

2016 IL App (1st) 140779-U

SIXTH DIVISION

August 26, 2016

No. 1-14-0779

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS, )	Appeal from the Circuit Court
)	of Cook County.
Plaintiff-Appellant and )	
Cross-Appellee, )	No. 97 CR 15260
v. )	
)	
GARY WHITMORE, )	
)	The Honorable
Defendant-Appellee and )	Carol M. Howard,
Cross-Appellant. )	Judge Presiding.

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JUSTICE HALL delivered the judgment of the court.  
Presiding Justice Rochford and Justice Hoffman concurred in the judgment.

ORDER

¶ 1 *Held:* This court affirmed the circuit court's order granting the defendant's postconviction petition following an evidentiary hearing. The defendant established that a *per se* conflict of interest existed where his trial attorney previously represented one of the victims of the defendant's crimes. The defendant's cross-appeal was dismissed as moot.

¶ 2 Following an evidentiary hearing, the circuit court of Cook County granted the defendant, Gary Whitmore's, postconviction petition and ordered that he receive a new trial. The court determined that the defendant suffered a substantial deprivation of his constitutional rights in that his trial attorney labored under a *per se* conflict of interest.

¶ 3 Pursuant to Supreme Court Rule 304(b)(3) (eff. Feb. 26, 2010), the State appeals. The defendant cross-appeals from the circuit court's dismissal of his ineffective assistance of counsel claim at the second-stage of postconviction proceedings.

¶ 4 **BACKGROUND**

¶ 5 The defendant and a co-defendant were indicted for the first degree murder of Jeffrey Jordan, the attempted first degree murders of Lee Otis Gilliams and Marlon Harden and the home invasion of Perinda Lee's residence. The defendant's first jury trial ended in a mistrial, and his convictions following his second jury trial were reversed on appeal, and his case was remanded for a new trial. The defendant chose a bench trial at which he was represented by attorneys, Lafonzo Palmer and D'Anthony Thedford. The defendant was found guilty of all four charges and sentenced to an extended term of 100 years for the first degree murder of Mr. Jordan, concurrent sentences of 20 years for the attempted murders of Mr. Hardens and Mr. Gilliams and a 20-year sentence for home invasion to be served consecutive to the attempted murder convictions. The defendant's convictions and sentences were affirmed on direct appeal. *People v. Whitmore*, No. 1-04-3263 (2007) (unpublished order pursuant to

Supreme Court Rule 23). Following the denial of his direct appeal, the defendant filed various *pro se* petitions seeking DNA testing of evidence used at his trial. The petitions were dismissed, and the dismissals were upheld on appeal.

¶ 6 In 2010, the defendant's 2007 *pro se* postconviction petition was reinstated. Postconviction counsel was appointed and filed a supplemental petition for postconviction relief. The circuit court granted the State's motion to dismiss, in part, dismissing the defendant's ineffective assistance of counsel and violation of *Brady v. Maryland*, 373 U.S. 83 (1963) claims and his request for DNA testing. The court granted the defendant an evidentiary hearing on his claim that attorney Thedford had a *per se* conflict of interest.

¶ 7 The pertinent testimony at the evidentiary hearing revealed that attorney Thedford had previously represented Mr. Gilliams. On January 28, 1999, attorney Thedford worked as a public defender and represented Mr. Gilliams on a plea of guilty to a misdemeanor. Mr. Gilliams was part of a group of defendants all entering pleas on offers made by the State. Attorney Thedford's contact with Mr. Gilliams was brief, and he had no further contact with Mr. Gilliams. In 2004, attorney Thedford began representing the defendant, working with attorney Palmer. He did not recognize Mr. Gilliams's name.

¶ 8 While noting attorney Thedford's limited representation of Mr. Gilliams, the circuit court ruled that the defendant had shown that attorney Thedford labored under a *per se* conflict of interest under the supreme court's decision in *People v. Hernandez*, 231 Ill. 2d 134 (2008), thereby establishing a substantial deprivation of his constitutional rights. The court granted the defendant's postconviction petition and ordered a new trial.

¶ 9 The State appeals from the circuit court's order granting the defendant's postconviction petition and ordering a new trial.

¶ 10

## ANALYSIS

¶ 11

### I. Standard of Review

¶ 12

Where, as in the present case, the facts are undisputed, our review is *de novo*. *Hernandez*, 231 Ill. 2d at 144.

¶ 13

### II. Discussion

¶ 14

A *per se* conflict of interest arises when a defendant's attorney has a tie to a person or entity that would benefit from an unfavorable verdict for the defendant. *Hernandez*, 231 Ill. 2d at 142. The underlying justification for the rule is the attorney's awareness that a result favorable to his other client would conflict with the defendant's interests might unconsciously affect the attorney's performance in undetectable ways, and in addition, the possibility that the conflict might subject the attorney to charges that he did not faithfully represent the defendant. *Hernandez*, 231 Ill. 2d at 143.

¶ 15

In *Hernandez*, the supreme court identified three situations where a *per se* conflict of interest exists: "(1) when defense counsel has a prior or contemporaneous association with the victim, the prosecution, or an entity assisting the prosecution [citations]; (2) when defense counsel contemporaneously represents a prosecution witness [citations]; and (3) when defense counsel was a former prosecutor who had been personally involved in the prosecution of the defendant [citation]." *Hernandez*, 231 Ill. 2d at 143-44. Once a *per se* conflict is shown to exist, the defendant is not required to show actual prejudice, and unless the defendant waives the conflict, a *per se* conflict is grounds for automatic reversal. *Hernandez*, 231 Ill. 2d at 143.

¶ 16

The State argues that the supreme court did not intend for *Hernandez* to apply to the present case where attorney Thedford's representation of Mr. Gilliams was brief, and the

attorney had no independent recollection of representing him four years later when the attorney represented the defendant. The court in *Hernandez* rejected those limitations on the *per se* conflict rule. The court explained that “the very nature of a *per se* conflict rule precludes inquiry into the specific facts of a case.” *Hernandez*, 231 Ill. 2d at 150. The court pointed out that where the attorney represented both the victim and the defendant, there was no requirement that the representation be active and that a prior relationship fell into the category of *per se* conflict. *Hernandez*, 231 Ill. 2d at 151. The court held that in order to ensure that a defendant’s right to effective assistance of counsel was given effect, “the *per se* conflict rule applies whenever an attorney represents a defendant and the alleged victim of the defendant’s crime, regardless of whether the attorney’s relationship with the alleged victim is active or not, and without inquiring into the specific facts concerning the nature and extent of counsel’s representation of the victim.” *Hernandez*, 231 Ill. 2d at 151-52.

¶ 17 In *People v. Cleveland*, 2012 IL App (1st) 101631, this court held that the defendant was entitled to an evidentiary hearing on his postconviction claim that his trial attorney suffered under a *per se* conflict of interest where his attorney previously represented the murder victim. We rejected the State’s argument that the attorney’s representation of the victim at a preliminary hearing seven years prior to his representation of the defendant precluded a finding of a *per se* conflict of interest. *Cleveland*, 2012 IL App (1st) 101631, ¶ 43; see *Hernandez*, 231 Ill. 2d at 151.

¶ 18 The trier of fact must determine whether the prior relationship gives rise to a *per se* conflict. *Cleveland*, 2012 IL App (1st) 101631, ¶ 45. “Findings of fact at an evidentiary hearing are necessary to ‘resolve the question [ ] of whether counsel suffered from a *per se* conflict.’ ” *Cleveland*, 2012 IL App (1st) 101631, ¶ 45 (quoting *People v. Gacho*, 2012 IL

App (1st) 091675, ¶ 32. In *Cleveland*, we determined that an evidentiary hearing was necessary to resolve factual disputes, such as whether the attorney had represented the victim. *Cleveland*, 2012 IL App (1st) 101631, ¶ 52

¶ 19 At the evidentiary hearing, attorney Thedford testified that he previously represented Mr. Gilliams, one of the victims of the defendant's crimes. He further testified that his representation was limited to the entry of Mr. Gilliams's plea and that his representation of Mr. Gilliams ended four years prior to his representation of the defendant. However, under *Hernandez*, neither the limited nature of the attorney's representation of the victim nor that the representation had ended prior to his representation of the defendant precludes a finding that a *per se* conflict exists. The State did not present evidence or argue at the hearing that the defendant waived any conflict of interest. Based on the evidence at the hearing, the defendant established a *per se* conflict of interest under *Hernandez*.

¶ 20 Finally, this court previously rejected the State's argument that the United States Supreme Court's opinion in *Mickens v. Taylor*, 535 U.S. 162 (2001), holding that a defendant must establish actual prejudice from the conflict of interest, controls rather than *Hernandez*. As this court noted in *Cleveland*, the court in *Hernandez* found that its *per se* conflict rule did not conflict with *Mickens*. *Cleveland*, 2012 IL App (1st) 101631, ¶ 48; *Hernandez* 231 Ill. 2d at 146. Moreover, we agreed with the majority of the court in *People v. Fountain*, 2012 IL App (3d) 090558, that we are bound to follow our supreme court's ruling that its *per se* conflict of interest rule does not conflict with the decision in *Mickens* " '[u]nless and until our supreme court or the United States Supreme Court overturns *Hernandez*.'" *Cleveland*, 2012 IL App (1st) 101631, ¶ 49 (quoting *Fountain*, 2012 IL App (3d) 090558, ¶ 23 n. 5).

¶ 21 We conclude that a *per se* conflict of interest existed. Therefore, the circuit court's order granting the defendant's postconviction petition and ordering a new trial was proper.

*Hernandez*, 231 Ill. 2d at 143 (a *per se* conflict is grounds for automatic reversal).

¶ 22 CONCLUSION

¶ 23 For the foregoing reasons, we affirm the order of the circuit court granting the defendant's postconviction petition and ordering a new trial in this case. We dismiss the defendant's cross-appeal since the order for a new trial renders his ineffective assistance of counsel claim moot.

¶ 24 Appeal affirmed and cross-appeal dismissed.