2016 IL App (2d) 140027-U
No. 2-14-0027
Order filed August 25, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. DANIEL C. CLARK, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Du Page County. No. 12-CF-303 Honorable Kathryn E. Creswell, Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Presiding Justice Schostok and Justice McLaren concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The trial court properly denied the State's motion to disqualify defendant's retained counsel: as defendant did not request new counsel, the trial court had no authority to disqualify defendant's attorneys merely because they might have had to argue their own ineffectiveness; (2) as defendant was subject to only one restitution order and one DNA analysis fee, we vacated the duplicates.

¶ 2 Defendant, Daniel C. Clark, appeals the denial of the State's motion to disqualify his privately retained counsel in connection with his motions to reconsider his sentence and withdraw his guilty plea to two counts of aggravated driving under the influence (625 ILCS 5/11-501(d)(1)(C), (F) (West 2012)). He contends that the trial court erred when it denied the

State's motion to disqualify, which alleged that his counsel could be required to present their own ineffective assistance in regard to his motion to withdraw the plea. He asks that the matter be remanded for new proceedings with conflict-free counsel. He also asks that a duplicate restitution order and duplicate DNA fee be vacated. We affirm the denial of the State's motion to disqualify and vacate the duplicate order and fee.

¶ 3 I. BACKGROUND

¶ 4 Defendant was indicted on multiple offenses related to an automobile accident in which he struck a state trooper's vehicle, killing a passenger and causing serious injury to the trooper. On July 22, 2013, the parties appeared for a guilty-plea hearing.

¶ 5 At the hearing, one of defendant's two privately retained attorneys told the court that he anticipated defendant entering a blind plea. The State said that the plea would be to two counts and that it would dismiss eight counts. The court asked defendant, "[t]he attorneys have indicated it's your intention to plead guilty to two charges today without any agreement as to what the disposition would be. Is that your understanding?" The assistant State's Attorney later interrupted and said "judge, I apologize for the interruption. But we did—part of the agreement, is that we would cap our recommendation to the Court at 12 years in the Department of Corrections." The court then told defendant that the State indicated that this was a negotiated plea and that, based on that representation, the court would not impose a sentence beyond 12 years. The court asked defendant if he understood, and he said "[y]es, I do." The court then admonished defendant that, because this was a plea agreement for a cap, defendant would not be able to ask the court to reconsider the sentence imposed as long as it did not exceed 12 years. The court asked defendant if he understood, and defendant again said "[y]es, I do." Defendant then pleaded guilty. Neither defendant nor his counsel objected to the characterization of the

plea as negotiated. At sentencing, the court again referred to the negotiated plea and sentenced defendant to 10 years' incarceration on one charge and a concurrent 3-year term on the other. There was no objection that the plea agreement was not negotiated. The court admonished defendant that, in order to appeal the sentence, he must first file a motion to withdraw the guilty plea. His counsel responded that he intended to file a motion to reconsider the sentence. The court also ordered defendant to pay restitution and a DNA analysis fee to be taken from his bond. The written orders prepared by the State assessed those twice by assessing them once for each conviction.

¶ 6 Defendant, through his counsel, moved to reconsider his sentence and to withdraw his guilty plea. Defendant contended that, while the State offered to cap the sentence at 12 years during negotiations, defendant did not agree to that offer and instead entered a blind plea. Defendant characterized the State's cap offer as a "good faith gratuitous act." Defendant further noted that counsel had stated at the guilty-plea hearing that it was a blind plea and never concurred that the cap was a condition of the agreement. Both of defendant's counsel attached affidavits stating that, although it was discussed, a cap of 12 years was never pursued as a condition of the plea.

¶ 7 The State moved to strike defendant's motions and moved to disqualify defendant's counsel. The State argued that the motion to withdraw the plea showed a potential conflict of interest because it implicated ineffective assistance of counsel and defendant's counsel would likely be called to testify as witnesses. The State noted that defense counsels' affidavits did not address whether they failed to convey the cap offer to defendant, why counsel stood mute on the matter at the plea hearing, or why defendant accepted the cap when he pleaded guilty. Thus, it

argued that counsel could be placed in the position of arguing their own ineffectiveness. Defendant's counsel did not respond.

¶ 8 At the hearing on the motions, the State stood on its argument in its motion to disqualify, and defendant made no argument on the matter. The court denied the motion without providing any specific analysis. The court then found that the plea was negotiated, that defendant was correctly admonished, and that defendant agreed to it. Thus, the court denied defendant's motions to withdraw the plea and reconsider the sentence. The court also found that, even if it could reconsider the sentence, it would still deny the motion. Throughout the process, defendant never objected to his counsel's representation or asked to replace his counsel. Defendant appeals.

¶ 9 II. ANALYSIS

¶ 10 Instead of contending that the trial court erred by denying his motions to withdraw the guilty plea and reconsider the sentence, defendant takes the unusual position of appealing the denial of a motion brought by the State. He contends that the trial court erred by denying the State's motion to disqualify his counsel and argues that he should have been appointed a new attorney to argue his motions.

¶ 11 The parties initially disagree on the standard of review. Defendant contends that the standard is *de novo*, while the State argues that it is for an abuse of discretion. We review a trial court's decision on disqualification of counsel for an abuse of discretion. See *People v Ortega*, 209 Ill. 2d 354, 359 (2004). "[A] trial court may exercise its discretion to deny a defendant's right to counsel of choice only if it could reasonably find that defense counsel has a specific professional obligation that actually does conflict or has a serious potential to conflict with

defendant's interests." *Id*. at 361. In any event, we note that our decision would be the same under *de novo* review.

¶ 12 In cases involving disqualification of counsel, the trial court " 'must recognize a presumption in favor of [defendant's] counsel of choice.' " *People v. Holmes*, 141 Ill. 2d 204, 223 (1990) (quoting *Wheat v. United States*, 486 U.S. 153, 164 (1988)). The question is whether the interests threatened by a conflict of interest or potential conflict of interest are weighty enough to overcome the presumption. *Id*. at 228. A conflict of interest can be *per se* or actual; a *per se* conflict exists where "facts about a defense attorney's status *** engender, *by themselves*, a disabling conflict." (Internal quotation marks omitted and emphasis in original.) *People v. Hernandez*, 231 Ill. 2d 134, 142 (2008). Our supreme court has identified three *per se* conflicts in the criminal context that require reversal: (1) defense counsel has a prior or contemporaneous association with the victim, the prosecution, or an entity assisting the prosecution; (2) defense counsel contemporaneously represents a prosecution witness; or (3) defense counsel is a former prosecutor who had been personally involved in the defendant's prosecution. *Id*. at 143-44. However, an attorney arguing his own ineffectiveness is not a *per se* conflict of interest. See *People v. Jones*, 219 Ill. App. 3d 301, 304 (1991).

¶ 13 Nevertheless, defendant asserts that new counsel was warranted. He relies primarily on *People v. Williams*, 176 Ill. App. 3d 73 (1988), and *People v. Willis*, 134 Ill. App. 3d 123 (1985).

¶ 14 In *Willis*, the defendant filed a *pro se* motion to withdraw his guilty plea and motion for appointment of counsel, and defendant's assistant public defender filed an amended motion to withdraw the plea, noting that defendant had alleged ineffective assistance. Defense counsel represented the defendant at the hearing on the motions, where the defendant asked his counsel several questions regarding an incorrect "rap sheet" that had not been clarified before he entered

his plea. Counsel responded to the questions. The defendant then testified that his counsel told him to accept the plea offer because, based on his criminal record, the trial court would be justified in imposing a greater sentence. The trial court denied the motions.

¶ 15 On appeal, the defendant argued that he was entitled to a new hearing because he was represented by the same attorney against whom he asserted a claim of ineffective assistance. We agreed, noting that the defendant filed a request for appointment of counsel and that the need for appointment of counsel should have been "glaringly apparent" when the defendant began to ask his counsel questions and counsel responded. *Willis*, 134 Ill. App. 3d at 133. Thus, counsel was clearly placed in conflict with the defendant. Accordingly, under the circumstances of the case, we found a *per se* conflict and remanded for a new hearing with new appointed counsel. *Id*.

¶ 16 In *William*s, the defendant moved to withdraw his guilty plea, arguing that his plea was obtained by fraud, material misrepresentations, and coercion by the court, his attorney, and other persons. The defendant's assistant public defender represented him at hearings on the matter, and the defendant told the court that he thought his attorney tricked him into pleading guilty. The court denied the motion, and the defendant appealed. On appeal, the defendant argued that he was entitled to a new hearing on his motion to withdraw his plea, because his attorney had a conflict of interest and he was denied effective assistance of counsel. Relying on *Willis*, the First District agreed, finding that the question whether the assistant public defender actually made misrepresentations to the defendant or coerced him into pleading guilty contemplated the assistance of counsel at a hearing on the motion to withdraw the plea. Because that assistance should be free of any conflict of interest, a new hearing with appointed counsel other than the public defender's office was required. *Williams*, 176 Ill. App. 3d at 79.

¶ 17 As the State points out, however, *Williams* and *Willis* are distinguishable because, here, defendant was represented not by appointed counsel but by retained counsel. Although this case does not involve *pro se* allegations of ineffective assistance, *People v. Pecoraro*, 144 Ill. 2d 1 (1991) is instructive. There, the defendant was found guilty of murder while represented by private counsel. The defendant filed a *pro se* posttrial motion alleging ineffective assistance of counsel. The trial court denied the defendant's claims of ineffective assistance of counsel without appointing new counsel to argue those claims. The defendant never informed the court that he wished to be represented by new counsel or that he needed the services of court-appointed counsel.

¶ 18 The supreme court affirmed, explaining as follows:

> "It was not within the trial court's rubric of authority to advise or exercise any influence or control over the selection of counsel by defendant, who was able to, and did, choose counsel on his own accord. [Citation.] Moreover, the trial judge could not force defendant to retain counsel other than that chosen by defendant. [Citation.] Defendant and his counsel were the only parties who could have altered their attorney-client relationship. Defendant could have retained other counsel to represent him prior to the hearing of his post-trial motions." *Id*. at 15.

¶ 19 In attempting to escape the import of *Pecoraro*, defendant relies on *People v. Johnson*, 227 Ill. App. 3d 800 (1992), and *People v. Willis*, 2013 IL App (1st) 110233. In both of those cases, the First District declined to apply *Pecoraro* despite the fact that the defendants were represented by retained counsel. We need not decide whether the First District was right to do so. Even if it was, both of those cases are distinguishable as well. In *Johnson*, the defendant personally requested new counsel. *Johnson*, 227 Ill. App. 3d at 808. In *Willis*, although the

defendant did not personally request new counsel (or otherwise complain about his present counsel), the appellate court excused that omission because the defendant was a minor. *Willis*, 2013 IL App (1st) 110233, ¶ 70.

¶ 20 Here, defendant, an adult, never complained about his privately retained counsel or requested new counsel. Thus, as in *Pecoraro*, the trial court had no authority to disqualify defendant's counsel merely because counsel might have had to argue their own ineffectiveness.[1] We do not deny that, as defendant points out, the sixth amendment does not distinguish between retained and appointed counsel. See *Mickens v. Taylor*, 535 U.S. 162, 168 n.2 (2002). But nevertheless, under these facts, the sixth amendment did not permit the trial court to deny defendant his concomitant right to counsel of his choice. See *Pecoraro*, 144 Ill. 2d at 15.

¶ 21 Finally, defendant contends that the trial court erred in issuing duplicate orders of the restitution and DNA testing fee. The State properly concedes that the imposition of the duplicate restitution order and DNA fee was improper. Accordingly, we vacate the duplicate assessments.

¶ 22 III. CONCLUSION

The judgment of the circuit court of Du Page County is affirmed in part and vacated in part. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2014); see also *People v. Nicholls*, 71 Ill. 2d 166, 179 (1978).

¶ 23 Affirmed in part and vacated in part.

[1] Curiously, the State took the unusual action here of filing a motion to disqualify defendant's privately retained counsel. Although the State is not precluded from filing such a motion, the record does not reflect a sufficient basis to do so in this instance.