COLORADO COURT OF APPEALS

DATE FILED: February 13, 2014
CASE NUMBER: 2011CA434

Court of Appeals No. 11CA0434
Douglas County District Court No. 98CR264
Honorable Nancy A. Hopf, Judge
Honorable Scott W. Lawrence, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Nathan Gayle Ybanez,

Defendant-Appellant.

JUDGMENT AFFIRMED, ORDER AFFIRMED IN PART AND REVERSED IN PART, SENTENCE VACATED, AND CASE REMANDED WITH DIRECTIONS

Division VI
Opinion by JUDGE VOGT*
Hawthorne and Gabriel, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)
Announced February 13, 2014

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*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2013.

Defendant, Nathan Gayle Ybanez, appeals the judgment of conviction and the sentence imposed following a jury verdict finding him guilty of first degree murder. He also appeals the district court's order partially denying his Crim. P. 35(c) motion for postconviction relief. We affirm the judgment of conviction, affirm the Crim. P. 35(c) order except insofar as it rejects defendant's challenge to the constitutionality of his sentence, vacate the sentence, and remand for resentencing.

I. Background

In 1998, defendant and his friend, Erik Jensen, were charged with the murder of defendant's mother, Julie Ybanez. The two were tried separately. Defendant's father, Roger Ybanez, hired Craig Truman to represent defendant at his trial.

Prior to defendant's trial, Jensen was convicted of first degree murder. *See People v. Jensen*, 55 P.3d 135 (Colo. App. 2001) (*cert. granted* Dec. 12, 2013). The defense theory at defendant's trial was that Jensen was primarily responsible for Julie's murder and that defendant was guilty only of second degree murder.

The jury found defendant guilty of first degree murder, and the trial court sentenced him to a mandatory term of life in prison without the possibility of parole. There was no direct appeal.

Defendant subsequently filed a Crim. P. 35(c) motion for postconviction relief based primarily on claims of ineffective assistance of counsel. Following a hearing on the motion, the postconviction court denied relief on most of defendant's claims, but agreed that Truman was ineffective for failing to file a direct appeal after defendant requested that he do so. The court vacated defendant's sentence and, after rejecting his challenge to the constitutionality of the sentence, reimposed the original sentence, thereby reinstating defendant's right to file a direct appeal. Defendant then filed this appeal of his conviction, his sentence, and the postconviction order.

II. Guardian Ad Litem

Defendant contends that a new trial is warranted because a guardian ad litem (GAL) was not appointed for him. We disagree.

A. Applicable Law

As a threshold matter, we do not agree with the People that we should refuse to review this issue. Although defendant did not

raise the issue at trial or in his initial Crim. P. 35(c) motion, it was the subject of testimony at the hearing, was raised in defendant's posthearing brief, and was considered by the postconviction court in the context of defendant's ineffective assistance claims. This was sufficient to preserve the issue for review as a postconviction claim. *See People v. Goldman*, 923 P.2d 374, 375 (Colo. App. 1996). Further, to the extent the issue — in particular, the claim of a due process violation — is being raised as part of defendant's direct appeal, it is reviewable under the plain error standard. *See People v. Miller*, 113 P.3d 743, 749-50 (Colo. 2005) (unpreserved claim of constitutional violation is reviewed for plain error, which requires reversal if error is "obvious and substantial" and so undermined fundamental fairness of trial as to cast serious doubt on reliability of conviction).

Defendant, who was sixteen years old at the time of the murder, was charged as an adult under the direct file statute. *See* § 19-2-517, C.R.S. 2013. At the time of defendant's trial, as now, the statute provided that the trial court "in its discretion may appoint a [GAL] for a juvenile charged by the direct filing of an information in the district court or by indictment pursuant to this

section." § 19-2-517(8) (codified at the time of defendant's trial as § 19-2-517(5)).

We are aware of no cases discussing section 19-2-517(5). However, the supreme court and a division of this court have recognized in other contexts that, even absent statutory authorization, a trial court has discretionary authority to appoint a GAL for a person whose capacity for rational decision-making is substantially impaired. *See People in the Interest of M.M.*, 726 P.2d 1108, 1117-18 (Colo. 1986) (termination of parental rights); *In re Marriage of Sorensen*, 166 P.3d 254, 256-57 (Colo. App. 2007) (dissolution of marriage). In such cases, a GAL should be appointed if the court is reasonably convinced that the person is not mentally competent to participate effectively in the proceeding. *M.M.*, 726 P.2d at 1118. Conversely, a court does not abuse its discretion by failing to appoint a GAL if the person is capable of understanding the nature and significance of the proceeding; is able to make decisions on his or her own behalf; and has the ability to communicate with and act on the advice of counsel. *Id.* at 1120; *Sorensen,* 166 P.3d at 256-57.

B. Analysis

Under these authorities and on the record here, it was not an abuse of discretion — let alone, a due process violation rising to the level of plain error — for the trial court to fail to appoint a GAL sua sponte. Nor was it ineffective assistance for Truman to fail to request appointment of a GAL.

At the time of trial, defendant was less than one month short of his eighteenth birthday. He was represented by experienced counsel and had a parent present with him throughout the trial. There was nothing to suggest to the trial court that he was mentally incompetent; on the contrary, during the colloquy regarding his decision whether to testify, defendant told the court he had obtained his GED while incarcerated and was studying Spanish. Nor did the trial court have grounds for concluding that defendant was incapable of understanding the proceedings, making decisions, or communicating with his counsel.

As to whether Truman was ineffective for failing to seek appointment of a GAL, Truman testified at the postconviction hearing that he had asked questions of defendant at their initial meeting to determine defendant's competency, had concluded that

he was competent, and had decided not to seek a GAL. Truman also testified regarding his conversations with defendant about defense strategy and regarding defendant's understanding of the various options. As the postconviction court noted, the defense legal expert had opined that "although a [GAL] could have been helpful, he was not critical of Mr. Truman's failure to request the appointment."

We are not persuaded by defendant's argument that appointment of a GAL was warranted because of conflicts among defendant, his father Roger Ybanez, and Truman — particularly, because of a "plainly visible" conflict of interest between defendant and his father.

Defendant points out that Roger qualified as a victim of the crime, that he was a prosecution witness, and that he had expressed anger at his son upon learning of the murder. However, apart from Roger's status as a prosecution witness, discussed below, most of the information on which defendant's conflict argument is based would have been unknown to the trial court. In any event, testimony at the postconviction hearing calls into question defendant's characterization of the level of conflict between

father and son. Roger testified at that hearing that, despite his anger, "I had to help [defendant] because he was my son." Thus, Roger tried to protect his son's rights when the youth was arrested; retained Truman to represent defendant after ascertaining that Truman was "the best"; paid Truman until he was no longer able to do so; visited defendant in jail almost every week; and was allowed to remain in the courtroom during trial because defendant wanted him there.

Nor does the record support defendant's related contention that the waiver of his right to testify was invalid because it was "made under the influence of Roger," who was "advising [him] on constitutionally critical decisions," without the assistance of a GAL. Again, testimony from the postconviction hearing by Truman and Roger — the only witnesses with direct knowledge of the issue — suggests that defendant's reliance on Roger for advice was minimal. Roger testified that, on two or three occasions, he tried to get his son to cooperate with Truman after Truman had expressed concerns that defendant was not being candid with him. Neither Truman nor Roger testified that defendant became more cooperative as a result of Roger's efforts. According to Roger, defendant did not

ask him for advice about testifying; rather, defendant told Roger that Truman thought testifying was not a good idea. Truman testified that he told defendant that, in his opinion, it would not be advisable for defendant to testify; and he recalled a conversation with defendant and Roger during which Roger also stated that he did not "see how [testifying] can do anything but hurt you." The defense legal expert at the postconviction hearing similarly stated that he would have been "reluctant" to call defendant to testify.

More important, defendant was told both by Truman and the trial court that the decision whether to testify was entirely his. Before the court gave defendant the advisement mandated by *People v. Curtis*, 681 P.2d 504 (Colo. 1984), Truman stated that his opinion was that defendant would be "best off not testifying," but that he had advised his client that "this is one of those decisions that must be personally made and that he should feel free to override my opinion if he believes that's in his best interest." Defendant affirmed, in response to the court's questions, that he understood he had an absolute right to testify; that no one could prevent him from doing so; and that while he could consider the "advice of other persons, including [his] attorney," the ultimate

decision was his. He also confirmed that no one had pressured him one way or the other on the issue of testifying, and that the decision not to testify was made "completely voluntarily."

The trial court found that defendant's decision not to testify was made "voluntarily, knowingly, and intelligently." That finding is supported by the record and is not rendered erroneous simply because a GAL was not appointed. *See People in the Interest of S.A.R.*, 860 P.2d 573, 574 (Colo. App. 1993).

III. Conflict of Interest

Defendant next contends that he received ineffective assistance of counsel because of an actual conflict of interest between Truman and Roger. We are not persuaded.

A. Applicable Law

The constitutionally guaranteed right to the effective assistance of counsel includes the right to conflict-free counsel. *See* U.S. Const. amend. VI; Colo. Const. art. II, § 16; *Strickland v. Washington*, 466 U.S. 668 (1984); *Cuyler v. Sullivan*, 446 U.S. 335, 345-50 (1980); *People v. Harlan*, 54 P.3d 871, 879 (Colo. 2002).

Where no objection to the asserted conflict was made at trial, the defendant must demonstrate that an actual conflict of interest

adversely affected counsel's performance. *Cuyler*, 446 U.S. at 348; *Dunlap v. People*, 173 P.3d 1054, 1073 (Colo. 2007); *People v. Miera*, 183 P.3d 672, 675 (Colo. App. 2008); *see also Mickens v. Taylor*, 535 U.S. 162, 172 n.5 (2002) (noting that the applicable standard is "not properly read as requiring inquiry into actual conflict as something separate and apart from adverse effect. An 'actual conflict,' for Sixth Amendment purposes, is a conflict of interest that adversely affects counsel's performance").

Thus, under *Cuyler,* a defendant who establishes an actual conflict that adversely affected counsel's performance need not also establish the second, or prejudice, prong normally required to prevail on an ineffective assistance claim under *Strickland*.[1]

[1] In *Mickens v. Taylor*, 535 U.S. 162, 175 (2002), the Supreme Court criticized decisions applying *Cuyler* outside the context of multiple concurrent representation. *See also Dunlap v. People*, 173 P.3d 1054, 1073 n. 24 (Colo. 2007) (recognizing that it is an "open question" whether *Cuyler* applies to conflicts other than multiple concurrent representation). Relying on *Mickens*, the People argue that *Strickland*, not *Cuyler*, applies here because this is not a claim premised on Truman's asserted concurrent representation of a codefendant or a prosecution witness. We need not decide the issue because we conclude that, inasmuch as there was no actual conflict adversely affecting Truman's performance, defendant cannot prevail under either standard.

Although conflicts of interest most clearly are found when counsel is representing or has represented a codefendant or a prosecution witness, they are not limited to such situations. Rather, a conflict may arise any time defense counsel's ability to represent a client is materially limited by counsel's own interests or by his or her alignment with a third party. *See Dunlap*, 173 P.3d at 1074; *People v. Kenny*, 30 P.3d 734, 744-45 (Colo. App. 2000); *see also People v. Hagos,* 250 P.3d 596, 614 (Colo. App. 2009) (distinguishing cases such as *Miera*, involving "an obvious actual conflict of interest," from the case before it, which involved a potential conflict that was not shown to have impeded counsel's representation of defendant).

As relevant here, a potential conflict arises where a client's fee is paid by a third party. The Colorado Rules of Professional Conduct address such a situation. Colo. RPC 1.8(f) provides that "[a] lawyer shall not accept compensation for representing a client from one other than the client unless: (1) the client gives informed consent; (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and (3) information relating to representation of a client is protected as

required by Rule 1.6." *See People v. Rivers*, 933 P.2d 6, 7 (Colo. 1997) (disciplinary proceeding involving a violation of RPC 1.8(f)); *see also People v. Samuels*, 228 P.3d 229, 240 (Colo. App. 2009) (noting that a conflict of interest under the Rules of Professional Conduct does not necessarily equate to a violation of the Sixth Amendment right to effective assistance of counsel).

A postconviction conflict of interest claim cannot rely on speculation or argument, but must be supported by evidence. *Dunlap*, 173 P.3d at 1074. As with any Crim. P. 35(c) claim, the defendant bears the burden of establishing the claim by a preponderance of the evidence. *Id.* at 1061. In doing so, the defendant must point to specific instances in the record to suggest actual impairment of his or her interest, and must identify something counsel chose to do or not do that was influenced by the conflict. *Kenny*, 30 P.3d at 745.

We review de novo the postconviction court's determination of whether an actual conflict existed, but we review the court's underlying findings of fact under a clear error standard. *Hagos,* 250 P.3d at 613.

B. Analysis

As noted, Roger had retained Truman to represent his son and had initially paid some of Truman's fee, although Truman was no longer being paid when the case went to trial. It is undisputed that Roger was never Truman's client. Defendant nevertheless asserts that an actual conflict existed based on the fee arrangement, and that Truman's allegiance to Roger led him to forgo pursuing a defense that would be embarrassing to Roger. Although the defense legal expert supported this theory, opining that Truman was "split between two masters here, Nathan Ybanez his client and Roger Ybanez who's footing the bill," the postconviction court was unpersuaded. That court, whose role it was to assess the credibility of the witnesses, *see Dunlap,* 173 P.3d at 1061, found that the "defense presented no credible evidence that [Truman] was influenced by Roger" in the choice of a defense. The court instead credited Truman's testimony, discussing it at length, in support of its conclusion that there was no actual conflict of interest. We agree with the postconviction court's conclusion.

Truman testified that he had very little contact with Roger after the initial interviews; that he had no allegiance whatsoever to

Roger; and that if it had been in the interest of his client, defendant, to "go after Roger," he would have done so. In his first meeting with defendant, Truman told defendant that Roger had asked him to "come see [defendant] to help him," but that he represented defendant and not Roger and that his job was to do what was best for defendant, not for his father. Truman stated that he was aware of the potential conflict present when someone other than the client pays for the representation; but he testified, in accordance with the requirements set forth in Rule 1.8(f) for undertaking such representation, that (1) defendant had consented after consultation;[2] (2) he believed there was no interference with his independent professional judgment or with the lawyer-client relationship; and (3) he maintained the confidentiality required under Colo. RPC 1.6. Both Truman and Roger testified that Truman never consulted with Roger about strategy, and Roger added that Truman would not give him any details of his conversations with defendant.

[2] The version of Rule 1.8(f) in effect when Truman undertook his representation of defendant required that the client "consent[] after consultation."

Thus, the fee arrangement did not produce a conflict that would have triggered the additional consent and disclosure requirements identified in *People v. Castro*, 657 P.2d 932, 946 n.10 (Colo. 1983), on which defendant relies. Further, we do not agree with defendant that an actual conflict arose here because Roger, in addition to having retained Truman, was a prosecution witness. In *Miera*, on which defendant also relies, an actual conflict of interest was found where defense counsel's cross-examination of a prosecution witness — his former client in a closely-related case — was limited by his ongoing duties of loyalty and confidentiality to the witness. 183 P.3d at 677. However, Truman's cross-examination of Roger was not limited by such ongoing duties. Defendant cites no authority, and we are aware of none, for the proposition that a conflict is necessarily present in the circumstances presented here — specifically, where the scope of cross-examination was a matter of trial strategy.

Truman testified at length about his reasons for not pursuing a defense based on the evidence of abuse and family discord that, according to defendant, should have been elicited on cross-examination of Roger. Although Truman suspected abuse and

continued to press defendant on the issue, he was also aware that the abuse was remote in time, was denied by defendant, and was unlikely to counter the significant evidence of premeditation and deliberation that the prosecution would present. Accordingly, after consultation with defendant, Truman decided to proceed on a theory that Jensen was primarily responsible for Julie's death and that defendant was guilty only of second degree murder. Roger's testimony, which suggested that defendant's problems began only after he came under the influence of Jensen and another youth, supported this theory. Although the defense chosen by Truman was unsuccessful, it was a plausible strategic choice and thus does not establish ineffective assistance of counsel. *See Ardolino v. People*, 69 P.3d 73, 76 (Colo. 2003).

IV. Sentence

Defendant received a mandatory sentence of life in prison without the possibility of parole. During the pendency of his appeal, the Supreme Court held that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without the possibility of parole for juvenile offenders." *Miller v. Alabama*, 567 U.S. ___, ___, 132 S. Ct. 2455, 2469 (2012). In light of *Miller*,

the People concede, and we agree, that defendant's sentence must be vacated and the case remanded to the trial court with directions to sentence defendant to life in prison with the possibility of parole after forty years. *See People v. Valles*, 2013 COA 84, ¶ 74; *People v. Banks*, 2012 COA 157, ¶ 131 (*cert. granted* June 24, 2013).

The judgment of conviction is affirmed. The postconviction order is affirmed except insofar as it denied defendant's challenge to the constitutionality of his sentence. The sentence is vacated, and the case is remanded for resentencing in accordance with this opinion.

JUDGE HAWTHORNE and JUDGE GABRIEL concur.

Court of Appeals

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CHRIS RYAN
CLERK OF THE COURT

PAULINE BROCK
CHIEF DEPUTY CLERK

NOTICE CONCERNING ISSUANCE OF THE MANDATE

Pursuant to C.A.R. 41(b), the mandate of the Court of Appeals may issue forty-three days after entry of the judgment. In worker's compensation and unemployment insurance cases, the mandate of the Court of Appeals may issue thirty-one days after entry of the judgment. Pursuant to C.A.R. 3.4(I), the mandate of the Court of Appeals may issue twenty-nine days after the entry of the judgment in appeals from proceedings in dependency or neglect.

Filing of a Petition for Rehearing, within the time permitted by C.A.R. 40, will stay the mandate until the court has ruled on the petition. Filing a Petition for Writ of Certiorari with the Supreme Court, within the time permitted by C.A.R. 52(b) will also stay the mandate until the Supreme Court has ruled on the Petition.

BY THE COURT: Alan M. Loeb
Chief Judge

DATED: October 10, 2013

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