

**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).

NO. 4-09-0569

Order Filed 3/14/11

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Macon County
PARNELL SIMONEAUX,	)	No. 07CF750
Defendant-Appellant.	)	
	)	Honorable
	)	Lisa Holder White,
	)	Judge Presiding.

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JUSTICE STEIGMANN delivered the judgment of the court.  
Justices McCullough and Myerscough concurred in the  
judgment.

**ORDER**

*Held:* We reject as forfeited defendant's claim that he had been denied his right to counsel of choice, and conclude that the trial court's decision to appoint defendant a new attorney based upon a potential conflict did not amount to plain error.

Following a June 2009 trial, a jury convicted defendant, Parnell Simoneaux, of possession of a controlled substance with intent to deliver (15 grams or more but less than 100 grams of cocaine) (720 ILCS 570/401(a)(2)(A) (West 2006)). Shortly thereafter, the trial court sentenced defendant to seven years in prison.

Defendant appeals, arguing that he is entitled to a new trial because the trial court denied him his right to counsel of his choice. We disagree and affirm.

I. BACKGROUND

In May 2007, the Decatur police department executed a search warrant for the home defendant shared with his wife, Carla Simoneaux, and the couple's adult children, Cornelius and Antonio Carr. Officers arrived to find (1) Carla, Antonio, Cornelius, and two minor children in the home and (2) defendant in a van parked outside. As a result of their search, officers seized 41.5 grams of cocaine, items associated with drug distribution, and documents linking defendant, Carla, Cornelius, and Antonio to the house. The arresting detective later testified when defendant realized that Carla, Cornelius, and Antonio were also going to be taken into custody at the scene, defendant told him that "everything in [the] house was his."

Shortly thereafter, the State charged (1) defendant with (a) possession of a controlled substance with intent to deliver (15 grams or more but less than 100 grams of cocaine) (720 ILCS 570/401(a)(2)(A) (West 2006)) and (b) possession of a controlled substance (15 grams or more but less than 100 grams of cocaine) (720 ILCS 570/402(a)(2)(A) (West 2006)); (2) Carla with (a) possession of a controlled substance with intent to deliver (15 grams or more but less than 100 grams of cocaine) (720 ILCS 570/401(a)(2)(A) (West 2006)) and (b) possession of a controlled substance (15 grams or more but less than 100 grams of cocaine) (720 ILCS 570/402(a)(2)(A) (West 2006)); and (3) Antonio with possession of a controlled substance (less than 15 grams of a

substance containing cocaine) (720 ILCS 570/402(c) (West 2006)). Defendant, Carla, and Antonio retained attorney Bruce Cowan to represent them.

In November 2007, Cowan, on defendant's behalf, filed motions to (1) suppress evidence and (2) suppress certain statements. Following a July 2008 hearing at which the trial court denied defendant's motions, Cowan orally petitioned the court to allow him to withdraw from representing Carla and Antonio. In response, the court ordered Cowan to file his petition to withdraw as a written motion.

On August 4, 2008, the State filed a motion to disqualify Cowan as defendant's counsel, claiming that a potential conflict of interest could arise in the event that the State extended use immunity to Carla and Antonio. Specifically, the State posited that a conflict existed because in the event Carla and Antonio were to testify, Cowan would be required to cross-examine his own clients. On August 14, 2008, Cowan responded by filing a written motion to (1) withdraw as counsel for Carla and Antonio and (2) sever defendant's case from theirs. Cowan asserted that no conflict existed because he had learned nothing from Carla and Antonio "that [was] not of public record during their representation," adding that defendant was willing to waive "any and all objections" to further representation.

At an October 2008 hearing on the State's motion, the

court (1) granted Cowan's motion to withdraw as counsel for Carla and Antonio and (2) appointed each new counsel. The following exchange then occurred related to the State's motion to disqualify Cowan as counsel for defendant.

"[PROSECUTOR]: Your Honor, the State [has] pretty much laid out its position in the [m]otion to [d]isqualify. Essentially, the position is that severing these defendants doesn't resolve the problem. The problem has been [that] there's already been communications between the attorney and each of the defendants, which, if given the right situation, results in the attorney having to cross-examine a witness that he previously represented. That in[]and[]of itself is where [the State] believe[s] the conflict lies. \*\*\*.

\*\*\*

MR. COWAN: We felt that severance would cure that problem, Your Honor.

THE COURT: How does it cure the problem of you cross-examining either Antonio \*\*\* or Carla \*\*\*?

MR. COWAN: Well, we didn't know that

they would take the stand for certain.

THE COURT: Okay. But if they do take the stand, \*\*\* which the [c]ourt has to consider, \*\*\* is it your--

MR. COWAN: We just felt that it was premature because it isn't known whether they would take the stand or not. If they did, I imagine the problem would present itself.

THE COURT: Okay. So you agree [that] if you're presented with a situation where you have to cross-examine either Antonio \*\*\* or Carla \*\*\*, that that would place you in a position of a conflict of interest?

MR. COWAN: At that point, Your Honor.

THE COURT: Yes. Well, [the court] obviously agree[s], and due to the fact that the potential is there, [the court is] going to have to grant the State's [m]otion \*\*\*. Obviously, \*\*\* a great potential exists for that, and clearly there would be a conflict at that point. \*\*\* So [the court] will grant the State's [m]otion \*\*\* to [d]isqualify [c]ounsel."

The court later appointed new counsel for defendant.

Following a June 2009 trial, at which neither Carla nor Antonio testified, a jury convicted defendant of possession of a controlled substance with intent to deliver (15 grams or more but less than 100 grams of cocaine) (720 ILCS 570/401(a)(2)(A) (West 2006)). Shortly thereafter, the trial court sentenced defendant to seven years in prison.

This appeal followed.

## II. DEFENDANT'S CLAIM THAT THE TRIAL COURT DENIED HIM HIS RIGHT TO COUNSEL OF HIS CHOICE

Defendant appeals, arguing only that he is entitled to a new trial because the trial court denied him his right to counsel of his choice. Specifically, defendant contends that the court abused its discretion by disqualifying Cowan based on a "theoretical conflict." Although defendant concedes that he failed to preserve this issue because he did not include it in his posttrial motion, he nonetheless asserts that he is entitled to a new trial in light of the fact that the court's error amounted to plain error. We disagree.

### A. Forfeiture and Plain-Error Review

"To preserve a claim for review, a defendant must both object at trial and include the alleged error in a written posttrial motion." *People v. Thompson*, 238 Ill. 2d 598, 611, 939 N.E.2d 403, 412 (2010). Otherwise, he has forfeited the issue. *Thompson*, 238 Ill. 2d at 612, 939 N.E.2d at 412. Nevertheless, plain error allows reviewing courts to bypass normal forfeiture

rules in limited circumstances. *Thompson*, 238 Ill. 2d at 613, 939 N.E.2d at 412.

Plain error occurs when the error is "clear or obvious" and (1) "the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error," or (2) "that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Piatkowski*, 225 Ill. 2d 551, 565, 870 N.E.2d 403, 410-11 (2007). As a consequence, when a reviewing court determines that no error occurred, it is unnecessary to conduct further plain-error analysis. See *Thompson*, 238 Ill. 2d at 613, 939 N.E.2d at 413 (in which the supreme court determined whether error occurred at all before conducting a plain-error analysis).

#### B. The Right to Counsel and the Standard of Review

In *People v. Ortega*, 209 Ill. 2d 354, 808 N.E.2d 496 (2004), the Supreme Court of Illinois outlined a defendant's right to counsel of choice and explained that such a right has limits when trial courts are faced with conflicts, actual or potential.

"The sixth amendment of the United States Constitution guarantees a criminal defendant the right to the assistance of counsel

of his choice, but that right is subject to certain limits. *Wheat v. United States*, 486 U.S. 153, 159, 100 L. Ed. 2d 140, 148-49, 108 S. Ct. 1692, 1697 (1988). Among those limits is a trial court's 'substantial latitude' to refuse to allow a defendant to waive his chosen counsel's actual or potential conflict of interest. *Wheat*, 486 U.S. at 163, 100 L. Ed. 2d at 151, 108 S. Ct. at 1699. Trial courts need latitude because they must decide whether to accept a proffered waiver before trial, when the 'likelihood and dimensions of nascent conflicts of interest are notoriously hard to predict, even for those thoroughly familiar with criminal trials.' *Wheat*, 486 U.S. at 162-63, 100 L. Ed. 2d at 151, 108 S. Ct. at 1699." *Ortega*, 209 Ill. 2d at 358-59, 808 N.E.2d at 500.

A reviewing court will not set aside a trial court's decision to disqualify a defendant's chosen counsel unless a clear abuse of discretion has occurred. *Ortega*, 209 Ill. 2d at 359, 808 N.E.2d at 500. "Generally, a court abuses its discretion when its decision is fanciful, arbitrary, or unreasonable to the degree that no reasonable person would agree with it."



*Ortega*, 209 Ill. 2d at 359, 808 N.E.2d at 500-01. "[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 \*\*\* has a serious *potential* to conflict with defendant's interests."

(Emphasis added.) *Ortega*, 209 Ill. 2d at 361, 808 N.E.2d at 502.

C. The Factors To Consider When Determining  
Whether the Presumption in Favor of a  
Defendant's Counsel of Choice Has Been Overcome

When determining whether the presumption in favor of a defendant's counsel of choice has been overcome, the trial court should weigh the following factors: (1) the defendant's interest in having the undivided loyalty of counsel; (2) the State's right to a fair trial in which defense counsel acts ethically and does not use confidential information to attack a State's witness; (3) the appearance of impropriety should the jury learn of the conflict; (4) the probability that continued representation by counsel of choice will provide grounds for overturning a conviction; and (5) whether the State's claim that a conflict warrants disqualification is the result of overreaching--that is, the question is whether the State manufactured a conflict to prevent the defendant from having a particularly able attorney at his side. *Ortega*, 209 Ill. 2d at 361-62, 808 N.E.2d at 502.

D. The Trial Court's Decision To Disqualify  
Defendant's Counsel of Choice in This Case

The first step in our analysis is to determine whether

the trial court could reasonably have found that a serious potential for conflict existed in this case. See *Ortega*, 209 Ill. 2d at 364, 808 N.E.2d at 503-04 (first addressing this question before proceeding to the questions of whether the court used the proper legal criteria to reach a reasonable result). We conclude that it could have.

Here, the trial court found that a serious potential for conflict existed because Carla and Antonio, who were facing prosecution based on the same evidence the State was using against defendant, could potentially testify against defendant. If such a scenario had materialized, Cowan would have been required to cross-examine his former clients after they testified about the very same matters upon which Cowan had previously represented them. As Cowan acknowledged at the October 2008 hearing on the State's motion to disqualify him, this scenario would lead to a conflict. Thus, we conclude that the court could reasonably have found that a serious potential for conflict existed.

This does not, however, end our analysis. We next determine whether the trial court used the proper legal criteria to reach a reasonable result. See *Ortega*, 209 Ill. 2d at 368-69, 808 N.E.2d at 506 (proceeding to the questions of whether the court used the proper legal criteria to reach a reasonable result after determining that the court could have reasonably found the

serious potential for conflict). Having reviewed the record, we conclude that the court reached a reasonable result on the facts of this case.

Initially, we note that defendant's interest in having the undivided loyalty of counsel compromised is not pertinent to our analysis in light of defendant's waiver. As for whether the State's right to a fair trial would potentially be compromised, a reasonable person could certainly conclude that it would be unfair to the State to allow Cowan to use the confidential information he had received from Carla or Antonio to impeach their credibility. (At this point, we reiterate that we are reviewing the court's decision from its perspective at the time the court ruled, not in retrospect with the luxury of knowing that Carla and Antonio did not testify.) Moreover, a reasonable person could find that if the jury were to learn that Cowan had previously represented Carla and Antonio in connection with this case, the public might conclude that the trial was unfair or that the court was allowing the defense to act unethically.

Pausing here, we do not mean to imply that Cowan did, in fact, act unethically at any point in this case. Indeed, Cowan appears to have been candid and open with the trial court, striking the appropriate balance between his duty to the court and his obligations to his client. However, as the court recognized in this case, the appropriate concern for the court is not

that counsel actually acted unethically, but that the public might view such representation as improper.

Further, a reasonable person could have found that had the trial court denied the State's motion to disqualify Cowan, and Carla or Antonio were to have been called to testify, a high probability existed that defendant would have used Cowan's conflict to attack his conviction. We note that defendant cites *Ortega* for the proposition that this factor is not implicated when a defendant waives any potential conflict. However, we do not read *Ortega* to require the court to disregard this factor whenever a defendant waives such a conflict. Instead, the court in *Ortega* merely indicated that this factor was not part of its analysis because the trial court had not considered it in rendering its judgment. See *Ortega*, 209 Ill. 2d at 369, 808 N.E.2d at 506 (explaining that the trial court noted that two of the factors were not affected by the provision of a valid waiver in that case).

Finally, a reasonable person could conclude on the facts of this case that the State did not manufacture this conflict to prevent defendant from selecting the counsel of his choice. Carla and Antonio were arrested with defendant, and the State thereafter charged all three in connection with the drugs recovered when the State executed its search warrant. On these facts, the court had every reason to believe that Carla and

Antonio--Cowan's former clients--would enter into plea negotiations and might as a result be called as witnesses by the State. (We take judicial notice of the fact that Carla indeed later pleaded guilty in exchange for a sentence of probation.) This circumstance created the serious potential for conflict in this case, as the trial court correctly noted. Thus, this is not a case in which the State somehow sought to inject into its prosecution a witness unconnected to the case for the purpose of creating a feigned conflict.

Accordingly, we conclude that, at the time the trial court ruled on the State's motion to disqualify Cowan, the court (1) could reasonably have concluded that a serious potential for a conflict existed and (2) reached a reasonable result on the facts of this case. Because we conclude that no error occurred, let alone plain error, we honor defendant's procedural default. See *People v. Naylor*, 229 Ill. 2d 584, 593, 893 N.E.2d 653, 659-60 (2008) (procedural default must be honored when a defendant fails to establish plain error).

### III. CONCLUSION

For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we grant the State's request that defendant be assessed \$50 as costs for this appeal.

Affirmed.