demonstrate the inconsistency between the victim's prior version of the incident and that given by her at trial. The trial court refused to allow the tape to be played for the jury, apparently upon the basis that it was cumulative of other evidence already introduced concerning the victim's inconsistent statements.

Mississippi Rule of Evidence 613 deals with the admission of extrinsic evidence of a prior inconsistent statement by a witness. Prior statements admitted under this rule are admissible only for purposes of impeachment as an attack on the credibility of the witness. *See* M.R.E. 613; *Peterson v. State*, 540 So. 2d 1340, 1341 (Miss. 1989). However, if the witness admits making the inconsistent statement, then the statement itself is not admissible, since the aim of the cross-examination has already been accomplished. Putting the statement in evidence would only serve to establish a fact not in dispute, *i.e.*, that at some time in the past the witness has given a different version of the facts. *Conner v. State*, 632 So. 2d 1239, 1260 (Miss. 1993) (citations omitted); *see also Foster v. State*, 508 So. 2d 1111, 1119 (Miss.1987) (citations omitted).

The central issue in regard to the victim's prior statement was her failure to implicate Byrd. She admitted that to be the case, but, as is permitted under the rules, she was offered the opportunity to explain the inconsistency. She did so by testifying that she had been threatened with bodily harm by Byrd if she reported his involvement in the crime. Under *Conner*, therefore, the statement itself was rendered inadmissible unless it was relevant as to some other issue. *Conner*, 632 So. 2d at 1260. Byrd asserts no alternate basis for admissibility in this appeal. Thus, we conclude that the trial court was correct in excluding the statement, although for reasons more fundamental than the essentially discretionary call of excluding relevant evidence solely due to its cumulative nature.

THE JUDGMENT OF CONVICTION OF THE ADAMS COUNTY CIRCUIT COURT IS REVERSED, AND THIS CAUSE IS REMANDED FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. COSTS OF THIS APPEAL ARE ASSESSED TO ADAMS COUNTY.

FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR.