

IN THE COURT OF APPEALS OF OHIO  
SIXTH APPELLATE DISTRICT  
ERIE COUNTY

State of Ohio

Court of Appeals No. E-08-004

Appellee

Trial Court No. 2007-CR-141

v.

Marco Amison

**DECISION AND JUDGMENT**

Appellant

Decided: June 5, 2009

\* \* \* \* \*

Kevin J. Baxter, Erie County Prosecuting Attorney, and  
Mary Ann Barylski, Assistant Prosecuting Attorney, for appellee.

Loretta A. Riddle, for appellant.

\* \* \* \* \*

SINGER, J.

{¶ 1} This is an appeal from a judgment issued by the Erie County Court of Common Pleas following a jury verdict finding appellant guilty of two drug related offenses. Because we conclude that the trial court did not err in failing to conduct a conflict of interest inquiry and that appellant received effective assistance of counsel, we affirm.

{¶ 2} Appellant, Marco Amison, was indicted on one count of trafficking in cocaine, in violation of R.C. 2925.03(A)(1) and (C)(4)(b), and one count of trafficking in a counterfeit substance, in violation of R.C. 2925.37(B), each with a specification that the offenses occurred within a school zone. The charges stemmed from appellant's two alleged sales of a controlled substance or a counterfeit controlled substance to a confidential informant working for the Erie County Drug Task Force ("ECDTF"). The sales allegedly occurred on August 17 and September 20, 2006, within 1,000 feet of a school. Appellant pled not guilty and a jury trial was conducted. During trial, the following testimony and evidence was presented.

{¶ 3} A Bureau of Criminal Investigation forensic scientist testified that one of the substances sold by appellant contained cocaine. He acknowledged that the bureau was not requested to perform any trace evidence, fingerprint, or DNA tests on the package containing the substance.

{¶ 4} Detective Dan Lewis, with the Sandusky Police Department, testified that a female confidential informant, Sunsaray Price, completed two alleged drug "buys" from appellant on two separate dates. Price wore a wire and was working as part of an agreement to "work off" a prior criminal offense. Detective Lewis said that, referencing lab test reports, the substance from the first buy contained cocaine and the second one contained a "counterfeit controlled substance." Detective Lewis also testified that both buys occurred within 1,000 feet of a school zone.

{¶ 5} Huron Police Detective Brent McConnell also testified that at the time of the alleged buys, he was employed with the Sandusky Police Department and was assigned to the ECDTF. He testified that he had searched Price prior to the buy to be sure she did not have drugs on her person. He said he was dressed in "plain clothes" and was present in a laundromat. Detective McConnell said he observed appellant in the front passenger seat of an orange vehicle which pulled into the laundromat parking lot. Appellant got out of the vehicle and approached the informant who was on a bicycle. The two hugged and then had a quick conversation. At one point one of the two bent over and picked something up from the ground. The informant then left on her bike and appellant returned to the orange vehicle. The detective said that appellant was not arrested that day.

{¶ 6} Sunsaray Price then testified that, as part of an agreement with the ECDTF to "work off" some drug trafficking charges, she agreed to be a confidential informant, i.e., to provide the names of drug sellers and to arrange for controlled buys of crack cocaine. She then testified as to what occurred during the two buys in the summer of 2006. She corroborated Detective Lewis' testimony that she had worn a wire and had allegedly purchased cocaine from appellant on two separate occasions. She described the meeting at the laundromat parking lot that she rode up on her bike and met with and hugged appellant who dropped a packet on the ground. She dropped her money on the ground and each picked up what the other had dropped.

{¶ 7} During her testimony, she stated that she knew appellant's public defender because he had previously represented her in a criminal case in 2001. Appellant's counsel elicited testimony that she had several previous convictions involving dishonesty, including check forgery, petty theft, receiving stolen property, theft, and fictitious registration.

{¶ 8} The prosecution then rested. Appellant offered no evidence or witnesses in defense.

{¶ 9} The jury found appellant guilty on both counts. The trial court sentenced appellant to prison terms of 17 months as to Count 1 and 16 months as to Count 2, with the sentences to run consecutively. The court further ordered appellant to pay fines of \$2,500 as to each count, suspended his driver's license for two years, and to pay costs of prosecution.

{¶ 10} Appellant now appeals from that judgment, arguing the following two assignments of error:

{¶ 11} "Assignment of Error No. 1

{¶ 12} "The trial court erred by not making inquiry when the court knows or reasonably knows that an 'automatic conflict of interest' exists between appellant's public defender when that public defender formerly represented a key prosecution witness and that key prosecution witness is presently being represented by the public defender's office and the representation of the key prosecution witness presently entails that key prosecution witness' testimony against the appellant.

{¶ 13} "Assignment of Error No. 2

{¶ 14} "An appellant's Sixth Amendment right to effective assistance of counsel and conflict free representation is violated when counsel is ineffective and appellant's counsel, the director of the public defender office, previously represented a key prosecution witness and appellant's counsel's office continues to represent the key prosecution witness on the very charges that were used to coerce that key prosecution witness into becoming an informant and testifying against appellant."

I.

{¶ 15} In his first assignment of error, appellant claims that the trial court erred in not making inquiry into an alleged potential conflict of interest because the public defender allegedly previously represented a prosecution witness.

{¶ 16} Where there is a right to counsel, the Sixth Amendment to the United States Constitution guarantees that representation shall be free from conflicts of interest. *State v. Dillon* (1995), 74 Ohio St.3d 166, 167. A lawyer represents conflicting interests when on behalf of one client, it is his duty to contend for something which his duty to another client requires him to oppose. *State v. Manross* (1988), 40 Ohio St.3d 180, 182. A possibility of conflict exists when the interests of the defendant may diverge at some point so as to place the attorney under inconsistent duties. *Id.* If a question of conflict of interest arises after trial, the defendant must prove an actual conflict of interest, as opposed to a serious potential for conflict. See *id.*, at the syllabus.

{¶ 17} Both defense counsel and the trial court are under an affirmative duty to ensure that a defendant's representation is conflict free. *Dillon*, supra, at 167. The trial court's duty only arises when the court knows or reasonably should know a possible conflict of interest exists, or when the defendant objects to multiple representation. *Manross*, supra, at 181. When this duty arises, the court is constitutionally required to conduct an inquiry into a possible conflict of interest. *Dillon*, supra, at 168.

{¶ 18} The public defender's office is "the functional equivalent of a law firm in terms of the assertions of conflict of interest. \* \* \*" (Citations omitted.) *State v. Dillman* (1990), 70 Ohio App.3d 616, 621, overruled on other grounds, *State v. Williams*, 6th Dist. Nos. L-03-1070, L-03-1071, 2003-Ohio-2533. Even where defendants whose charged offenses arise from the same transaction are represented by separate members of that office, they are represented by a single legal entity and the potential for a conflict of interest exists. \* \* \* Separate public defenders are not independent of one another. \* \* \*." (Citations omitted.) *Dillman*, supra, at 622. Nevertheless, the record must contain evidence of any such conflict of interest.

{¶ 19} In this case, the only reference in the record to any possible conflict was the comment made by the witness, Sunsaray Price, that appellant's trial counsel had represented her in a prior case. Nothing in the record directly or indirectly suggests, however, that at the time of appellant's trial, Price was being represented by appellant's counsel or by the public defender's office. Consequently, nothing in the record indicates that the trial court was put on notice that any conflict of interest existed at that moment.

Therefore, we cannot say that the trial court erred by failing to conduct further inquiry into any possible conflict of interest.

{¶ 20} Accordingly, the first assignment of error is not well-taken.

## II.

{¶ 21} In his second assignment of error, appellant argues that, because an alleged conflict of interest in the public defender's office representing both him and one of the prosecution's witnesses, he did not receive effective assistance of counsel.

{¶ 22} There is a two-part standard for judging whether counsel's representation was ineffective:

{¶ 23} "Counsel's performance will not be deemed ineffective unless and until counsel's performance is proved to have fallen below an objective standard of reasonable representation and, in addition, prejudice arises from counsel's performance." *State v. Bradley* (1984), 42 Ohio St.3d 136, paragraph two of the syllabus, following *Strickland v. Washington* (1984), 466 U.S. 668. Further, when assessing attorney performance, "every effort [should] be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, supra, at 689.

{¶ 24} We have already determined that nothing in the record indicates that appellant and confidential informant Price were, in fact, both being represented by the public defender's office. Our review of the record reveals that appellant's trial counsel vigorously cross-examined both Price and the police officer who set up the buys with

Price. Trial counsel explored the possible alternative sources for the drugs which were allegedly purchased from appellant as well as the possible motives that Price might have had to lie about the sale. Nevertheless, the jury believed Price and did not believe any of the alternative versions. Therefore, appellant's claim of ineffective assistance of counsel is without merit.

{¶ 25} Accordingly, appellant's second assignment of error is not well-taken.

{¶ 26} The judgment of the Erie County Court of Common Pleas is affirmed.

Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

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JUDGE

Arlene Singer, J.

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JUDGE

James R. Sherck, J.  
CONCUR.

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JUDGE

Judge James R. Sherck, retired, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:  
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.