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SUPREME COURT CLERK

**COMMONWEALTH OF KENTUCKY
KENTUCKY SUPREME COURT
CASE NO. 2008-SC-00079-DG**

CHARLES BRENT BEARD

APPELLANT

v.

**APPEAL FROM CRITTENDEN CIRCUIT COURT
HONORABLE C. RENE WILLIAMS, JUDGE
INDICTMENT NO. 05-CR-0053**

COMMONWEALTH OF KENTUCKY

APPELLEE

REPLY BRIEF FOR APPELLANT, CHARLES BRENT BEARD

Submitted by

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Brief for Appellant has been served by first-class mail upon Hon. C. Rene Williams, Judge, Crittenden Circuit Court, Judicial Annex, 35 U.S. Hwy. 41AS, P.O. Box 126, Dixon, Kentucky 42409-126; Hon Zachery Greenwell, Commonwealth's Attorney, 215 North Main Street, P.O. Box 341, Marion, Kentucky 42064-0341; Hon. Jason J. Pfeil, Assistant Public Advocate, Department Of Public Advocacy, 739 South Main Street, P.O. Box 695, Henderson, Kentucky 42419-0695; and to the Hon. Kenneth Wayne Riggs, Asst. Attorney General, Criminal Appellate Branch, 1024 Capital Center Drive, Frankfort, Kentucky 40601 on this 16th day of March, 2009. The record on appeal was not checked out for the purpose of this Reply Brief.


J. BRANDON PIGG

PURPOSE OF REPLY BRIEF

The purpose of this reply brief is to clarify where there are discrepancies as to law or fact between Appellant's and Appellee's briefs.

ARGUMENT

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO REMOVE HIS COUNSEL AND THE COURT OF APPEALS IMPROPERLY AFFIRMED.

Appellee perplexingly contends that Appellant, by arguing that "good cause" need be shown in order to warrant removal of counsel, is somehow seeking a "lower standard." (Appellee's brief, p. 7). This allegation is most curious because Appellee cites in their brief the exact same language from Deno v. Commonwealth, 177 S.W.3d 753 (Ky. 2005) as Appellant in which this Court clearly and unequivocally stated that a defendant must show "good cause" to support a request for a substitution of counsel. (Appellee's brief, p. 6). More importantly, it is not that "good cause" is a "lower standard" than a conflict of interest. A simple review of Deno will show that establishing a conflict of interest is simply one of the ways demonstrating "good cause" for substitution of counsel. Deno, 177 S.W.3d at 759. This Court defined "good cause" as "(1) complete breakdown of communication between counsel and himself, (2) **a conflict of interest**, or (3) that is legitimate interests are being prejudiced." (Emphasis added) Id. citing Baker v. Commonwealth, 574 S.W.2d at 326. Therefore, Appellee's contention that "good cause" is somehow a lower standard is an incorrect interpretation of Deno.

In this case, the conflict is clear. Throughout the proceedings, when Davis was questioned by the Commonwealth and by defense counsel Pfeil why he did not tell Detective Kirk that he was on probation when he requested to serve as a confidential informant, Davis repeatedly responded that he did not know he was on

probation. (VR NO. 5: 8/07/06, 12:41:58 and VR NO. 7: 8/18/06, 11:20:08). More specifically, when Davis was questioned by Pfeil about the alleged probation violation, which Pfeil himself was slated to represent him at a future hearing, Davis stated that he had failed to report because he was not aware he was on probation and, therefore, was not aware that he needed to report. (VR NO. 5: 8/07/06, 12:42:48). This clearly demonstrates that the defense Davis intended to put forth in his upcoming probation revocation was that he was unaware that he needed to report because he did not know he was on probation. This created a severe conflict of interest for attorney Pfeil. Pfeil had represented Davis when he was sentenced to probation, had stood with him when a judge had sentenced him to probation and had, as his attorney, undoubtedly had conversations with him regarding probation.

Pfeil was placed in a situation where, while representing Beard, he was attacking and attempting to discredit Davis and the defense Davis intended to put forth to his alleged probation violation, that he would be representing him on in his upcoming hearing. Put simply, Pfeil was discrediting Davis' defense only weeks before he would be defending Davis and presenting that same defense. It is difficult to imagine how Pfeil's representation of both Beard and Davis was not prejudicial to one, if not both, clients.

A major portion of Beard's defense was that the officers involved had conducted a reckless and sloppy investigation in his case. Chiefly among this was the fact that the officers had used Davis as a confidential informant while he was

still on probation. As part of Beard's Sixth Amendment right to counsel, he was entitled to counsel free from conflict.

Also, Pfeil's actions of calling a recess in the trial of Ron Damron and visiting Mr. Beard to question him about his involvement in the alleged crime Damron had been charged with created a conflict of interest sufficient to warrant Pfeil's dismissal from representing Beard and the appointment of new counsel. Pfeil openly admitted that he had indeed called a recess in Damron's trial and had gone to the detention center and questioned Beard about his involvement and knowledge of the crime Damron was charged with committing. (VR NO. 6: 8/14/06, 3:06:00–3:06:58). Specifically, Pfeil stated that he had questioned Beard about his relationship with Ron Damron, his relationship with the alleged victim in the case, what he knew about the case and, apparently, if Beard thought the victim in that case might have misidentified Damron. (VR NO. 6: 8/14/06, 3:06:33–VR NO.6: 8/14/06, 3:06:58). Once Pfeil began questioning Beard, his client, about his involvement in the crime for which Damron, another client, was on trial for, his loyalty for either client had been severely damaged and a conflict was created that was sufficient to warrant Pfeil's removal and the appointment of new counsel.

As far as Appellant can discern, Appellee's only arguments surrounding Pfeil's actions of questioning Beard at the jail about his possible involvement in another crime where he was representing the defendant is that it was not a conflict because Beard told Pfeil he "knew nothing." (Appellee's brief, p. 5). Beard's answer to Pfeil that he "knew nothing" is immaterial to determining whether a

conflict of interest existed. "The right to counsel guaranteed by the Constitution contemplates the services of an attorney devoted solely to the interests of his client...Undivided allegiance and faithful, devoted service to a client are prized traditions of the American lawyer. It is this kind of service for which the Sixth Amendment makes provision." Von Moltke v. Gillies, 332 U.S. 708, 725-726 (1948).

Review

In determining if a trial court erred in failing to remove conflicted counsel, an appellate court must review the facts as they existed when the allegation of the conflict arose and a motion to substitute was denied, not by conducting a retrospective review of counsel's conduct following to that ruling. A conflict of interest is judged by the facts giving rise to the conflict, not by counsel's performance under the conflict.

Both the Court of Appeals and Appellee incorrectly portray appellate review of the failure to remove conflicted counsel as merely retrospectively determining if, after the trial court fails to remove counsel, a defendant received sufficient counsel despite the conflict. In the two paragraphs of the Court of Appeals opinion focusing on the issue of conflict of interest, the Court goes as far as to claim that Kirkland v. Commonwealth, 53 S.W.3d 71 (Ky. 2001) elevated the burden placed on a defendant who is represented by conflicted counsel to the "but for" standard of Strickland v. Washington, 466 U.S. 668 (1984). (Opinion, p. 2). However, procedurally, the Strickland standard to the direct appeal of a trial court's denial of a motion to remove counsel is inapplicable.

In this case, the facts to be reviewed are those that were presented to the trial court in the hearing held on August 14, 2006. The question upon appellate review is if, based on the facts presented to the trial court at that hearing, the defendant demonstrated "good cause" to have his counsel removed. More specifically, the question is if Beard demonstrated on August 14, 2006 that an "actual conflict" of interest existed, then the trial court erred in not removing Pfiel. If good cause to remove counsel (conflict of interest) was demonstrated at that hearing and the trial court failed to substitute with un-conflicted counsel, conflicted counsel's conduct throughout the remaining proceedings, whether good or bad, does not cure the error by the trial court. All defendants are entitled to conflict-free counsel. *See Deno and Von Moltke*. Conflicts of interests exist, not necessarily in actions, but in circumstances. This Court's concern should be whether Beard provided sufficient evidence on August 14, 2006 to have his counsel removed for a conflict of interest, not speculating as to what degree Beard's counsel's performance was diminished under that conflict.

CONCLUSION

For the foregoing reasons, Charles Brent Beard requests that his conviction be vacated and the case remanded for a new trial.

Respectfully Submitted,



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