

**IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA**

ROSCOE CURTIS GATEWOOD, JR.,            )  
  )  
  )       NOT FOR PUBLICATION  
  )  
v.    )  
  )  
THE STATE OF OKLAHOMA,                    )  
  )  
  )       Case No. C-2009-542  
  )  
  )  
  )       Respondent.

**FILED**  
IN COURT OF CRIMINAL APPEALS  
STATE OF OKLAHOMA  
SEP 24 2010

**SUMMARY OPINION GRANTING CERTIORARI**

MICHAEL S. RICHIE  
CLERK

**A. JOHNSON, VICE PRESIDING JUDGE:**

Petitioner Roscoe Curtis Gatewood, Jr. entered blind pleas of guilty in the District Court of Love County, Case No. CF-2007-130, to Trafficking in Illegal Drugs (Cocaine Base), in violation of 63 O.S.Supp.2004, § 2-415, and Case No. CF-2007-131, to Using a Telephone to Cause the Commission of the Crime of Trafficking in Illegal Drugs, in violation of 13 O.S.Supp.2003, § 176.3. The Honorable John Scaggs accepted Gatewood's pleas. Following the completion of a presentence investigation report, Judge Scaggs sentenced Gatewood to thirty-five years imprisonment for drug trafficking and ten years imprisonment for illegally using a telephone to facilitate drug trafficking and ordered Gatewood's sentences to run concurrently. Gatewood's timely motion, and a subsequent amendment to that motion, were denied by Judge Scaggs after a hearing. Gatewood now appeals that denial and asks this Court to issue a Writ of Certiorari allowing him to withdraw his pleas and proceed to trial.

Gatewood's claim in his first proposition--namely that his lawyer had an actual conflict of interest that affected his representation-- requires discussion and relief. Because we grant Gatewood's petition for writ of certiorari on that claim, the remaining claims need not be addressed.

Gatewood and his girlfriend, Sammi Powell, were charged with Trafficking in Illegal Drugs and Using a Telephone To Facilitate Drug Trafficking arising out of the same incident. Gatewood retained and was represented by John Albert, and based on Albert's advice, Powell retained and was represented by Mike Arnett, another attorney in the same firm. According to Gatewood's unchallenged testimony, he and Powell entered into a joint defense agreement that provided neither codefendant would testify against the other. On the day Powell's case was set for trial, however, she entered a blind plea to a reduced charge of Possession of Drugs with Intent to Distribute that was contingent on her testifying against Gatewood.<sup>1</sup> The same day Powell entered her plea, Gatewood followed his lawyer's advice and waived his right to a jury trial. Gatewood later entered blind pleas, again at the urging of his lawyer, because the deadline to enter a negotiated plea had long past--the deadline passing at a time when the parties were abiding by the joint defense agreement.

A defendant's Sixth Amendment right to the effective assistance of counsel includes the right to be represented by an attorney who is free from conflicts of interest. *See, e.g., Wood v. Georgia*, 450 U.S. 261, 271, 101 S.Ct.

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<sup>1</sup> The prosecutor agreed to dismiss the other charge against Powell.

1097, 67 L.Ed.2d 220 (1981); *Holloway v. Arkansas*, 435 U.S. 475, 481-82, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978). The right to the assistance of counsel free of conflicting interests extends to *any* situation in which a defendant's counsel owes conflicting duties to the defendant and some other person.<sup>2</sup> *Wood v. Georgia*, 450 U.S. 261, 268-72, 101 S.Ct. 1097, 1101-03, 67 L.Ed.2d 220 (1981); *Allen v. State*, 1994 OK CR 30, ¶ 11, 874 P.2d 60, 63. In order to prevail on an ineffective assistance of counsel claim based upon conflict of interest, a defendant who raised no objection at trial need not show prejudice, but "must demonstrate that an actual conflict of interest adversely affected his lawyer's performance."<sup>3</sup> *Cuyler v. Sullivan*, 466 U.S. 335, 349-50, 100 S.Ct. 1708, 1718-19, 64 L.Ed.2d 333 (1980); *Allen v. State*, 1994 OK CR 30, ¶ 12, 874 P.2d 60, 63. Once an actual conflict and an adverse effect are shown, a defendant "need not demonstrate prejudice in order to obtain relief." *Cuyler*, 446 U.S. at 349-50, 100 S.Ct. at 1719.

Requiring or permitting a single attorney (or two attorneys from the same firm) to represent codefendants in a criminal case is not a *per se* violation of

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<sup>2</sup> Conflicts of interest have also been described as follows:

"An attorney has an actual, as opposed to a potential, conflict of interest when, during the course of the representation, the attorney's and defendant's interests diverge with respect to a material factual or legal issue or to a course of action." *United States v. Schwarz*, 283 F.3d 76, 91 (2d Cir.2002) (quoting *Winkler v. Keane*, 7 F.3d 304, 307 (2d Cir.1993) (internal quotation marks omitted)

or

A conflict of interest is present whenever one defendant stands to gain significantly by counsel adducing probative evidence or advancing plausible arguments that are damaging to the cause of a codefendant whom counsel is also representing. *Ramirez v. Dretke*, 396 F.3d 646, 650 (5th Cir. 2005).

the constitutional guarantees of effective assistance of counsel. *Holloway v. Arkansas*, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978); *Ross v. State*, 1992 OK CR 18, ¶ 8, 829 P.2d 58, 61. While “a possible conflict inheres in almost every instance of multiple representation,” *Cuyler*, 446 U.S. at 348, 100 S.Ct. at 1718, there is no precise test as to when the possible conflict of interest inherent in dual or multiple representation will become an actual conflict of interest. See *Allen*, 1994 OK CR 30, ¶ 12, 874 P.2d at 63. Under Oklahoma’s Rule 1.10, *Rules of Professional Conduct*, Title 5, Ch. 1, App. 3-A (2010) discussing the imputation of conflicts of interests among lawyers associated in a firm,<sup>4</sup> however, attorneys in the same firm are prohibited from representing clients who have conflicting interests.

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<sup>3</sup> Gatewood entered his plea without objection to a conflict of interest.

<sup>4</sup> **Rule 1.10. Imputation of Conflicts of Interest: General Rule**

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9 , unless the prohibition is based on a personal interest of the prohibited lawyer and does not represent a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

- (1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and
- (2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9 (c) that is material to the matter.

(c) A disqualification prescribed by this rule may be waived in writing by the affected client under the conditions stated in Rule 1.7.

(d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

(e) Where a lawyer is prohibited from engaging in certain transactions under Rule 1.8, paragraph (k) of that Rule, and not this Rule, determines whether that prohibition also applies to other lawyers associated in a firm with the personally prohibited lawyer.

The potential conflict in this case ripened into an actual conflict once Powell along with her attorney abandoned the joint defense agreement not to testify against Gatewood and entered a plea the acceptance and fulfillment of which was contingent upon her testimony, if necessary, against Gatewood.<sup>5</sup> This plea decision advanced Powell's cause at Gatewood's expense and left Gatewood with severely diminished options. The interests once unified among clients and lawyers diverged once Powell changed course and entered a plea beneficial to her and adverse to Gatewood. Counsel could not fulfill duties to both Gatewood and his codefendant under these circumstances. The joint representation by two members of the same firm, owing loyalty to both clients, adversely affected Gatewood's representation. The writ of certiorari is granted and Gatewood is allowed to withdraw his pleas of guilt.

#### **DECISION**

The Petition for a Writ of Certiorari on is **GRANTED**. The Judgment and Sentence of the district court is **REVERSED** and Gatewood is allowed to withdraw his pleas of guilt. Gatewood's Motion to Supplement the Record and/or for Evidentiary Hearing is **GRANTED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2010), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

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<sup>5</sup> Gatewood filed a motion to supplement the record with, among other things, the plea hearing for his co-defendant. The court's acceptance of her plea to a reduced charge of possession with intent to distribute and dismissal of count 2 was contingent on her testifying against Gatewood should it be necessary. This material is necessary to resolve this issue and Gatewood's motion to supplement the record is **GRANTED**.

AN APPEAL FROM THE DISTRICT COURT OF LOVE COUNTY  
THE HONORABLE JOHN H. SCAGGS, DISTRICT JUDGE

**APPEARANCES IN DISTRICT COURT**

MICHAEL D. TIPPS  
SIX EAST MAIN  
ARDMORE, OK 73401

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ATTORNEYS FOR DEFENDANT

PAULE' HAGGERTY-WISE  
ASSISTANT DISTRICT ATTORNEY  
405 WEST MAIN STREET; SUITE 301  
MARIETTA, OK 73448  
ATTORNEY FOR STATE

**OPINION BY: A. JOHNSON, V.P.J.**

**C. JOHNSON, P.J.: Concur**

**LUMPKIN, J.: Dissent**

**LEWIS, J.: Concur**

**SMITH, J.: Dissent**

RE

**APPEARANCES ON APPEAL**

DAVID AUTRY  
1021 N.W. 16TH STREET  
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ATTORNEY FOR PETITIONER

**LUMPKIN, JUDGE: DISSENT**

I find that Petitioner has shown nothing on which this Court can base a finding that an actual conflict of interest adversely affected his lawyer's performance. Therefore I dissent to granting the writ of certiorari. At most, the case illustrates the mere possibility of a conflict of interest and that is not sufficient to reverse a criminal conviction. *Burnett v. State*, 1988 OK CR 161, ¶ 12, 760 P.2d 825, 828, citing *Cuyler v. Sullivan*, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). Powell's plea actually shows that each attorney was representing their client independently. There is nothing in the record to support the conclusion that Petitioner's counsel was surprised by Powell's plea. However, if he was surprised, then it would only show that Petitioner's counsel merely failed to communicate with Powell's attorney. This is not sufficient to show that Petitioner's counsel actively represented conflicting interests.

Further, when a Petitioner claims his plea was not voluntarily entered, he has the burden of showing that there is a defense that should be presented to the jury. *Estell v. State*, 1988 OK CR 287, ¶ 7, 766 P.2d. 1380, 1382. Here, Petitioner has not shown that he has a defense to the criminal charges filed against him.

I am authorized to state that Judge Smith joins in this dissent.