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FILED
Jul 02 2009, 9:48 am
CLERK
of the supreme court, court of appeals and tax court

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IN THE
COURT OF APPEALS OF INDIANA

CHAD PEMBERTON	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 53A01-0810-PC-469
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE MONROE CIRCUIT COURT
The Honorable Marc R. Kellams, Judge
Cause No. 53C02-0804-PC-864

July 2, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Chad Pemberton appeals the denial of his petition for post-conviction relief. The State brings a cross-appeal, asserting that the petition should be dismissed without prejudice. The State also has filed a motion to disqualify Pemberton's counsel.

Concluding that Schalk is disqualified to serve as Pemberton's counsel, we dismiss the appeal, and remand with instructions.

ISSUES

Pemberton raises the following issue:

> Whether the post-conviction court erred in denying his petition without a hearing.

On cross-appeal, the State raises the following issue:

> Whether the order denying Pemberton's petition should be reversed and the case remanded with instructions to dismiss the petition without prejudice due to Pemberton's counsel's conflict of interest.

The State also has filed a motion, seeking to disqualify Schalk as Pemberton's counsel.

FACTS

On March 28, 2007, the State charged Pemberton with class B felony dealing in methamphetamine and class A felony dealing in methamphetamine in Monroe County. David Schalk entered an appearance on Pemberton's behalf on April 26, 2007.

On May 14, 2007, Pemberton filed a motion for speedy trial pursuant to Indiana Criminal Rule 4(B), which provides, in part, that a defendant "shall be discharged if not brought to trial within seventy (70) calendar days from the date of such motion . . . ."

Thus, the State had until July 23, 2007 to bring Pemberton to trial. The trial court set the trial for July 2, 2007.

On June 28, 2007, the State moved to have Schalk disqualified. Also on June 28, 2007, Pemberton moved for discharge. On July 2, 2007, the trial court disqualified Schalk after determining that he had "attempted to orchestrate an 'independent controlled buy' of a controlled substance in order to discredit a witness of the State." (App. 14). Pemberton did not appeal the disqualification.

On July 3, 2007, the trial court appointed John Plummer, III as Pemberton's counsel. Citing to Schalk's disqualification and subsequent appointment of new counsel, the trial court ordered that Pemberton's trial be continued, with the seventy-day period to commence from July 3, 2007.

The trial court held a hearing on August 2, 2007, during which Pemberton withdrew his motion for discharge and again requested a speedy trial, giving the State until October 11, 2007 to bring him to trial. On October 2, 2007, Pemberton filed a motion for discharge, which the trial court denied.

On October 9, 2007, Pemberton and the State entered into a plea agreement under which Pemberton agreed to plead guilty to one count of class B felony dealing in methamphetamine. On November 8, 2007, the trial court sentenced Pemberton to eight years.

On April 17, 2008, Pemberton, by his counsel, Schalk, filed a petition for post-conviction relief. Pemberton asserted that he received ineffective assistance of counsel from Plummer when he failed to move for discharge after July 23, 2007, which was

seventy days from the original motion for speedy trial. He also asserted that Plummer's "failure to object to David Schalk's disqualification—even refusing to speak with David Schalk about it—is another example of his deficient performance . . . ." (App. 6).

In the petition, Schalk admitted that he "provided cash and a digital audio recorder for the purpose of documenting the sale of marijuana by a witness for the State." (App. 6). However, he argued that this was an invalid reason to disqualify him, and therefore, "his removal could not be used as a valid excuse for delay." (App. 6).

Pemberton maintained that he did not waive his right to a speedy trial by entering a guilty plea because "(1) [he] would have been discharged but for ineffective assistance of counsel, and (2) the trial court's removal of [Schalk] from the case was a violation of his state and federal constitutional rights of such magnitude that it deprived the court of jurisdiction over the case." (App. 7).

On July 25, 2008, the post-conviction court entered its findings of fact and conclusions of law. It denied Pemberton's petition without a hearing.

Pemberton filed a notice of appeal on August 25, 2008. On September 30, 2008, he filed a motion to remand his case back to the post-conviction court with instructions to conduct an evidentiary hearing. This Court denied his motion on October 10, 2008.

On November 25, 2008, the State filed a motion to vacate the order denying Pemberton's petition and remand the case with instructions to dismiss the petition without prejudice due to Pemberton's counsel's conflict of interest. This Court denied the motion on January 5, 2009.

The State filed its appellee's brief and appendix on February 4, 2009. On February 26, 2009, Pemberton filed a motion to strike the appendix for containing documents not in the record. On April 15, 2009, this Court granted the motion without prejudice to the State's right to file a motion to disqualify counsel and tender such documents in support thereof.

On April 20, 2009, the State filed its motion to disqualify counsel due to a conflict of interest arising out of Schalk's involvement in the drug buy and subsequent class D felony conspiracy to commit possession of marijuana charge against him.[1] Pemberton filed his response on May 11, 2009. On May 18, 2009, this Court entered an order holding the State's motion in abeyance "to be addressed by the writing panel to which this case will be assigned." (Order, May 18, 2009).

DECISION

The State asserts that Schalk should be disqualified as Pemberton's post-conviction and appellate counsel due to a conflict of interest. We agree.

Indiana Professional Conduct Rule 1.7 provides, in pertinent part, as follows:

> (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:
>
> . . .
>
> (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.

[1] The State charged that Schalk conspired with Pemberton and other individuals to purchase marijuana. The charges remain pending.

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

An example of a conflict due to the lawyer's personal interest is where "the probity of a lawyer's own conduct in a transaction is in serious question," thereby making it "difficult or impossible for the lawyer to give a client detached advice." Prof. Cond. R. 1.7 cmt. 10.

"If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from representation, unless the lawyer has obtained the informed consent of the client . . . ." *Id.* at cmt. 4. "Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interest of that client." *Id.* at cmt. 18. Informed consent must be confirmed in writing "to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing." *Id.* at cmt. 20.

No matter how noble his intentions,[2] Schalk's involvement in a drug buy clearly calls into question his integrity and conduct, despite his contention that he "wanted the marijuana to be purchased for the sole purpose of placing it into the custody of the police for use at the scheduled Pemberton trial."[3] (Schalk's Resp. at 2). We also agree with the State that Schalk's own interests are in direct conflict with Pemberton's interests, where Pemberton could be called as a witness in a trial against Schalk. *See In re Kern*, 555 N.E.2d 479, 483 (Ind. 1990) (finding a conflict of interest where the attorney was the primary focus of an investigation and the client could benefit from providing information against the attorney). Thus, we find that Schalk's duty to represent Pemberton conflicts with his interests related to his own pending criminal case.

Moreover, Schalk makes no showing that Pemberton has given his informed, written consent to Schalk's representation. Even if Pemberton had given his consent, we cannot say that it would be valid. *See id.* (finding that "the lawyer involved cannot provide representation on the basis of the client's consent" where "[n]o disinterested lawyer could ethically conclude that [a client] should be represented by the very person against whom the Prosecution was seeking information in exchange for [the client]'s immunity").

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[2] In his response to the motion to disqualify him, Schalk asserts that he is "quite certain that [he] ha[s] behaved in conformance with the law and [his] oath as an attorney in the Pemberton matter" and that his behavior "was courageous and noble," making him "a beacon of justice and elevat[ing] [him] to the status of noble champion of our nations [sic] cherished ideals." (Schalk's Resp. to Mot. to Disqualify at 2).

[3] Professional Conduct Rule 8.4 provides that it is professional misconduct to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects"; "engage in conduct involving dishonesty, fraud, deceit or misrepresentation"; or "engage in conduct that is prejudicial to the administration of justice[.]" Prof. Cond. R. 8.4(b)-(d).

Given the conflict of interest, where his representation of Pemberton may be materially limited by his own interests, we hereby find that Schalk's disqualification continues to run throughout all proceedings related to Pemberton's case, including his petition for post-conviction relief and this appeal. Accordingly, we dismiss the appeal and remand this matter to the post-conviction court with instructions to vacate its order denying Pemberton's petition for post-conviction relief and to enter an order dismissing the petition without prejudice. We further order that any subsequently filed petition for post-conviction relief shall not be considered a successive petition.

Dismissed and remanded with instructions.

BAILEY, J., and ROBB, J., concur.