

NOTICE
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2012 IL App (4th) 101019-U

Filed 5/24/12

NO. 4-10-1019

IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Champaign County
DANIEL B. MONTGOMERY,)	No. 10CF692
Defendant-Appellant.)	
)	Honorable
)	Thomas J. Difanis
)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Presiding Justice Turner concurred in the judgment.
Justice Appleton dissented.

ORDER

¶ 1 *Held:* Defendant's trial counsel had neither (1) a *per se* conflict of interest or (2) an actual conflict of interest which prejudiced defendant.

¶ 2 In July 2010, a jury convicted defendant, Daniel B. Montgomery, of unlawful possession with intent to deliver a controlled substance (720 ILCS 570/401(a)(7.5)(A)(ii) (West 2008)). Defendant appeals, arguing his conviction should be reversed because his attorney had a conflict of interest. We affirm.

¶ 3 I. BACKGROUND

¶ 4 In April 2010, the State charged defendant by information with unlawful possession of methylenedioxymethamphetamine, commonly known as “ecstasy” (between 15 and 199 pills containing “ecstasy”) with intent to deliver (720 ILCS 570/401(a)(7.5)(A)(ii) (West

2008).

¶ 5 At trial, defendant's attorney did not dispute defendant was in possession of the ecstasy tablets at issue. Defense counsel's theory was defendant did not intend to distribute the drugs but possessed them for his own personal use.

¶ 6 Trooper Tom Lillard of the Illinois State Police testified he stopped Eric Orr for a traffic violation on April 21, 2010, at approximately 10:30 a.m. During a consensual search of Eric Orr's vehicle, Lillard found a clear plastic bag containing pills, which based on his training he believed to be "ecstasy."

¶ 7 Sergeant Sylvia Morgan of the City of Urbana police department testified Lillard gave her the bag of pills retrieved from Eric Orr's vehicle. The pills were then split into two bags in preparation for a controlled buy. One bag contained 80 pills and the other bag contained 20 pills. Eric Orr agreed to go to an apartment complex, pick up the person to whom he was supposed to deliver the drugs, drive to a local gas station where police would be observing his vehicle, tap his brakes after the drugs had been delivered, and then exit the vehicle and enter the gas station. Eric Orr was given the bag containing 80 pills to make the controlled delivery.

¶ 8 Eric Orr drove his vehicle to an apartment complex and picked up defendant. Eric Orr then went to the gas station as planned and tapped his brakes. The police officers present then apprehended defendant and the drugs. Investigator Michael Cervantes of the City of Urbana police department testified he spoke with defendant after defendant was given his *Miranda* rights (see *Miranda v. Arizona*, 384 U.S. 436 (1966)). Defendant stated the pills were his and Eric Orr had no involvement. Defendant said he was not a drug dealer and was not going to actively try to sell the pills. However, defendant said he would sell the pills for \$5 per pill if someone wanted a

pill or two. Cervantes testified these pills usually sold for between \$15 and \$50 per pill.

¶ 9 On cross-examination, Cervantes testified no money was recovered from defendant. The officer did not recall whether defendant had a cell phone. Defendant originally said he had the pills for his own use, but Cervantes testified that did not make sense because defendant was homeless, did not have any money, and the amount of pills was too much for personal use. In addition, Eric Orr did not have any additional money after the drug transaction took place, which meant defendant had not given Eric Orr any money for the drugs. Defendant then admitted he had received the drugs "on a front." However, defendant also claimed he was going to use some for personal use, but would sell some if he had the opportunity. On redirect examination, Cervantes testified when a seller is given drugs "on a front," the supplier gives the drugs to someone in anticipation of being repaid after the drugs are sold.

¶ 10 At the close of the State's case, defendant chose not to testify and rested without presenting any evidence. Defendant asked for a lesser-included-offense instruction for simple possession, which the trial court granted.

¶ 11 In his closing argument, defense counsel conceded defendant was guilty of possessing the pills. However, he argued the State failed to prove defendant intended to distribute the drugs. The jury found defendant guilty of unlawful possession with intent to deliver a controlled substance.

¶ 12 In July 2010, defendant, *pro se*, wrote a letter to the trial court stating he wanted to appeal his conviction "on grounds of lack of representation." Defendant stated his attorney, Harvey Welch, rushed him to trial claiming "he had this case beat" after only having the case for a few weeks. Defendant argued his attorney did not get all the evidence in the case, failed to

subpoena Eric Orr, did not speak to defendant until two days before trial, advised defendant not to testify against defendant's "better judgment," allowed police officers to present perjured testimony, and failed to present an entrapment defense.

¶ 13 On August 19, 2010, defendant filed a motion for a new trial. (While a file-stamped copy of the motion is contained in the record, it is not recorded on the circuit clerk's docket sheet.) Among other things, defendant argued his trial counsel provided ineffective assistance of counsel and had a conflict of interest. On August 23, 2010, Attorney Welch filed a motion to withdraw as defendant's attorney. The trial court granted this motion.

¶ 14 On September 29, 2010, Attorney Randall Rosenbaum of the Champaign County Public Defender's office filed a motion for acquittal or, in the alternative, a motion for a new trial on defendant's behalf. The public defender's motion flushed out the alleged facts pertinent to the issue in this appeal. According to the motion, on April 22, 2010, defendant and Eric Orr were arrested for possession with the intent to deliver a controlled substance. Eric Orr hired attorney Alfred Ivy to represent him. The Champaign County Public Defender's office was originally appointed to represent defendant. However, on June 14, 2010, attorney Harvey Welch entered his appearance to represent defendant. The matter went to trial on July 13, 2010, and defendant was found guilty. According to the motion:

"Mr. Welch was retained by co-defendant [Eric] Orr's brother [(Earl Orr)] to represent the Defendant. This is a conflict of interest in that Mr. Welch did not disclose to Defendant prior to trial that he was being paid to represent Defendant by the co-Defendant's brother. Defendant did not know this and did not, and

would not have, consented to this arrangement. Defendant asserts there is a *per se* conflict and he should receive a new trial because Mr. Welch spoke to Earl Orr on occasion about trial strategy which negatively impacted on Defendant's case. Further, Mr. Welch rushed to trial without doing proper preparation, did not use the best defense strategy available and did not zealously represent Defendant at trial."

The motion further alleged specific instances of ineffective assistance.

¶ 15 The trial court held hearings on that motion on October 4 and 13, 2010. Defendant testified he barely knew Eric Orr, who was the brother of Earl Orr. Earl Orr and defendant's sister had two children. Defendant stated he met Eric Orr one time and the meeting was not drug related. He stated he was unable to hire a private attorney so he was appointed a public defender. His mother, sister, and brother told him they were trying to obtain a lawyer for him. In June 2010, attorney Harvey Welch came to the jail to talk to defendant about his case. He did not know Welch. Defendant testified Welch introduced himself and said "he was interested in my case, more or less someone sent him to talk to me about my case." Defendant then changed his testimony saying Welch said he was a private attorney and defendant's family sent him. According to defendant, Welch never indicated who was paying for his services.

¶ 16 Defendant stated Welch never told him he was being paid by Eric Orr's brother. Defendant stated he would not have allowed Welch to represent him if he had known Welch was being paid by Eric Orr or Earl Orr. He told Welch he wanted to testify and he wanted to subpoena Eric Orr to testify. They also discussed the statement defendant gave to the police.

Defendant testified both Eric Orr and Earl Orr also visited him at the jail.

¶ 17 According to defendant, Welch never visited him at the jail again, showed him any of the police reports, or indicated the existence of any audio or videotape related to the alleged offense. Welch told defendant he should not testify because the jury would not believe his story and his past convictions would be introduced into the case. Welch never filed any motions to exclude defendant's prior convictions. Defendant told Welch he wanted a plea bargain because he was afraid to go to trial. Welch told him he did not know if the State had offered a deal. As for his negative response to the trial court's question at trial whether he wanted to testify, defendant explained his negative response by saying he "blanked out."

¶ 18 According to defendant, on the day of his arrest, he was with Earl Orr when Eric Orr called Earl Orr's phone. Earl Orr gave defendant the phone, and Eric Orr asked defendant to ride with him to look at an apartment. Defendant and Earl Orr went outside to meet Eric Orr. Eric Orr and Earl Orr spoke together on the driver's side of the car. Defendant got in the passenger seat. While driving, Eric Orr gave defendant the bag of drugs and said defendant could have them. Eric Orr did not mention defendant paying for the drugs or setting up any sales for the drugs. Defendant put the drugs in his pocket. Defendant said he did not question Eric Orr giving him the drugs. Defendant testified he intended to get some water at the gas station so he could take some of the drugs. Defendant testified he was using three or four "ecstasy" pills per day at that time. After he was arrested, he told the police the pills were for his own personal use. He admitted he told the police at the end of his interview he might sell a pill to get food. However, he testified he had no plans to sell the drugs. On cross-examination, defendant admitted the best argument Welch could have made for him was that he did not intend to sell the

pills. Defendant acknowledged he had possession of the pills.

¶ 19 Attorney Welch testified Earl Orr paid his retainer to represent defendant. Welch testified he told defendant Earl Orr asked Welch to talk with defendant about possibly representing defendant. This meeting occurred prior to Earl Orr paying Welch. According to Welch, defendant agreed to talk to him about the case. Welch said he and defendant talked for about one hour and defendant said he wanted Welch to represent him. Welch acknowledged defendant wanted Welch to contact Eric Orr about testifying at the trial. Welch said he made no effort to contact Eric Orr.

¶ 20 The trial court stated defendant's ineffective-assistance-of-counsel argument was without merit. The court found Welch's performance did not fall below any standard and did not result in any prejudice. The court found Welch's testimony credible and defendant's testimony not credible.

¶ 21 On October 20, 2010, the trial court sentenced defendant to 20 years in prison with credit for 183 days served.

¶ 22 In November 2010, defendant filed a motion to reconsider sentence, which the trial court denied.

¶ 23 This appeal followed.

¶ 24 II. ANALYSIS

¶ 25 Defendant argues his conviction should be reversed because his trial attorney labored under a *per se* conflict of interest. "We review *de novo* the legal question whether the undisputed facts present a *per se* conflict." *People v. Morales*, 209 Ill. 2d 340, 345, 808 N.E.2d 510, 512-13 (2004).

¶ 26 "A criminal defendant's sixth amendment right to effective assistance of counsel includes the right to conflict-free representation." *Morales*, 209 Ill. 2d at 345, 808 N.E.2d at 513. In *Morales*, our supreme court cited its decision in *People v. Spreitzer*, 123 Ill. 2d 1, 14-19, 525 N.E.2d 30, 34-37 (1988), for the analytical framework to apply in determining whether a defendant's attorney's conflict of interest violates the defendant's sixth-amendment right to the effective assistance of counsel. According to our supreme court:

"Under *Spreitzer*, we must first decide whether there was a *per se* conflict of interest. If there was a *per se* conflict, 'there is no need to show that the attorney's actual performance was in any way affected by the existence of the conflict.' [Citation.] That is, a *per se* conflict is grounds for reversal unless the defendant waived his right to conflict-free counsel. [Citation.] We refer to this rule of automatic reversal as the '*per se* rule.'

We have found a *per se* conflict when defense counsel had a contemporaneous relationship with the victim, the prosecution, or an entity assisting the prosecution. *People v. Lawson*, 163 Ill. 2d 187, 211[, 644 N.E.2d 1172, 1183] (1994) (collecting cases). We have also found a *per se* conflict when defense counsel contemporaneously represented a prosecution witness. *People v. Thomas*, 131 Ill. 2d 104, 111[, 545 N.E.2d 654, 657] (1989). Finally, we have found a *per se* conflict when defense counsel was a former prosecutor who had been personally involved in the

prosecution of the defendant." *Morales*, 209 Ill. 2d at 345-46, 808 N.E.2d at 513.

According to defendant, his trial attorney operated under a *per se* conflict of interest because he was paid by Earl Orr. Defendant argues "Earl Orr would benefit from [defendant's] conviction because Earl's brother Eric would benefit." This is pure speculation on defendant's part and nothing in the record gives any credence to this speculation. Mere speculation Earl Orr might have stood to benefit from defendant's conviction does not support application of the *per se* rule. *Morales*, 209 Ill. 2d at 347, 808 N.E.2d at 514.

¶ 27 While defendant has not established a *per se* conflict, our analysis is not complete. In this case, as the alleged conflict was not brought to the trial court's attention until after defendant's conviction, we will only reverse a conviction based on an actual conflict of interest if it adversely affected defense counsel's performance. *People v. Spreitzer*, 123 Ill. 2d 1, 18, 525 N.E.2d 30, 36 (1988). According to our supreme court:

"What this means is that the defendants must point to some specific defect in his counsel's strategy, tactics, or decision making attributable to the conflict. In this sense, proof of an actual conflict of interest requires proof of what we have sometimes referred to in our *per se* cases as 'prejudice' or 'actual prejudice.' On the other hand, it is also clear that the defendant is never required to prove that his attorney's deficiencies did not constitute harmless error. He is not required, in other words, to prove that the conflict contributed to his conviction." *Spreitzer*, 123 Ill. 2d at 18-19, 525

N.E.2d at 36.

¶ 28 In this case, defendant has not established an actual conflict of interest. While Earl Orr and Eric Orr were brothers, defendant and Earl Orr were effectively brothers-in-law. Defendant saw Earl Orr daily. Earl Orr was the father of defendant's sister's children, and defendant and Earl Orr referred to each other as "brothers." When defendant was in jail, Earl Orr visited him 13 times between April 24 and July 22, 2010. In other words, nothing supports defendant's speculation Earl Orr had any interest in helping only his brother as opposed to helping defendant also.

¶ 29 Even if we assume for the sake of argument a conflict did exist, defendant cannot point to any specific defect attributable to the alleged conflict that caused him any prejudice. While defendant points to his trial attorney's failure to contact Eric Orr to determine whether he could provide favorable testimony for defendant, it is difficult to see how defendant was prejudiced. This is not a case where defendant claimed he did not have possession of the drugs. In fact, defendant had the drugs in his pocket and conceded he was in possession of the drugs. Further, he admitted to Cervantes he would have sold the pills if he heard of someone wanting to buy some. Additionally, Eric Orr was also arrested and charged at the same time as defendant. It is reasonable to conclude Eric Orr would assert his fifth amendment privilege if subpoenaed for defendant's trial.

¶ 30 While defendant is clearly not happy with the result in this case, his attorney was faced with a difficult factual situation. Defendant was arrested while in possession of 80 "ecstasy" pills. Defendant also made a statement to the police after his arrest, admitting he would sell pills if someone wanted to buy some. Further, his client had a prior criminal record that

would likely have been introduced into evidence if defendant testified.

¶ 31 Defendant never claimed he did not know what the drugs were or Eric Orr forced him to hold the drugs. Defendant does not dispute he was guilty of possessing the drugs. In fact, he agreed with his trial attorney the best strategy was to concede he was guilty of possession and focus his defense on his lack of present intent at the time of his arrest to distribute the drugs. As part of this strategy, defendant agreed to have the jury given a lesser-included-offense instruction for simple possession. While defendant complained his attorney talked him out of testifying even though he wanted to testify, defendant told the trial court it was his choice not to testify. The jury chose not to believe defendant's argument.

¶ 32 III. CONCLUSION

¶ 33 For the reasons stated, we affirm the trial court's ruling. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 34 Affirmed.

¶ 35 JUSTICE APPLETON, dissenting:

¶ 36 I respectfully dissent from the majority's decision because, in my view, defendant's trial attorney suffered from a *per se* conflict of interest.

¶ 37 What is a *per se* conflict of interest? It is not reducible to a list of specific instances in which courts previously found a *per se* conflict, such that if the situation at hand is absent from the list, one can rule out a *per se* conflict. Instead, a *per se* conflict arises "[w]hen a defendant's attorney has a tie to a person or entity that would benefit from an unfavorable verdict for the defendant." *People v. Hernandez*, 231 Ill. 2d 134, 143 (2008).

¶ 38 In the present case, defendant argues that his trial counsel was in a *per se* conflict of interest in that (1) Earl Orr was paying the trial counsel to represent defendant and (2) Earl was the brother of the codefendant, Eric Orr, who would benefit from defendant's conviction.

¶ 39 The majority dismisses that argument as "pure speculation." *Supra* ¶ 26. I do not regard it as "pure speculation" that Eric would benefit from defendant's conviction. Granted, the State never contractually promised Eric any particular sentence if defendant ended up being convicted. Rather than get hung up, however, on the technicalities of offer and acceptance, we should acknowledge the probable realities of the situation. *People v. Daly*, 341 Ill. App. 3d 372, 376 (2003). In all likelihood, Eric was cooperating with the police not because his arrest had caused life-changing remorse but because he hoped that, in his own sentencing hearing, the prosecutor would stand up and say a good word for him and maybe even make a favorable recommendation. The prosecutor could tell the trial court that although Eric had cooperated by making a controlled delivery, nothing ever came of it. Or, alternatively, the prosecutor could tell the court, with perhaps greater enthusiasm, that Eric's cooperation had borne fruit in the form of

defendant's conviction and that, thanks largely to Eric, another drug dealer was off the streets of Urbana. Arguably, the latter presentation would sound better for Eric's purposes.

¶ 40 In sum, it would be reasonable to assume that Earl wanted what was best for his brother, Eric. Arguably, defendant's conviction would be best for Eric. Granted, that is not a certainty; all the trial court might care about in Eric's sentencing hearing is whether he cooperated with the State, regardless of the results. On the other hand, though, it is not fantastical to suppose that the court would take into account a favorable result, some tangible good that Eric made possible, to offset the bad. Because defendant's trial attorney was being paid by Earl and because brothers usually want things to turn out well for one another, the attorney's loyalty to defendant's interest possibly was undermined or threatened. At the very least, it is not baseless paranoia on defendant's part to wonder, in these circumstances, about the singleness of his attorney's loyalty, and—here is the important point—a defendant should not have to wonder. Having a loyal defense counsel should be more than a hope.

¶ 41 It is precisely because of the threat of dual loyalties that Rule 1.8(f)(1) of the Illinois Rules of Professional Conduct of 2010 requires the "informed consent" of the client before the lawyer accepts compensation from anyone else for the representation of that client. Ill. S. Ct. R. Prof. Conduct of 2010, R. 1.8(f)(1). See *Wood v. Georgia*, 450 U.S. 261, 268-69 (1981) ("Courts and commentators have recognized the inherent dangers that arise when a criminal defendant is represented by a lawyer hired and paid by a third party."); Gregory G. Sarno, Annotation, *Circumstances Giving Rise to Prejudicial Conflict of Interests Between Criminal Defendant and Defense Counsel—State Cases*, 18 A.L.R.4th 360, 387 (1982) ("The courts in many of the modern state decisions reported herein consider significant, to resolution of the

question of whether an actionable conflict of interest existed between the defendant and defense counsel, the content of various ethical standards adopted by the American Bar Association and by the states.").

¶ 42 It may be that, in actuality, defendant suffered no prejudice from Earl's paying an attorney to represent defendant. It may be, as the majority says, that Earl liked defendant as much as he liked his own brother and that Earl therefore would have genuinely regretted defendant's conviction, even if it helped his brother. It may be, as the majority says, that Earl paid his brother's attorney, too, and that it all evened out. In a case of *per se* conflict, however—in a case in which the very factual situation could reasonably make one wonder whether defense counsel's loyalty was compromised—the defendant does not have to prove actual prejudice from the "possible conflict." *People v. Stoval*, 40 Ill. 2d 109, 113 (1968). The situation is so "fraught with the dangers of prejudice, prejudice which the cold record might not indicate, that the mere existence of the conflict" violates the defendant's sixth-amendment rights, regardless of whether the conflict "in fact influences the attorney or the outcome of the case." (Internal quotation marks omitted.) *Id.*