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No. 3-09-0744

Order filed April 6, 2011

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2011

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the Thirteenth Judicial Circuit
Plaintiff-Appellee,	)	LaSalle County, Illinois,
	)	
v.	)	No. 08-CF-632
	)	
DARREN WAITE,	)	The Honorable
	)	Cynthia Raccuglia,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE McDADE delivered the judgment of the court.  
Justices O'Brien and Holdridge concurred in the judgment.

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**ORDER**

*Held:* Where trial court failed to conduct any inquiry into any of defendant's *pro se* allegations of ineffective assistance of counsel the judgment was reversed and the cause was remanded for inquiry into defendant's claims and new proceedings.

Pursuant to a fully negotiated guilty plea, the circuit court of LaSalle County convicted defendant, Darren Waite, of aggravated battery, and sentenced him to probation. The State filed a petition to revoke probation, which the trial court granted. Before and after the hearing on the

petition to revoke, defendant raised a claim of ineffective assistance of counsel due to a conflict of interest. The trial court ruled that defendant's claims lacked merit. For the reasons that follow, we reverse and remand for further proceedings consistent with this court's judgment.

### **BACKGROUND**

Defendant entered a fully negotiated guilty plea to aggravated battery. The trial court sentenced defendant to 48 months' probation and ordered him to report to the probation department. Defendant reported to the LaSalle County probation department for his initial intake interview. The LaSalle County probation department informed defendant that his probation was being transferred to the DeKalb County probation department, where defendant resided with his father. The LaSalle County probation department telephoned defendant at his father's residence and left a message giving defendant a date on which to report to the DeKalb County probation department.

Defendant did not report for his scheduled meeting with the DeKalb County probation department. The DeKalb County probation department and defendant engaged in "phone tag" in an attempt to reschedule defendant's meeting, without success. The difficulty may have been attributable in part to the fact that, during the time the DeKalb County probation department was trying to schedule a meeting, defendant purportedly changed residences several times between his father's residence and his girlfriend's residence. Defendant's father and girlfriend lived in different counties. The DeKalb County probation department warned defendant that he should not be changing residences between counties while on probation.

The DeKalb County probation department ultimately sent defendant a "missed appointment letter" which set another appointment date. When defendant missed that

appointment, the DeKalb County department transferred defendant's probation back to LaSalle County. When LaSalle County received defendant's probation back from DeKalb County, it attempted to contact defendant. Defendant responded with a voicemail message that he would contact the probation department on April 15, when he returned from out of town. Defendant failed to contact LaSalle County on the appointed date, and LaSalle County left two more messages trying to contact defendant. When defendant failed to return LaSalle County's calls, it recommended the State file a petition to revoke defendant's probation.

The public defender's office represented defendant at the hearing on the petition to revoke probation. Public Defender Cappellini took over the case from one of his assistants due to problems between the assistant and defendant. Defendant informed the trial court that he felt the public defenders appointed to him did not respect him and were refusing to call witnesses he requested. During an exchange with the trial court before the hearing on the petition to revoke probation, defendant stated as follows:

“I would have been fine with the public defenders [sic] had he not disrespected me, calling me out on my name; and I feel the last—when I did get convicted of this charge, I felt that they didn't work—didn't work for me \*\*\*.”

The court informed defendant that the public defender himself had agreed to represent defendant, and asked him “Now, are you having a problem with [the public defender]?” Defendant replied:

“[W]hen he stepped in—excuse my—I don't mean to be so blunt. He said, okay, mother fucker, I'll take your case then \*\*\*. It's not something a lawyer should do to his client.”

The court and the public defender also explained that the witnesses defendant suggested could not be called unless defendant waived his right to a hearing on the State's petition within 14 days. The court informed defendant that it would continue the proceedings but to do so would require defendant to waive the 14-day right. The defendant later stated that he had not understood the barrier to calling the witnesses. The court recessed proceedings for defendant to confer with the public defender. When proceedings resumed, defendant waived his right to a hearing on the petition to revoke probation within 14 days of its filing, and informed the court he would attempt to hire private counsel.

At the subsequent hearing, defendant had been unable to retain counsel, and the cause proceeded with the public defender as defendant's counsel. The transcript of those proceedings reveals that the trial court did not ask defendant about an ongoing conflict of interest with his counselor. The defense presented no witnesses. Based on the testimony of the LaSalle and DeKalb County probation officers, the trial court found that defendant violated the terms of his probation and entered an order revoking probation. Defendant does not challenge the trial court's judgment revoking his probation. The trial court scheduled a sentencing hearing.

The public defender informed the trial court that he and defendant discussed potential witnesses but agreed not to call any witnesses to testify at the sentencing hearing. Following the sentencing hearing, the court sentenced defendant to five years' imprisonment. The public defender filed a motion to reconsider sentence. Defendant also filed a *pro se* motion to reconsider sentence in which he stated that, after the hearing on the petition to revoke, he had engaged in heated arguments with counsel, leading to defendant's filing of a complaint with the Attorney Registration and Disciplinary Commission (ARDC). Defendant stated that after he

filed his complaint, counsel held a grudge and stopped "performing as a licensed attorney should," resulting in a conflict of interest.

Following argument, the trial court denied counsel's motion to reconsider sentence. Defendant brought his *pro se* motion to the court's attention. The court had not seen defendant's motion. The public defender informed the court that he too had not seen defendant's motion. Defendant produced a copy of the motion, after which the following exchange occurred:

TRIAL COURT: "Let me take a look at it. Let me see if there's anything further. Did you file a complaint at the ARDC at all?"

DEFENSE COUNSEL: "Yes, they said there was no action required."

TRIAL COURT: "All right. Very good. Then under those circumstances, sir, this motion is of no merit. You took action and from this point forward I see no reason to consider it but that's something you can talk to your appellate defender about, all right? And let the record reflect that I'm not filing formally this motion."

This appeal followed.

### ANALYSIS

Defendant argues that the trial court failed in its duty to inquire into his *pro se* allegations of ineffective assistance of counsel.

"The supreme court has explained as follows:

'[W]hen a defendant presents a *pro se* posttrial

claim of ineffective assistance of counsel, the trial court should first examine the factual basis of the defendant's claim. If the trial court determines that the claim lacks merit or pertains only to matters of trial strategy, then the court need not appoint new counsel and may deny the *pro se* motion. \*\*\*

The operative concern for the reviewing court is whether the trial court conducted an adequate inquiry into the defendant's *pro se* allegations of ineffective assistance of counsel. [Citation.] During this evaluation, some interchange between the trial court and trial counsel regarding the facts and circumstances surrounding the allegedly ineffective representation is permissible and usually necessary in assessing what further action, if any, is warranted on a defendant's claim." *People v. Scates*, 393 Ill. App. 3d 566, 571 (2009) (citing *People v. Moore*, 207 Ill. 2d 68, 77-79 (2003)).

Defendant argues that the trial court neglected its duty twice. First, prior to the hearing on the petition to revoke defendant's probation, when defendant informed the trial court that the public defender called him an expletive. Defendant argues that, under *People v. Jocko*, 389 Ill. App. 3d 247, 267 (2009), the trial court's duty to inquire into *pro se* claims of ineffective assistance of counsel should be applied to pretrial claims, thus the trial court should have engaged in further inquiry regarding his claim of a conflict of interest for his upcoming hearing. See *Jocko*, 389 Ill. App. 3d at 267. Defendant argues the trial court erred a second time, when defendant informed the court that he had filed a complaint against counsel after the hearing on

the petition, resulting in a conflict of interest, and the trial court failed to inquire into his claims.

The supreme court has expressly rejected the First District's holding and held that as a general rule the trial court is not obligated to address a *pro se Strickland* claim prior to trial. *People v. Jocko*, 239 Ill. 2d 87, \_\_\_ (2010). The supreme court stated that the reason it created this new rule is that

“[t]he fundamental problem with addressing *Strickland* claims prior to trial is that the outcome of the proceeding has not yet been determined. Because there is no way to determine if counsel's errors have affected an outcome that has not yet occurred, the circuit court cannot engage in this analysis prior to trial.” *Jocko*, 239 Ill. 2d at \_\_\_.

However, in *Jocko* the supreme court recognized that "there may be some instances when a circuit court is obligated to investigate potential sixth amendment violations prior to trial." *Jocko*, 239 Ill. 2d at \_\_\_. Those instances would include assertions of ineffective assistance that do not require the court "to consider the possible prejudicial effect on the outcome of the proceedings. *Jocko*, 239 Ill. 2d at \_\_\_. As an example, the supreme court cited *Holloway v. Arkansas*, 435 U.S. 475 (1978), for its holding that, "when a potential conflict of interest is brought to the court's attention at an early stage, the court is obligated to either appoint separate counsel or take adequate steps to ascertain whether the risk of conflict is too remote to warrant separate counsel." *Jocko*, 239 Ill. 2d at \_\_\_ (citing *Holloway*, 435 U.S. at 484). See also *People v. Massa*, 271 Ill. App. 3d 75, 83 (1995) ("Where there is no *per se* conflict but the trial court is aware of a possible conflict at an early stage, the trial court has a duty to either appoint separate

counsel or to inquire whether there is an actual conflict").

Although the conflict in *Holloway* arose from joint representation of multiple defendants (*Holloway*, 435 U.S. at 478), the operative concern was the protection of the constitutional guarantee of effective assistance of counsel, "untrammelled and unimpaired by \*\*\* conflicting interests." *Holloway*, 435 U.S. at 482 (citing *Glasser v. United States*, 315 U.S. 60 (1942)). This court has recognized that a conflict of interest, resulting in a denial of the right to effective assistance of counsel, *may* arise strictly from animosity between client and attorney. See *People v. Woods*, (Nos. 1-88-2643, 1-89-0210 and 1-90-2821 November 28, 1994) ("this court has recognized the undesirability of a *per se* rule requiring reversal whenever either a personal conflict or animosity develops between an accused and his counsel"); *People v. Gardner*, 47 Ill. App. 3d 529, 533 (1977) ("Even though the *per se* rule is inapplicable, this does not end our examination into the possible subliminal effects such a conflict might have on the defendant's right to be zealously represented by counsel of undivided loyalty").

In *Holloway*, defense counsel, representing multiple defendants, brought the probability of the risk of a conflict of interest to the trial court's attention before trial. *Holloway*, 435 U.S. at 484. The United States Supreme Court found that the trial court "then failed \*\*\* to take adequate steps to ascertain whether the risk \*\*\* was too remote to warrant separate counsel." *Holloway*, 435 U.S. at 484. The Court held that the trial court's failure deprived those defendants of the guarantee of assistance of counsel. *Id.*

The United States Supreme Court's holding in *Holloway* permits the trial court to explore the adequacy of the allegation of a conflict of interest before requiring the appointment of separate counsel. *Holloway*, 435 U.S. at 487. However, the Court's holding also makes clear

that the failure to do so is not subject to harmless error analysis and requires reversal of the judgment on the proceedings in question. *Holloway*, 435 U.S. at 491. *Cf. Masa*, 271 Ill. App. 3d at 83 ("The trial court then took adequate steps under the circumstances to ascertain whether there was an actual conflict"). The *Holloway* court held that "a rule requiring a defendant to show that a conflict of interests—which he and his counsel tried to avoid by timely objections \*\*\*—prejudiced him in some specific fashion would not be susceptible of intelligent, even-handed application." *Holloway*, 435 U.S. at 40.

The Court found that its decision not to require the defendant to show actual prejudice was particularly appropriate in the case of a potential conflict of interest. *Holloway*, 435 U.S. at 40. The *Holloway*, court held that:

"It may be possible in some cases to identify from the record the prejudice resulting from an attorney's failure to undertake certain trial tasks, but even with a record of the sentencing hearing available it would be difficult to judge intelligently the impact of a conflict on the attorney's representation of a client. And to assess the impact of a conflict of interests on the attorney's options, tactics, and decisions in plea negotiations would be virtually impossible." *Holloway*, 435 U.S. at 490-91.

At our defendant's next court appearance, following his request for a continuance to attempt to obtain private counsel, the only information brought to the court's attention was the public defender's statement that "It's my understanding he hasn't retained private counsel." The trial court ordered that the hearing date it set would stand. When that hearing date arrived, the public defender continued to represent defendant. The court announced that defendant was "present along with his attorney," the same attorney defendant had previously claimed had a

conflict of interest due to his animus toward his client. The court never addressed whether defendant and his counsel had resolved the alleged conflict. The hearing proceeded with the State calling its first witness.

We find that under *Holloway*, we must reverse the trial court's judgment on the State's petition to revoke probation. "Generally a *pro se* defendant is not obligated to renew claims of ineffective assistance once they are made known to the circuit court." *Jocko*, 239 Ill. 2d at \_\_\_\_\_. The trial court was aware of defendant's complaint that he was not receiving effective assistance due to a conflict of interest between himself and the public defender. The court took no steps to inquire whether there was an actual conflict of interest that would impede defendant's representation, or whether the appointment of new counsel was warranted. The court's inaction "deprived defendant of the guarantee of 'assistance of counsel' "*(Holloway*, 435 U.S. at 484) and requires us to reverse the trial court's judgment (*Holloway*, 435 U.S. at 490).

Although the foregoing analysis is sufficient to and does resolve defendant's appeal, we would also find that, pursuant to the supreme court's judgment in *People v. Moore*, 207 Ill. 2d 68, 79 (2003), the trial court committed reversible error in failing to conduct any inquiry into defendant's allegations of ineffective assistance at the close of the hearing on the motion to reconsider sentence. If necessary, we would remand for that limited purpose.

In *Moore*, the supreme court found as follows:

"The trial court conducted no inquiry of any sort into defendant's allegations of ineffective assistance of counsel. Indeed, the record does not show whether the trial court ever read defendant's *pro se* posttrial motion. Rather, the court apparently

concluded that defendant's claim of ineffective assistance of counsel could be resolved by the appointment of different counsel *on appeal.*” (Emphasis in original.) *Moore*, 207 Ill. 2d at 79.

The court held that:

“[t]he law requires the trial court to conduct some type of inquiry into the underlying factual basis, if any, of a defendant's *pro se* posttrial claim of ineffective assistance of counsel. No such investigation occurred in this case. Accordingly, we must remand the cause to the trial court for that limited purpose. *Moore*, 207 Ill. 2d at 79.

Defendant's *pro se* motion to reconsider sentence clearly raised a claim of ineffective assistance of counsel. Defendant averred as follows:

“It is a fact that prior to my being sentenced, I did file an official complaint against [the public defender] who at the time was my legal counsel. I try'd [sic] several times to have [him] removed from my case and was involved in a few heated arguments with him. After catching wind of the complaint I had sent to ARDC [he] became defensive toward me; his client in a case which was awaiting sentence. It became very clear that [the public defender] was holding a grudge and was not performing as a licensed attorney should have. There was clearly and still is a conflict of interest regarding myself and [the public defender.]”

The trial court refused to consider defendant's motion based on the word of the public defender that the ARDC deemed it did not need to take action on defendant's complaint. The trial court conducted no inquiry into the factual basis of defendant's complaint to the ARDC or into defendant's complaints about his counsel's performance. The court did not conduct any inquiry to determine whether the facts independently demonstrated a conflict of interest. This court has also recognized that a conflict of interest may arise, resulting in a denial of the right to effective assistance of counsel, when a defendant makes a claim with the ARDC against his attorney. See *People v. Childress*, 321 Ill. App. 3d 13, 31 (2001) (citing *Massa*, 271 Ill. App. 3d at 83 ("Although a pending lawsuit between a defendant and his attorney may give rise to a conflict of interest requiring appointment of new counsel, a defendant who files a lawsuit against his attorney does not necessarily create such a conflict")). The trial court did not even attempt to determine whether the filing of the complaint itself gave rise to a conflict of interest that resulted in the denial of defendant's right to effective representation.

Under *Moore*, we would reverse for the limited purpose of remanding the cause to the trial court with directions that it conduct an appropriate inquiry into defendant's posthearing claim of ineffective assistance of counsel. However, we hold that under *Holloway* and *Jocko*, the trial court's judgment on the State's petition to revoke probation must be reversed outright.

### **CONCLUSION**

The judgment of the circuit court of LaSalle County is reversed and the cause remanded for further proceedings consistent with this judgment.

Reversed and remanded.