



IN THE SUPREME COURT OF THE STATE OF DELAWARE

JOSHUA MIRABAL,)
)
 Defendant-Below,)
 Appellant,)
)
 v.) **No. 211, 2013**
)
 STATE OF DELAWARE,)
)
 Plaintiff-Below,)
 Appellee.)

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STATE'S ANSWERING BRIEF

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NATURE AND STAGE OF THE PROCEEDINGS

The Appellant, Joshua Mirabal (“Mirabal”), was arrested on December 1, 2011 and thereafter indicted on charges of Tier 5 Possession of Cocaine, Possession of Marijuana and Criminal Impersonation. (A1 at DI 2). A Superior Court jury trial began on October 11, 2012. (A2 at DI 30). On October 12, 2012, the jury convicted Mirabal of all charges. Following a presentence investigation, on March 22, 2013, Superior Court sentenced Mirabal to a total of 9 years and 6 months Level V incarceration, suspended after 3 years for decreasing levels of supervision.¹

Mirabal has appealed his convictions and sentence to this Court. This is the State’s Answering Brief.

¹ Exhibit A-1 of Opening Brief.

SUMMARY OF THE ARGUMENT

1. DENIED. Mirabal's argument that his claim of ineffective assistance of counsel should be considered on direct appeal because "it relates to the Sixth Amendment right to counsel, attorney ethics, judicial responsibility, and fundamental fairness in the administration of justice throughout a criminal proceeding"² is unsupported by the facts. In any case, a claim of ineffective assistance due to a conflict of interest must be supported by a demonstration of actual prejudice. Mirabal has not shown that his counsel actively represented conflicting interests, and therefore, has not established the constitutional predicate for his claim of ineffective assistance of counsel. Therefore, his argument fails.

² *Lewis v. State*, 757 A2d 709, 712 (Del. 2000).

STATEMENT OF FACTS

On December 1, 2011, Officer Christopher Field of the Delaware River and Bay Authority Police Department (“DRBA”) observed a red chevy cavalier change lanes without signaling as it travelled on I-295 southbound. (A7-8). Officer Field also noticed the vehicle had an inoperable right brake light. (A8). He conducted a motor vehicle stop on Route 13 southbound and made contact with the three occupants of the vehicle. (A8). Rebecca Stafford was the vehicle’s driver. Joshua Mirabal was the front seat passenger and Bethany Santana was lying down in the back seat. (A8).

Officer Field asked Stafford for her license, registration and insurance. (A9). Mirabal became involved in the discussion and when asked, told Officer Field that his name was Jose Zakeem Ramos. (A9). Being unable to confirm his identity, Officer Field asked Mirabal to exit the vehicle and began to question him more thoroughly. (A10). Upon questioning, Mirabal provided his correct name and birthdate. (A11). Officer Field arrested Mirabal for criminal impersonation and placed him in his patrol vehicle. (A11).

Officer LaMora, who had arrived on scene to assist, obtained consent from Stafford to search the vehicle. (A11; A15). During his search, Officer LaMora found a black jacket in the middle of the back seat. (A15). When he lifted the jacket, he found a Newport cigarette box with a partially-opened clear plastic

baggy containing cocaine hanging out of it. (A15). At that point, Officer LaMora radioed Officer Field to take Santana, who was standing outside, into custody. (A11; A15-16). As he went to arrest Santana, Officer Field could hear and see Mirabal yelling and shaking the patrol car. (A12). When the officer opened the patrol vehicle's door, Mirabal stated "[i]t's not hers, it's mine." (A12). When asked what he was talking about, Mirabal stated "[t]he work, it's mine." (A12). Mirabal stated that "work" was "the crack" and that "he put it in her jacket." (A12). The cocaine-based crack weighed a total of 77.63 grams (B-4). Mirabal, Stafford and Santana were transported to DRBA Troop 1 headquarters at the Delaware Memorial Bridge. (A12). Upon a search incident to Mirabal's arrest, Officer Field found 6.30 grams of marijuana in a baggy in Mirabal's sock. (A12-13; B-4).

After Officer Field provided *Miranda* warnings, Mirabal made a voluntary statement. Mirabal acknowledged that they drove to a house in Penns Grove, New Jersey to obtain drugs located at the base of a mailbox. (B-1-2). Based upon phone calls with "some Mexicans" Mirabal intended to transport the drugs back to an apartment complex off of Route 40 in or near New Castle. (B-2). Mirabal denied that the drugs belonged to Stafford or Santana and admitted to placing the drugs in the jacket. (B-3). Mirabal also stated he was going to be paid \$500 for

transporting the drugs but, rather than take the money, he was thinking of just taking a cut of the drugs. (B-3).

ARGUMENT

I. MIRABAL’S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL DUE TO A PERCEIVED CONFLICT OF INTEREST ON THE PART OF TRIAL COUNSEL SHOULD NOT BE CONSIDERED ON DIRECT APPEAL

Question Presented

Whether this Court has an adequate record to consider Mirabal’s claim of ineffective assistance of trial counsel on direct appeal.

Standard and Scope of Review

It is well-settled that this Court generally will not consider a claim of ineffective assistance of counsel raised for the first time on direct appeal.³ “The reason for that practice, in part, is to develop a record on that issue in a postconviction proceeding.”⁴

Merits of Argument

A. Mirabel’s Ineffectiveness Claim is Not Ripe in this Appeal.

Mirabal contends that the trial court denied him conflict-free effective assistance of counsel by refusing to declare a mistrial in his case.⁵ He claims his trial counsel from the public defender’s office was working under an

³ *Desmond v. State*, 654 A.2d 821, 829 (Del. 1994).

⁴ *Sahin v. State*, 7 A.3d 450, 451 (Del. 2010).

⁵ Op. Brf. at 13.

insurmountable conflict of interest because another attorney from the public defender's office formerly represented co-defendant Rebecca Stafford on a charge of hindering prosecution, arising out of the same incident, in the Court of Common Pleas.⁶ ("CCP"). This conflict, Mirabal argues, "potentially undermined the attorney's effectiveness during the entire proceedings,"⁷ and as such, should be considered by this Court on direct appeal. Mirabal is mistaken.

To bolster his argument, Mirabal argues that the facts of his case are "materially similar" to the facts in *Lewis v. State*.⁸ In *Lewis*, one attorney represented at a joint trial two defendants with separate alibis.⁹ Not so in Mirabal's case. Here, Stafford pled guilty in CCP on June 4, 2012 to the only crime for which she was charged – hindering prosecution. Stafford entered this plea and was sentenced to a fine only, at least one month before Mirabal's public defender began to represent him on July 17, 2012 for felony drug and related offenses in the Superior Court.¹⁰ The charges pending against Mirabal and Stafford were not even

⁶ See Ex. B1-B5 of Op. Brf. A3 at DI 22.

⁷ Op. Brf. at 14.

⁸ 757 A.2d 709; *see* Op. Brf. at 14.

⁹ 757 A.2d at 711, 719.

¹⁰ *See supra* n. 3. Although it is clear the Office of the Public Defender represented Stafford on the day of her plea, there is no indication from the docket as to when representation commenced. See Ex. B-1 of Op. Brf.

lodged in the same court. After the imposition of sentence, the public defender's representation of Stafford was concluded. This case is substantially different from *Lewis*. As such, Mirabal's argument that his claim of ineffective assistance of counsel should be considered on direct appeal "because it relates to the Sixth Amendment right to counsel, attorney ethics, judicial responsibility, and fundamental fairness in the administration of justice throughout a criminal proceeding,"¹¹ is unsupported by the facts.

B. Mirabal's Claim that Trial Counsel was Operating Under a Conflict of Interest is Unsupported

Rule 1.7 of the Delaware Rules of Professional Conduct states:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

¹¹ *Lewis*, 757 A.2d at 712.

(4) each affected client gives informed consent confirmed in writing.¹²

In considering Rule 1.7, the fact, if it exists, that defense counsel has a conflict of interest, without more, is normally insufficient to overturn a judgment.¹³ To be entitled to relief in a conflict of interest dispute, the defendant must both: (1) “prove by clear and convincing evidence there is a conflict of interest in the first place,” and (2) “demonstrate how the conflict [prejudiced] the fairness of the proceedings.”¹⁴

The record, as it exists, does not demonstrate that Mirabal’s trial counsel operated under an impermissible conflict. Stafford was represented by a public defender when she pled guilty to hindering prosecution at her CCP non-jury trial and was sentenced to a fine only.¹⁵ With respect to his charges, Mirabal, by contrast, initially retained private counsel who was allowed to withdraw on May 7, 2013, while Mirabal was on *capias*. (A2 at DI 9, 11, 19). Therefore, by the time of his October 11, 2012 trial date, Mirabal no longer had private counsel and did not seek other private counsel. Rather, the public defender entered his appearance on behalf of Mirabal on July 17, 2012 (A3 at DI 22).

¹² DELAWARE RULES OF PROF’L CONDUCT R. 1.7

¹³ *Hitchens v. State*, 2007 WL 2229020 (Del. July 26, 2007) at *3; *see also Stigars v. State*, 1990 WL 43491, at *1 (Del. Mar. 29, 1990).

¹⁴ *See Hitchens*, 2007 WL 2229020 at *2.

¹⁵ Ex. B-1 of Op. Brf.

At trial both parties acknowledged that a conflict of interest would only arise for trial counsel if Stafford were to testify at trial. (A22). On the morning of the second day of trial, trial counsel advised the Superior Court that Mirabal, not trial counsel, wanted to call Stafford as a witness. (A17). It is also apparent that Stafford intended to invoke her Fifth Amendment right if called to testify.¹⁶ Trial counsel represented that he told Mirabal that he did not plan on calling Stafford, and that if Mirabal chose to testify and mentioned a statement supposedly signed by Stafford claiming ownership of the drugs, the State would likely call Stafford in rebuttal, making a mistrial likely. (A17). The Superior Court followed up counsel's representation with its finding that Stafford claimed her statement was not voluntary and she was intimidated or threatened into making it. (A18).¹⁷ While admitting that his counsel had "been doing an excellent job on everything," Mirabal nonetheless, refused to waive the purported conflict, rejected his attorney's advice that calling Stafford would not benefit his case, and requested a mistrial. (A18).

¹⁶ The Court asked:

Court: And if you intend to call her to ask her about the content of her affidavit, she would still claim a Fifth Amendment right and we're back where we were before trial started. Am I right, Mr. Motoyoshi?

Trial Counsel: Yes, your honor. (A19).

¹⁷ Although the Superior Court indicated the conversation between the Superior Court and Stafford (and counsel appointed to represent Stafford) was on the record, the State has been unable to find this discussion. (A18).

Because all parties were agreed that no conflict existed until or unless Stafford testified, the Superior Court ordered that trial continue. (A22). Mirabal elected to testify, but the Superior Court admonished him not to reference Stafford's statement as it was, at that point, inadmissible hearsay.¹⁸ (A23). Notwithstanding the Superior Court's admonishment, Mirabal self-servingly referenced Stafford's statement on two occasions. (A29-30). Despite the State's request, the Superior Court refused to declare a mistrial. (A30). Neither Mirabal nor the State called Stafford as a witness. No conflict of interest arose. Mirabal, thus, cannot substantiate his claim of conflict of interest affecting his representation.

C. On the Present Record, Mirabal Cannot Substantiate a Claim of Ineffective Assistance of Counsel.

To the extent this Court considers Mirabal's claim of ineffective assistance of counsel because of a purported conflict of interest, it fails. In order to succeed in an ineffective assistance of counsel claim a defendant must show both: (1) "that counsel's representation fell below an objective standard of reasonableness," and (2) "that there is a reasonable probability that, but for counsel's unprofessional

¹⁸ To the extent that Mirabal argues that Stafford's statement is admissible as a statement against interest under DRE 804(b)(3), he is incorrect. The Superior Court was aware that Stafford indicated she was forced to sign the statement and she feared Mirabal. The affidavit was not a trustworthy statement. Indeed, the Superior Court advised Mirabal that it was not admissible under DRE 804(b)(3). (A23). And, because of its lack of trustworthiness, the residual exception under DRE 807 does not assist him.

errors, the result of the proceeding would have been different.¹⁹ There is a strong presumption that the legal representation was professionally reasonable.²⁰ As such, mere allegations will not suffice; instead, a defendant must make concrete allegations of ineffective assistance, and substantiate them, or risk summary dismissal.²¹

“A claim of ineffective assistance due to a conflict of interest must be supported by a demonstration of actual prejudice.”²² Prejudice is presumed “only if the defendant demonstrates that counsel ‘actively represented conflicting interests’ and that ‘an actual conflict of interest adversely affected his lawyer’s performance.’”²³ “[U]ntil a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance of counsel.”²⁴

In the first instance, it is apparent from the record that Stafford intended to invoke her 5th Amendment right to counsel at trial. From the existing record, it does not appear it was trial counsel’s strategic intent to call Stafford, but instead

¹⁹ *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

²⁰ *Flamer v. State*, 585 A.2d 736, 743-44 (Del. 1990) (citations omitted).

²¹ *Younger v. State*, 580 A.2d at 552, 556 (1990).

²² *McDougal v. State*, 2011 WL 4921345 (Del. Oct. 17, 2011) (citing *Lewis*, 757 A.2d at 717).

²³ *Strickland*, 466 U.S. at 692; (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980); *Lewis*, 757 A.2d at 718; see also *Mickens v. Taylor*, 535 U.S. 162, 174-75 (2002) .

²⁴ *Sullivan*, 446 U.S. at 350.

Mirabal's desire to do so.²⁵ Again, from the existing record, it appears that Stafford would have refused to testify and if she did, would have provided damaging testimony that she had been forced to sign the affidavit and was afraid of Mirabal. Other than the defendant himself, it is counsel's tactical decision, not his client's, as to what witnesses to call.²⁶ Mirabal cannot show he suffered prejudice as a result of counsel's decision to not call Stafford.²⁷ He cannot show that "an actual conflict of interest adversely affected [] counsel's performance."²⁸ Indeed, Mirabal offers nothing other than speculation to support his claim that the public defender's office's brief prior representation of Stafford created divided loyalties that prohibited effective representation.²⁹ And, the evidence against Mirabal was great. He confessed both at the scene and in detail at the police station that the drugs found were his and that he placed them in the location where they were discovered. Even at trial, Mirabal admitted his guilt to all charges except the drug

²⁵ See Op. Brf. at 25.

²⁶ See *Wainwright v. Sykes*, 433 U.S. 72, 93 n. 1 (1977); *Outten v. State*, 720 A.2d 547, 557 (Del. 1998) (whether to call a witness and how to examine and/or cross-examine witnesses who are called are tactical decisions reserved to counsel.)

²⁷ When the Superior Court and Counsel discussed the previously scheduled but aborted hearing regarding the admissibility of Stafford's statement, defense counsel stated "since there was a hearing scheduled before and I *chose* not to have the hearing." (A23). (emphasis added).

²⁸ *Pettiford v. State*, 2011 WL 2362383, at *2 (Del. June 13, 2011), citing *Lewis* 757 A.2d at 718.

²⁹ *Pettiford*, 2011 WL 2362383, at *2; see also *United States v. Hess*, 135 F.3d 905, 910 (3d Cir. 1998) ([defendant] must identify a plausible defense strategy that could have been pursued,

dealing. (A26-27). Mirabal cannot show that calling Stafford to the stand to testify, if she even agreed to do so, would have changed the outcome of his proceeding.³⁰ Having failed to demonstrate an actual conflict of interest and how that alleged conflict prejudiced the fairness of his trial, Mirabal's claim must fail.

³⁰ As the Superior Court stated on the record just prior to the verdict:

Counsel, I just want to say on the record while he's getting the jury that regardless of the verdict in this matter, both of you clearly knew the facts and the law, presented very competent presentations on behalf of your respective clients, and I commend you both. Regardless of the verdict, your clients should be satisfied with the work that you've done on their behalf. (B-5).

CONCLUSION

This decision of the Superior Court should be affirmed.

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September 13, 2013

CERTIFICATION OF SERVICE

The undersigned, being a member of the Bar of the Supreme Court of Delaware, hereby certifies that on July 12, 2013, she caused the attached document to be delivered via File and ServeXpress to:

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