

NOTICE

This Order was filed under Supreme Court Rule 23 and is not precedent except in the limited circumstances allowed under Rule 23(e)(1).

2022 IL App (4th) 200447-U

NO. 4-20-0447

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

March 31, 2022

Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Woodford County
JEFFREY MOSER,)	No. 19CF42
Defendant-Appellant.)	
)	Honorable
)	Charles M. Feeney III,
)	Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Presiding Justice Knecht and Justice DeArmond concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court affirmed, finding defendant was not denied his right to conflict-free postsentencing counsel.

¶ 2 Following a stipulated bench trial in the circuit court of Woodford County, the trial court found defendant, Jeffrey Moser, guilty of predatory criminal sexual assault of a child. See 720 ILCS 5/11-1.40 (West 2018) (formerly section 12-14.1 of the Criminal Code of 1961). The court later sentenced defendant to 45 years' imprisonment. Defendant filed a motion to reconsider his sentence, which the trial court denied.

¶ 3 On appeal, defendant argues he was denied his right to conflict-free postsentencing counsel because his initial postsentencing counsel labored under a *per se* conflict of interest. We affirm.

¶ 4 I. BACKGROUND

¶ 5 On April 4, 2019, a grand jury indicted defendant for predatory criminal sexual assault against his grandson, G.H.M., a child under 13, in violation of section 1.40 of the Criminal Code of 2012 (720 ILCS 5/11-1.40 (West 2018)). The State alleged defendant, who was over the age of 17, committed an act of sexual penetration with the victim, G.H.M., who was under the age of 13, in that defendant placed his penis in G.H.M.'s mouth.

¶ 6 During his arraignment on April 16, 2019, defendant was advised of the charge against him and the potential penalties he faced, as well as his rights. After defendant acknowledged that he understood the charge against him and the possible penalties, defendant requested a public defender be appointed to represent him. The assistant state's attorney informed the trial court that "if the public defender is appointed, it can't be Mr. [Andrew] Lankton. *** He has represented the victim." The court inquired, "Can it be Mr. [Jason] Netzley?" The assistant state's attorney responded, "It can be, yes," and the court appointed Assistant Public Defender Netzley to represent defendant.

¶ 7 The following month, private counsel entered an appearance on behalf of defendant, and Netzley withdrew as counsel.

¶ 8 On August 12, 2019, defendant waived his right to a jury trial and elected to proceed with a bench trial. The parties filed a written "stipulation of the parties as to testimony." The stipulation stated, in part, that G.H.M. would testify he is 11 years old, born on December 21, 2007. He lives with his adoptive parents and siblings in Washburn, Illinois. G.H.M. would testify that, between the ages of three and five, he spent time in the care of his grandparents, defendant and C.M. During baths and showers, defendant would expose his penis and have G.H.M. place defendant's penis inside G.H.M.'s mouth. G.H.M. would further testify that he had committed a sexual act on his sister, K.M., and he learned of this type of behavior from the

actions of defendant upon G.H.M. The trial court accepted the stipulation and found defendant guilty of predatory criminal sexual assault of a child “based upon the stipulation of evidence.”

¶ 9 On October 30, 2019, the trial court held defendant’s sentencing hearing. Without objection, the court took judicial notice of the juvenile case of G.H.M., in which he was “charged and convicted of his own sex crime, aggravated criminal sexual assault, and [was] receiving services for that.” After considering the evidence presented, the trial court sentenced defendant to 45 years in the Department of Corrections (DOC). After the court pronounced defendant’s sentence, private counsel informed the court he was no longer able to represent defendant and he believed defendant to be indigent. Counsel stated, “I’ve already spoken with the local public defender’s office, Mr. Lankton. *** I would ask that they be appointed for [the filing of a motion to reconsider defendant’s sentence].” After admonishing defendant as to his appeal rights, the court informed defendant that “[private counsel] has already asked me to appoint an attorney to assist you on your post-sentencing motion, and I’m going to.” The court entered an order appointing Woodford County Public Defender Lankton “as to any post-sentencing motion.”

¶ 10 On November 27, 2019, defendant, through Public Defender Lankton, filed a motion to reconsider his sentence, arguing (1) the sentence was excessive in light of the evidence presented; (2) the sentence violated the proportionate penalties clause (Ill. Const. 1970, art. I, § 11); (3) the trial court should have considered (a) defendant’s limited criminal history and (b) defendant “had a stipulated bench trial which saved the victim from having to testify in court”; and (4) the sentence should be at the lower end of the sentencing range.

¶ 11 Due to the COVID-19 pandemic, no action was taken on defendant’s motion for several months. The record shows that, on March 25, 2020, an amended notice of hearing rescheduling the cause was sent to the Woodford County State’s Attorney and Assistant Public

Defender Netzley. On June 11, 2020, the trial court conducted a status hearing on defendant's motion to reconsider his sentence. Assistant Public Defender Netzley appeared on behalf of defendant, stating, "I have interviewed my client, but I do need more time to review matters with him to prepare for an actual hearing." Without objection, the trial court allowed a continuance.

¶ 12 In August 2020, the trial court held another status hearing. Assistant Public Defender Netzley again appeared on behalf of defendant. The assistant state's attorney indicated his readiness to proceed to hearing contingent on Assistant Public Defender Netzley filing a certificate pursuant to Illinois Supreme Court Rule 604(d) (eff. July 1, 2017). Netzley indicated he had prepared and filed a certificate where he certified he (1) consulted with the defendant to ascertain defendant's contentions of error, (2) examined the trial court file and report of proceedings, and (3) made any amendments to the motion necessary for the adequate presentation of any defects in those proceedings. Netzley made no amendments to defendant's motion filed November 27, 2019, but did move to correct two scrivener's errors in the motion. The court then set a hearing for September 2020.

¶ 13 On September 11, 2020, the trial court held a hearing on defendant's motion to reconsider his sentence. Netzley argued (1) the court did not consider defendant's rehabilitative potential and (2) defendant would be denied "education and other services" due to his lengthy sentence. Netzley further argued defendant's sentence presented a significant hardship to (1) an elderly couple who had horses and relied on defendant's help to care for the horses and (2) a childhood friend suffering from multiple sclerosis who defendant assisted. Netzley requested the court resentence defendant to the minimum sentence of six years in DOC. The State argued the trial court properly considered the evidence presented at the sentencing hearing when fashioning

defendant's 45-year sentence. After argument, the court denied the motion to reconsider defendant's sentence.

¶ 14 This appeal followed.

¶ 15 II. ANALYSIS

¶ 16 The sixth amendment right to effective assistance of counsel includes the right to conflict-free counsel. *People v. Yost*, 2021 IL 126187, ¶ 36. "The guarantee of conflict-free representation ensures that a defendant is provided assistance by an attorney whose allegiance to his client is not diluted by conflicting interests or inconsistent obligations." (Internal quotation marks omitted.) *Id.* "Essentially, the party asserting such a claim is arguing that a conflict rendered the attorney's performance substandard and that the substandard performance caused prejudice." *In re Br. M.*, 2021 IL 125969, ¶ 44.

¶ 17 Our supreme court has identified two categories of conflicts of interest: *per se* and actual. *Yost*, 2021 IL 126187, ¶ 37. "A *per se* conflict of interest exists where certain facts about a defense attorney's status, by themselves, engender a disabling conflict." *People v. Fields*, 2012 IL 112438, ¶ 17, 980 N.E.2d 35. An attorney labors under a *per se* conflict of interest where defense counsel's past or present commitments raise the possibility that the attorney is unwilling or unable to effectively represent the defendant. *People v. Becerril*, 307 Ill. App. 3d 518, 524, 718 N.E.2d 1025, 1029 (1999). "Unless a defendant waives his right to conflict-free representation, a *per se* conflict is automatic grounds for reversal." *Fields*, 2012 IL 112438, ¶ 18. When the record shows that the facts are undisputed, the issue of whether a *per se* conflict exists is a legal question that this court reviews *de novo*. *Yost*, 2021 IL 126187, ¶ 35.

¶ 18 Until recently, it was commonly held a *per se* conflict of interest existed "whenever an attorney represent[ed] 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." *People v. Hernandez*, 231 Ill. 2d 134, 151-52, 896 N.E.2d 297, 308 (2008). Thus, "where defense counsel has a *prior* or contemporaneous association with the victim," a *per se* conflict of interest exists. (Emphasis added.) *People v. Taylor*, 237 Ill. 2d 356, 374, 930 N.E.2d 959, 971 (2010).

¶ 19 However, our supreme court recently modified its holding in *Hernandez* "to recognize a *per se* conflict based on defense counsel's representation of the victim *only* when that representation is contemporaneous with counsel's representation of the criminal defendant." (Emphasis added.) *Yost*, 2021 IL 126187, ¶ 65. The supreme court's decision in *Yost* clarified that a *per se* conflict of interest exists in the following situations: "(1) when defense counsel has a *contemporaneous* association with the victim, the prosecution, or an entity assisting the prosecution; (2) when defense counsel contemporaneously represents a prosecution witness; and (3) when defense counsel was a former prosecutor who was personally involved in the prosecution of the defendant." (Emphasis added.) *Id.* ¶ 66. Pursuant to *Yost*, defense counsel's prior representation of a victim does not create a *per se* conflict of interest requiring automatic reversal.

¶ 20 In his opening brief, defendant argues he was denied conflict-free counsel because Woodford County Public Defender Lankton "briefly represented" defendant and also "previously represented" G.H.M., thus creating a *per se* conflict of interest, which defendant did not waive. In his reply brief, defendant acknowledges our supreme court's decision in *Yost*, 2021 IL 126187, where the supreme court clarified a *per se* conflict of interest exists only when defense counsel's association with the victim is *contemporaneous*. *Id.* ¶ 65. Thus, defendant abandons his

argument Lankton “previously represented” G.H.M., creating a *per se* conflict of interest, and argues anew that the record is “unclear” as to whether Lankton’s representation of G.H.M. “had concluded” or “was ongoing” when defendant, through Public Defender Lankton, filed his motion to reconsider defendant’s sentence. Defendant seeks remand for an evidentiary hearing to determine “the timeline of when Lankton represented G.H.M.”

¶ 21 The State does not reference the supreme court’s decision in *Yost* but argues remand would serve no purpose because any alleged conflict was cured by Assistant Public Defender Netzley’s representation of defendant as postsentencing counsel.

¶ 22 Following defendant’s indictment, the trial court appointed the Woodford County assistant public defender, Jason Netzley, to represent defendant. An assistant state’s attorney informed the court that Woodford County Public Defender Lankton could not be appointed to represent defendant because Lankton “has represented the victim.” The following month, private counsel entered an appearance on behalf of defendant. Private counsel represented defendant through the court’s pronouncement of defendant’s 45-year sentence and then informed the court he would not be able to continue his representation of defendant and believed defendant to be indigent. Counsel stated, “I’ve already spoken with the local public defender’s office, Mr. Lankton. *** I would ask that they be appointed for [the filing of a motion to reconsider defendant’s sentence].” The record shows the court entered an order appointing Public Defender Lankton “as to any post-sentencing motion.” On November 27, 2019, defendant, through Public Defender Lankton, filed a motion to reconsider his sentence. The record makes no further reference to Lankton.

¶ 23 Approximately four months after defendant filed his motion to reconsider sentence, Assistant Public Defender Netzley’s name begins to appear in the record as defendant’s

postsentencing counsel. While defendant claims he was deprived of the effective assistance of counsel by a conflict of interest concerning Public Defender Lankton, the record is clear Assistant Public Defender Netzley ultimately served as defendant's postsentencing counsel and defendant points to nothing in the record to warrant an inquiry into Netzley's diligence.

¶ 24 In an amended notice of hearing, the record references Netzley as defendant's postsentencing counsel as early as March 25, 2020. Netzley appeared on defendant's behalf on June 11, 2020, and stated he had interviewed defendant and needed more time to "review matters" with defendant. Netzley also appeared for defendant in August 2020. At the direction of the trial court, Netzley filed a certificate pursuant to Illinois Supreme Court Rule 604(d) (eff. July 1, 2017). Although compliance with Rule 604(d) was not required in this case (see *People v. Weaver*, 2013 IL App (3d) 130054, ¶ 25, 2 N.E.3d 621), the certificate affirmatively shows Netzley (1) consulted with the defendant to ascertain defendant's contentions of error, (2) examined the trial court file and report of proceedings, and (3) made any amendments to the motion necessary for the adequate presentation of any defects in those proceedings. Although Netzley did not file an amended motion to reconsider defendant's sentence, he orally moved to correct two scrivener's errors in the original motion. Netzley continued his representation of defendant at the hearing on defendant's motion. Netzley argued (1) the court did not consider defendant's rehabilitative potential and (2) defendant would be denied "education and other services" due to his lengthy sentence. Netzley further argued defendant's sentence presented a significant hardship to (1) an elderly couple who had horses and relied on defendant's help to care for the horses and (2) a childhood friend suffering from multiple sclerosis who defendant assisted. Netzley requested the court resentence defendant to the minimum sentence of six years in DOC. However, the State argued the trial court properly considered the evidence presented at

the sentencing hearing when fashioning defendant's 45-year sentence. After argument, the court denied the motion to reconsider defendant's sentence.

¶ 25 Under the specific circumstances of this case, defendant's argument lacks merit. Importantly, although Lankton prepared a posttrial motion on defendant's behalf, his involvement thereafter was nonexistent and of no consequence. Ultimately, Netzley served as postsentencing counsel. In that role, Netzley undertook a thorough evaluation of the case and represented defendant throughout the postsentencing phase. This is not a situation where new counsel neglected to exercise his own professional judgment after reviewing and analyzing defendant's case. As Assistant Public Defender Netzley ultimately represented defendant as postsentencing counsel, and not Public Defender Lankton, we find defendant's argument he was denied conflict-free postsentencing counsel fails.

¶ 26 III. CONCLUSION

¶ 27 For the reasons stated, we affirm the trial court's judgment.

¶ 28 Affirmed.