

Commonwealth of Kentucky
Supreme Court
No. 2008-SC-0079-DG

FILED
FEB 12 2009
SUPREME COURT CLERK

CHARLES BRENT BEARD

APPELLANT

v.

Appeal from Crittenden Circuit Court
Hon. C. Rene' Williams, Judge
Indictment No. 05-CR-0053

COMMONWEALTH OF KENTUCKY

APPELLEE

Brief for Commonwealth

Submitted by,

JACK CONWAY

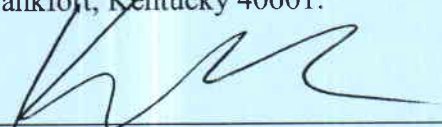
Attorney General of Kentucky

KEN W. RIGGS

Assistant Attorney General
Office of Criminal Appeals
Office of the Attorney General
1024 Capital Center Drive
Frankfort, Kentucky 40601
(502) 696-5342

CERTIFICATE OF SERVICE

I certify that the record on appeal has been returned to the Clerk of this Court and that a copy of the Brief for Commonwealth has been mailed this 12th day of February, 2009, to Hon. C. Rene' Williams, Judge, Crittenden Circuit Court, Judicial Annex, 35 U.S. Hwy. 41A, P.O. Box 126, Dixon, Kentucky 42409; electronically mailed to Hon. Zach Greenwell, Commonwealth's Attorney, 215 North Main Street, P.O. Box 341, Marion, Kentucky 42064, and sent via messenger mail to Hon. J. Brandon Pigg, Assistant Public Advocate, Department of Public Advocacy, 100 Fair Oaks Lane, Suite 302, Frankfort, Kentucky 40601.



Ken W. Riggs

Assistant Attorney General

INTRODUCTION

The Appellant was convicted of Trafficking in a Controlled Substance in the First Degree (methamphetamine), Trafficking in Marijuana Less Than 8 Ounces (2 counts), and Persistent Felony Offender in the First Degree. He received an aggregate sentence of ten (10) years imprisonment which was affirmed by the Court of Appeals. This Court granted discretionary review on one (1) issue.

STATEMENT OF ORAL ARGUMENT

Oral argument is not necessary in this case since the issues may be fairly decided based on the briefs of the parties.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

INTRODUCTION i

STATEMENT OF ORAL ARGUMENT ii

COUNTERSTATEMENT OF POINTS AND AUTHORITIES iii

COUNTERSTATEMENT OF THE CASE 1

ARGUMENT 3

**I. TRIAL COURT DID NOT ERR IN DENYING APPELLANT’S
MOTION TO REMOVE AND REPLACE HIS PUBLIC
ADVOCATE, AND THE COURT OF APPEALS PROPERLY
AFFIRMED** 3

SCR 3.130(1.7) 6

SCR 3.130(1.9) 6

SCR 3.130(1.9)(a) 6

Deno v. Commonwealth,
177 S.W.3d 753 (Ky. 2005) 6

Kirkland v. Commonwealth,
53 S.W.3d 71 (Ky. 2001) 6

Brewer v. Commonwealth,
206 S.W.3d 313 (Ky. 2006) 7

Donatelli v. Commonwealth,
175 S.W.3d 103, 105 (Ky.App. 2005) 7

Deno v. Commonwealth,
177 S.W.3d 753, 759 (Ky. 2005) 7

CONCLUSION 10

COUNTERSTATEMENT OF THE CASE

Jackie Davis contacted police about becoming a confidential informant. (VR 20¹: 8/18/06: 10:58:53). Davis was a former drug addict, and wanted to clean his life up. (Id., at 10:59:35). He viewed helping the police as part of his addiction recovery. (Id., at 11:00:05). He was referred to Det. Robert Kirk of the Pennyrile Narcotics Task Force. (Id., at 10:59:11).

On a typical undercover drug buy with Det. Kirk, Davis would meet Kirk who would search both Davis and his car. Kirk would give him money to buy drugs, and then wire him with a audio recording device. (VR 20: 8/18/06; 11:01:42 - 11:02:11).

Such procedure was followed on September 12, 2005. The target of the investigation was Chris Walker. (VR 7: 8/18/06; 11:03:05 - 11:03:30). With Det. Kirk following at a safe distance, Davis went to Walker's house to make a buy, but Walker was not home. (Id., at 11:03:45). As he was leaving the Walker house, the Appellant pulled up and ask Davis if he needed anything. (Id., at 11:04:38). Davis told Appellant that he was looking for some marijuana. (Id., at 11:04:45). Appellant told Davis to follow him to his house. (Id., at 11:04:50). They went to the Appellant's apartment, where for \$40, Davis bought marijuana from the Appellant. (Id., at 11:06:02). Davis left the apartment and delivered the drugs to Det. Kirk. (Id., at 11:06:27).

A few days later, on September 14, 2005, Davis was once again searched, wired, and given money by Davis to buy drugs from the Appellant. (VR 20: 8/18/06;

¹TAPE 028-06-VCR-020-B. In the Court of Appeals, this was Tape #7, but that numbering system appears to have been removed from the labels of the tapes provided to counsel.

11:07:26). Davis went to Appellant's apartment again, and purchased \$60 of marijuana. (Id., at 11:08:50). He met det. Kirk, and turned over the drugs. (Id., at 11:09:50).

September 16, 2005, once again saw Davis being searched, the recorder attached, and Davis was provided with money to buy drugs from the Appellant. (VR 20: 8/18/06; 11:10:38). Davis went to Appellant's apartment, but this time the Appellant had company: his brother and his wife. (Id., at 11:11:25). Davis told Appellant he wanted to purchase methamphetamine. (Id., at 11:12:07). Davis gave the Appellant the money for the methamphetamine, and Appellant left the apartment alone. (Id., at 11:13:29).

Appellant was gone about 30 minutes, and then returned. Appellant asked Davis to take a ride with him. (Id., at 11:14:17). They traveled to a residence, which was unknown to Davis. (Id., at 11:15:06). There, the Appellant went into the house, and came back out saying he needed to make change. (Id., at 11:15:22 - 11:16:26). After unsuccessfully attempting to get change at a gas station, Appellant and Davis drove to a bank to get some change. (Id.). They returned to the unknown house, and Appellant entered again. He came back out and they returned to the Appellant's apartment. (Id.). Appellant eventually gave Davis the methamphetamine that he wanted. (Id.). Davis met Det. Kirk and gave him the drugs.

On December 5, 2005, the Appellant was indicted by the Crittenden County Grand Jury on one (1) count of Trafficking in a Controlled Substance in the First Degree (methamphetamine), two (2) counts of Trafficking in Marijuana under 8oz., and being a Persistent Felony Offender in the First Degree. (Transcript of Record (TR), 1-2).

Following a jury trial, the Appellant was found guilty of all counts. Appellant's defense was that he was guilty of the marijuana offenses, but did not sell Davis methamphetamine. He attacked Davis' credibility and Det. Kirk's compliance with rules concerning the use of informants. The jury recommended a ten (10) year sentence, and such was imposed by a judgment entered on August 31, 2006.

The Appellant appealed as a matter of right to the Kentucky Court of Appeals. In that forum, Appellant raised two (2) issues. The Court of Appeals issued an opinion affirming Appellant's conviction on January 4, 2008.

Appellant sought discretionary review from this Court, and review was granted on one (1) issue.

Additional facts will be set forth below as needed.

ARGUMENT

I.

TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION TO REMOVE AND REPLACE HIS PUBLIC ADVOCATE, AND THE COURT OF APPEALS PROPERLY AFFIRMED

For his sole assignment of error on discretionary review, the Appellant alleges that the trial court erred by denying his motion for a new appointed attorney. He asserts that the Court of Appeals erred in its affirmation of the trial court's decision. His contention is without merit.

A little over a week before his jury trial was scheduled to begin, the Appellant filed a *pro se* motion seeking the dismissal of his appointed public advocate,

and the appointment of a new public advocate. (TR, 47-51).

The trial court conducted a hearing regarding that motion on August 14, 2006. There, the Appellant asserted that the public advocate was not representing him to the best of the advocate's ability, that they were not ready for trial, and that he needed more discovery. (VR 18²: 8/14/06; 2:56:00 - 2:57:11). The Appellant asserted that the public advocate represented the informant, Jackie Davis, during a recent probation revocation hearing, and also represented Davis on the underlying case that put him on probation. (*Id.*, at 3:03:15). To Appellant, this was a conflict of interest. The trial court replied to Appellant, stating that those were cases *unrelated* to his own. (*Id.*, at 3:03:36). The Appellant maintained that since Davis was involved in *his* case, that such prior representation created a conflict. Further, Appellant asserted that during the trial of another unrelated person, his public advocate had come to the jail and asked Appellant if he had any knowledge of that case. (*Id.*, at 3:03:45 - 3:04:00). In Appellant's view, that was also a conflict of interest. When asked how he was prejudiced by the prior representation, Appellant replied that the representation "put bad thoughts in his [the advocate's] mind" and that the public advocate might think that Appellant was guilty. (*Id.*, at 3:04:19).

The Public Advocate responded that he did in fact represent Jackie Davis on the underlying case that placed him on probation³. (VR 6: 8/17/06; 3:04:26 - 3:07:47).

²TAPE 028-06-VCR-018-B, see note 1.

³The fact that Davis was on probation was related to a suppression issue raised in the trial court, and affirmed by the Court of Appeals. However, discretionary review was not granted on that issue.

He also represented Davis at his revocation hearing, but the hearing was remanded. The advocate's representation of Davis came before he met the Appellant. Further, the advocate did speak with Appellant at the jail about any information he might have in another of the advocate's cases, and the Appellant knew nothing. (Id.). The public advocate emphasized that his opinion of a defendant's guilt did not matter: "I defend everyone that I am appointed to represent equally." (Id.). Appellant's attorney further asserted that he learned of nothing by representing Davis that would have any effect on his representation of Appellant. (Id., at 3:08:52).

The Appellant seemed to accept that explanation, and then pressed the court for other materials that he thought he needed, including files concerning the informant. (VR 6: 8/14/06; 3:09:21). At that point, the public advocate requested an *ex parte* hearing with the trial court. (Id., 3:14:04). The Commonwealth Attorney left the courtroom, and the hearing was recorded on the video record. The public advocate explained what his trial strategy was going to be and told the court that he had fully considered all the points being raised by the Appellant. (Id., at 3:14:35 - 3:31:10). Appellant pressed his desire for a continuance of his trial, again alleging that the public advocate was not doing his job. Appellant characterized his level of trial preparation as "like taking a knife to a gunfight." He kept repeating that he needed more time. (Id.). The trial court concluded that there was no evidence that the public advocate was acting in any manner contrary to Appellant's best interests. (Id.). The trial court eventually ordered the Commonwealth to turn over some files, if the police had them, and denied the Appellant's motion to remove his public advocate. (Id., at 3:31:40).

The Appellant's allegation of unethical conduct by his public advocate, if true, would be a very serious matter, that could result in the advocate's disbarment or other sanctions. As a general rule, an attorney should not undertake representation of a client when such would be a conflict of interest. SCR 3.130(1.7). The exception to this rule involves a belief by the attorney that the representation would not affect the relationship with the client, and each client must consent to the representation. When the issue concerns a possible conflict with representation of one client, because of the prior representation of another client, SCR 3.130(1.9) governs. That rule provides that a lawyer who formally represented a client cannot represent another client "in the same or substantially related matter in which that person's interests are materially adverse to the interests of the former client..." SCR 3.130(1.9)(a). Even in the face of such a conflict, the rule provides that clients may consent to representation.

The Appellant is certainly entitled to conflict-free counsel. Appellant is not entitled to the appointment of counsel of his choosing, and removal of appointed counsel can only be undertaken for good cause such as a conflict of interest, a complete breakdown of communication or an irreconcilable conflict which leads to an apparently unjust verdict. Deno v. Commonwealth, 177 S.W.3d 753 (Ky. 2005). Whether or not good cause exists is a matter left to the sound discretion of the trial court. (Id.). However, for reversal, Appellant was show *actual* conflict of interest on behalf of his public advocate, not merely the *possibility* of conflict of interest. Kirkland v. Commonwealth, 53 S.W.3d 71 (Ky. 2001).

The Appellant asserts that the Court of Appeals misapplied Kirkland. The Court of Appeals cited Kirkland for the premise outlined above by the Commonwealth: that Appellant must show an actual conflict of interest in order to obtain a reversal. Appellant now seeks to ignore that premise, and instead argues that Appellant must only show “good cause” and argues that such is a lower standard. While Kirkland does indeed deal with a situation where two (2) co-defendants were represented by public advocates from the same office, its impact on the overall issue of conflicts is applicable here. The logic of Kirkland is that a mere allegation of conflict of interest is not enough for reversal. The holding of Kirkland requiring actual conflict of interests has been applied since. *see Brewer v. Commonwealth*, 206 S.W.3d 313 (Ky. 2006); *Donatelli v. Commonwealth*, 175 S.W.3d 103, 105 (Ky.App. 2005). The burden was placed on the appellant to show a conflict actually exists. Appellant cites to *Deno v. Commonwealth*, 177 S.W.3d 753, 759 (Ky. 2005), in support of his supposedly lower “good cause” showing standard. However, the standard enunciated in *Deno* differs only in diction from the standard in *Kirkland*:

When a defendant requests substitution of counsel during trial, “the defendant must show good cause, such as a conflict of interest, a complete breakdown of communication or an irreconcilable conflict which leads to an apparently unjust verdict.” ^{FN24} Good cause has been described as: (1) a “complete breakdown of communications between counsel and defendant;” (2) a “conflict of interest;” and (3) that the “legitimate interests of the defendant are being prejudiced.”
[footnote omitted]

Deno, 177 S.W.3d at 759. *Deno* still requires that the Appellant demonstrate a conflict of interest. It does *not* say that Appellant only has to *allege* a conflict. The trial court is

charged with fully investigating the complaint and utilizing its discretion. That is exactly what occurred here, and the Court of Appeals did not err in affirming.

In this situation, the record does not support that the public advocate was operating under a conflict of interest. First, the representation of Appellant was not in any way related to the advocate's prior representation of Jackie Davis. The advocate did state that he represented Davis on a criminal charge that resulted in his being placed on probation. But, as the trial court noted, that case was completely unrelated to Appellant's matter. Thus, no conflict arose under SCR 3.130(1.9) because the two matters were not "the same or substantially related." Further, the fact that the advocate had been appointed to represent Davis at his probation revocation hearing did not run afoul of the rule. The hearing was remanded from the docket, and no hearing was ever conducted. Further, this is *not* a case where Davis was working as an informant to get a break on any charges or sentences. Davis *sought out police* in an attempt to clean up his life and believed that helping out was beneficial to his addiction recovery. (VR 20: 8/18/06; 10:59:35 - 11:00:05). As came out in the testimony below, Det. Kirk did not even know that Davis was on probation when he used Davis as an informant. Thus, representing Davis at a probation revocation, the basis for which was failure to report, would not involve seeking to enforce any leniency deals concerning the work Davis did in the Appellant's case. As for the public advocate's questioning of Appellant as to his involvement in another client's case, that clearly is not the same matter.

Appellant must show a conflict of interest, not just the possibility that one existed. He cannot show such. An examination of the conduct of his counsel reveals the

representation to be exemplary. Contrary to what Appellant argued, his counsel was well prepared and presented a coherent and through defense. He adequately cross-examined all the witnesses, including Davis. To say that there was any evidence of a conflict of interest, is to ignore the record. The Court of Appeals correctly concluded:

Here, the record indicates that, despite his prior, professional relationship with the informant, Beard's lawyer defended Beard by vigorously attacking the informant's credibility at trial and even filing a suppression motion seeking to exclude the informant's testimony altogether. Indeed, Beard failed to show in any way how the performance of his counsel was adversely affected by counsel's prior representation of the Commonwealth's chief witness or that his defense was otherwise prejudiced. The unrealized possibility that Beard's lawyer might have gone easy on the informant is not grounds for reversal.

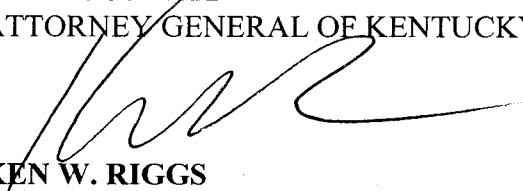
(Slip Opinion, 2-3). Those conclusions of the Court of Appeals are reasonable based on the prevailing law and the factual record of this case. It is clear from the words of the Appellant at the hearing, that his true desire was to delay his trial at all costs. The trial court was correct in denying the Appellant's motion to dismiss his public advocate. That decision was not an abuse of the court's wide discretion. The Court of Appeals correctly affirmed that decision, and no error can be found. Reversal of the Court of Appeals is not necessary.

CONCLUSION

For the above stated reasons, the decision of the Court of Appeals should
be affirmed.

Respectfully submitted,

JACK CONWAY
ATTORNEY GENERAL OF KENTUCKY



KEN W. RIGGS
ASSISTANT ATTORNEY GENERAL
OFFICE OF CRIMINAL APPEALS
OFFICE OF THE ATTORNEY GENERAL
1024 CAPITAL CENTER DRIVE
FRANKFORT, KENTUCKY 40601-8204
(502)696-5342

COUNSEL FOR APPELLEE