

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

QUINTON BLAKE RICHARDSON,)

Appellant,)

-vs.-)

THE STATE OF OKLAHOMA,)

Appellee.)

NOT FOR PUBLICATION

No. RE-2013-939

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

OCT 23 2014

MICHAEL S. RICHIE
CLERK

SUMMARY OPINION

LUMPKIN, JUDGE:

On November 6, 2012, in the District Court of Payne County, Case No. CF-2010-440, Appellant, Quinton Blake Richardson, while represented by counsel, entered a plea of guilty to an Amended Information alleging that on July 10, 2010, he stole from a Wal-Mart store merchandise valued in excess of \$500.00, and thereby committed the offense of Larceny of Merchandise from a Retailer, After Former Conviction of Two or More Felonies, in violation of 21 O.S.2001, § 1731(4). Pursuant to Appellant's plea agreement, the Honorable Phillip Corley, District Judge, sentenced Appellant to seven (7) years imprisonment, all suspended under written conditions of probation.

The State subsequently filed a Motion to Revoke Suspended Sentence. This Motion alleged that Appellant had violated his probation as shown by charges filed against him in Clay County, Kansas, for Criminal Threat and Domestic Battery, and that those charges arose from Appellant striking the victim in the forehead multiple times and threatening to kill her. Additionally, the Motion alleged that during the month of February 2013, Kansas authorities performed several drug tests on Appellant that had revealed Appellant's use of THC, alcohol, and amphetamines in violation of his probation. Following an

evidentiary hearing on the State's Motion, Judge Corley found Appellant had violated his probation, and on September 26, 2013, he revoked a four-(4)-year portion of the order suspending execution of sentence.

From that final order of revocation, Appellant appeals and raises the following propositions of error:

- I. Mr. Richardson was denied the effective assistance of counsel at the hearing on the application to revoke because of an actual conflict of interest of appointed counsel.
- II. This Court should order correction of the original Judgment and Sentence and the Judgment and Sentence After Revocation to accurately reflect the crime and statutory citation for the conviction.
- III. This Court should order the Judgment and Sentence After Revocation to conform to the oral pronouncement of the trial court.

Having thoroughly considered Appellant's propositions of error and the entire record before this Court, including the original record, transcript, and briefs of the parties, the Court **FINDS** Proposition I possesses merit requiring reversal and remand for further proceedings.

In Proposition I, Appellant contends his court-appointed counsel at the revocation proceedings was the same attorney who had previously represented Amanda Harding, the same individual identified in the Motion to Revoke as the victim struck in the forehead by Appellant in violation of his probation. Counsel's prior representation of Harding was for the same larceny of merchandise from Wal-Mart with which Appellant had been convicted.¹ Additionally, counsel had been Harding's attorney on additional counts in that

¹ The attorney who represented Appellant at his November 6, 2012, plea and sentencing for the larceny from Wal-Mart is not the same court-appointed attorney who represented Appellant in the revocation proceedings.

same case, one of which alleged that she had been engaged in a conspiracy with Appellant to commit the Wal-Mart larceny. At revocation, the State's key witness was Harding, and other than calling Appellant to testify, it presented no other witnesses in support of its Motion to Revoke.

Harding testified that she had been in a relationship with Appellant for seven years and had four children together. She testified that Appellant, while living in Kansas after he was released on parole in that state, used marijuana and alcohol and struck her in the forehead with his fists and threatened her life by calling her a snitch and saying "snitches belong in ditches."

At the time of Harding's testimony, there was an application to accelerate that the State had filed against her that awaited adjudication. This application sought to accelerate the deferred sentencings Harding had received on the Wal-Mart larceny and conspiracy charges. Further, it appeared that the charges pending against Appellant in Kansas for Criminal Threat and Domestic Battery naming Harding as victim were set for trial, with Harding scheduled to testify in the case against Appellant.

Because of these circumstances, Appellant concludes there was an actual conflict of interest in counsel representing Appellant on revocation where the key witness against Appellant was counsel's former client for the same criminal transaction on which Appellant's conviction was based. Appellant therefore concludes that he was denied the assistance of counsel guaranteed by the Constitution, and that the final order of revocation entered against him without that assistance of counsel must therefore be reversed.

In *Livingston v. State*, the Court succinctly outlined the law concerning conflict of interest claims such as Appellant's:

Regarding conflict of interests through joint representation, it is settled that where a defendant raises no objection at trial but demonstrates on appeal that an actual conflict adversely affected his attorney's performance, prejudice will be presumed. This principle extends to "**any** situation in which a defendant's counsel owes conflicting duties to the defendant and some other person." An actual conflict of interest exists where the interests of an attorney and a defendant diverge with respect to a material factual or legal issue **or to a course of action.**

Livingston v. State, 1995 OK CR 68, ¶ 11, 907 P.2d 1088, 1091-92 (footnotes omitted) (emphasis in original).

Hence by law, regardless of whether a defendant can show prejudice resulted from the dual representation, if an actual conflict exists that adversely affects counsel's performance, a defendant is entitled to relief. In this appeal, the State does not argue there was not an actual conflict of interest present, but instead it focus on whether Appellant has shown that conflict adversely affected trial counsel's performance. In this regard, the State relies on the record showing counsel "thoroughly cross-examined Ms. Harding and made all appropriate arguments on defendant's behalf, including arguments against Ms. Harding's credibility." (Br. of Appellee 14.) But as was noted in *Livingston*, the potential evil does not necessarily lie in what was done, but "lies in what an advocate may find himself compelled to refrain from doing."² *Livingston*, ¶ 12,

² In expanding further on conflicts occurring from joint representation, the Court in *Livingston* noted:

Discussing conflict of interests in the context of joint representation, the Supreme Court states the potential evil lies in what an advocate may find himself compelled to refrain from doing. The Tenth Circuit extends this principle to situations in which defense counsel previously represented a state witness. In another case the Tenth Circuit states that, where trial counsel previously represented a state witness in a case with a factual relationship to the pending criminal case, the primary concern is that counsel may not effectively cross-examine the witness for fear of divulging privileged information. An actual conflict will arise where counsel is unable to effectively cross-examine a state witness because counsel also represented that witness.

Livingston, ¶ 12, 907 P.2d at 1092 (footnotes omitted).

907 P.2d at 1092. Thus, “the mere fact that cross-examination might appear ‘vigorous’ does not necessarily expunge this aspect of the constitutional error.” *Church v. Sullivan*, 942 F.2d 1501, 1512 (10th Cir. 1991).

“While there is no per se rule prohibiting representation of the defendant by counsel who has previously represented a government witness in a related case, the potential for conflict is great where there is a substantial relationship between the cases.” *United States v. Bowie*, 892 F.2d 1494, 1502 (10th Cir. 1990) (citations omitted). Although we find this to be a close case arising as it does in the context of revocation proceedings, given the overall circumstances, we are unable to safely declare counsel’s performance free from the adverse effects of her prior representation. As prejudice must be presumed, reversal of the revocation order is required and the matter must be remanded as set forth below.

In Proposition II, Appellant complains of an incorrect statutory reference within the written final order of revocation. In Proposition III, Appellant asserts that same document wrongfully includes an additional order for post-imprisonment supervision that Judge Corley did not make when pronouncing his order of revocation. As we have reversed the District Court’s revocation order under Appellant’s Proposition I, Appellant’s complaints concerning errors in the written order of revocation have been rendered moot.

Appellant further asks under his Proposition II that this Court direct the District Court to enter orders *nunc pro tunc* for the correction of the Judgment and Sentence for Appellant’s November 6, 2012, conviction. Appellant contends that document erroneously reflects that his conviction was for violation of “21 O.S. § 1705” (the statute for Grand Larceny) rather than for violation of “21 O.S. § 1731(4),” the statute for Larceny of Merchandise from

Retailer for which he was actually convicted. This portion of Appellant's Proposition II claim raises a non-jurisdictional issue that concerns Appellant's underlying conviction and sentence, rather than an issue challenging validity of the final order of revocation. As such, it is an issue outside the scope of this revocation appeal and cannot be considered herein. See Rule 1.2(D)(4), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2013) ("the scope of review is limited to the validity of the revocation order," and "[t]he validity of the predicate conviction can only be appealed through a separate appeal pursuant to the regular felony and misdemeanor procedures of these Rules.")

DECISION

The September 26, 2013, final order of revocation entered in the District Court of Payne County, revoking a four-(4)-year segment of the order suspending the execution of the sentence imposed in Case No. CF-2010-440 against Appellant, Quinton Blake Richardson, is **REVERSED AND REMANDED** for further proceedings consistent with this Opinion. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2014), **MANDATE IS ORDERED ISSUED** on the filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF PAYNE COUNTY
THE HONORABLE PHILLIP CORLEY, DISTRICT JUDGE

APPEARANCES AT TRIAL

VIRGINIA BANKS
116 WEST 7TH, SUITE 232
STILLWATER, OKLAHOMA 74074
ATTORNEY FOR DEFENDANT

APPEARANCES ON APPEAL

CINDY BROWN DANNER
OKLA. INDIGENT DEFENSE SYSTEM
P.O. BOX 926
NORMAN, OKLAHOMA 73070
ATTORNEY FOR APPELLANT

MICHAEL KULLING
ASSISTANT DISTRICT ATTORNEY
PAYNE COUNTY COURTHOUSE
606 SOUTH HUSBAND ST. ROOM 111
STILLWATER, OKLAHOMA 74074
ATTORNEY FOR STATE OF OKLAHOMA

E. SCOTT PRUITT
ATTORNEY GENERAL OF OKLAHOMA
THEODORE M. PEEPER
ASSISTANT ATTORNEY GENERAL
313 NORTHEAST 21ST STREET
OKLAHOMA CITY, OKLAHOMA 73105
ATTORNEYS FOR APPELLEE

OPINION BY: LUMPKIN, J.
LEWIS, P.J.: CONCUR
SMITH, V.P.J.: CONCUR
JOHNSON, J.: CONCUR

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