

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NATALIE HASSAN,

Defendant-Appellant.

UNPUBLISHED

July 30, 2013

No. 312162

Wayne Circuit Court

LC No. 12-005233-FC

Before: GLEICHER, P.J., and BECKERING and SHAPIRO, JJ.

PER CURIAM.

The circuit court disqualified Cyril C. Hall from representing defendant Natalie Hassan in this case based on Hall's prior "personal relationship" with one of the complaining witnesses. Although defendant waived any possible conflict created by Hall's liaison with the witness, the circuit court ruled that if Hall and the witness rekindled their romance, a conflict might arise. The question presented is whether the trial court's ruling violated defendant's Sixth Amendment right to select the counsel of her choice.

We conclude that the circuit court abused its discretion by disqualifying Hall. Because the evidence presented to the circuit court revealed no actual conflict of interest and there exists no serious potential for conflict, we reverse the circuit court's ruling and reinstate Hall as defendant's counsel.

I. FACTS AND PROCEEDINGS

According to the prosecution, defendant and Hanan Achkar engaged in a physical fight after arguing about the man both were dating. Nancy Faraj, the witness at the center of this Sixth Amendment dispute, intervened. According to Faraj, defendant threatened to kill Achkar and Faraj and proceeded to strike both women with her vehicle. The prosecution charged defendant with assault with intent to murder, MCL 750.83, assault with intent to do great bodily harm less than murder, MCL 750.84, reckless driving causing serious impairment of a body function, MCL 257.626, and two counts of felonious assault, MCL 750.82.

Defendant retained attorney Cyril Hall. Hall represented defendant at the preliminary examination, where he vigorously cross examined Faraj. After the district court bound defendant over for trial, the prosecution moved to disqualify Hall. The motion averred that Faraj and Hall were involved in a sexual relationship and had recently travelled together to Florida. The

prosecution further alleged that Hall had agreed to assist Faraj in obtaining an expungement of her 2006 misdemeanor conviction for assault and battery.

The circuit court conducted an evidentiary hearing. Faraj testified that she first met Hall when her brother retained Hall as his counsel in an unrelated criminal matter. In his capacity as counsel for Faraj's brother, Hall interviewed Faraj. According to Faraj, the two became friends and talked on a "daily basis." At some point, Faraj claimed, she and Hall engaged in sexual relations in Hall's office. In March 2012, they travelled together to Florida to take in a Tiger's game and stayed in the same hotel room for two nights, but did not engage in sexual intercourse. Hall paid the expenses for this trip. Faraj asserted that while in Florida and on other occasions Hall agreed to "take care of" expunging her criminal record, which consisted of one misdemeanor conviction. Faraj claimed that she and Hall had "an understanding that he would serve as her counsel," but admitted that they never entered a retainer agreement.

In April 2012, Faraj was involved in the altercation with defendant. She told Hall of the "accident," but he declined to "take this case."¹ Hall later advised her that he had agreed to represent defendant and instructed her: "[d]on't say anything out of the ordinary." Still later, Faraj testified, Hall advised that if she retracted her statement incriminating defendant that she "wouldn't get in trouble." Faraj claimed that she then ended her relationship with Hall.

Hall vehemently denied having sexual relations with Faraj and refuted that he spoke with Faraj about her testimony or her statement. He admitted the Florida excursion, contending that Faraj had essentially invited herself to accompany him. According to Hall, he considered the possibility of engaging in a sexual relationship with Hall, but changed his mind after he saw her tattoos. Hall characterized as "totally false" Faraj's allegation that he had agreed to obtain an expungement. Rather, he claimed that in preparation for Faraj's brother's case he inquired about prior convictions and she revealed the misdemeanor offense. During a meeting with the prosecutor in the instant case, Hall requested information concerning the criminal backgrounds of all prosecution witnesses, including Faraj. Upon discovering the prosecution's ignorance of Faraj's history, Hall admittedly informed the prosecution about her prior assault and battery conviction. Hall offered to present evidence that he had undergone a polygraph examination refuting Faraj's claims, but the circuit court declined to entertain that evidence.²

The circuit court rendered a bench opinion disqualifying Hall, reasoning as follows:

Okay. There is somebody else who's of interest here; the Court system. And if you look at client/lawyer relations under MRPC 1.8 or any of the rules, you're talking about clients. Okay?

¹ Apparently Faraj asked Hall to represent her in a civil action against defendant arising from injuries she allegedly sustained after being hit by defendant's car.

² On appeal, defendant challenges the circuit court's evidentiary ruling. Because we reverse the disqualification order on the merits we need not reach the evidentiary issue.

Now, the question is, I'd have to determine whether or not the lady who testified ever was a client. I can't quite do that. But I do know that her brother was a client. And based on that relationship, Mr. Hall got certain information.

Now, I don't think he would hope that he would think – and I know Mr. Hatchett [attorney Hall's counsel] knows I don't think he took that lady to Florida just because he goes there to see the Tigers. Obviously, he intended a sexual relationship with her, and I kind of believe they probably had one. But that's not for me to decide at this point either.

They tell me, well, the client in this case is willing to waive. Yeah, but what if down the line I get — if we come back and we get some kind of a conviction? And then suddenly she says, well, wait a minute, he really didn't do his best because after we had that hearing and I said it was okay, guess what? He started sleeping with her again. And I've got this kind of a record that would have to go up to the Court of Appeals.

I am going to take you out of the case, disqualify you based on your personal relationship with one of the witnesses in this matter. I will give this lady one week to come in here with a new lawyer. But I have to do that because I don't want this case coming back to me on a humble [sic].

One week from today she's to be back here with a new lawyer

This Court granted defendant's application for leave to appeal. *People v Hassan*, unpublished order of the Court of Appeals, entered October 18, 2012 (Docket No. 312162).

II. ANALYSIS

We review for an abuse of discretion a trial court's disqualification of a defendant's chosen counsel. *People v Akins*, 259 Mich App 545, 556; 675 NW2d 863 (2003). Such an abuse "occurs when the decision results in an outcome falling outside the range of principled outcomes." *Barnett v Hidalgo*, 478 Mich 151, 158; 732 NW2d 472 (2007). "The abuse-of-discretion standard includes review to determine that the discretion was not guided by erroneous legal conclusions." *Koon v United States*, 518 US 81, 100; 116 S Ct 2035; 135 L Ed 2d 392 (1996). A court "'abuses its discretion when it makes an error of law.'" *Kidder v Ptacin*, 284 Mich App 166, 170; 771 NW2d 806 (2009), quoting *Koon*, 518 US at 100.

The Sixth Amendment's "core constitutional command" mandates that when considering disqualification of retained defense counsel, a trial court's "default position" must, at minimum, acknowledge a defendant's Sixth Amendment right. *United States v Turner*, 594 F3d 946, 951 (CA 7, 2010). The record of these proceedings reveals no such acknowledgment. The circuit court's opinion makes no mention whatsoever of defendant's Sixth Amendment right. Nor does the record supply a proper legal basis for Hall's disqualification. We conclude that the circuit court abused its discretion by failing to recognize the strong constitutional presumption favoring defendant's choice of counsel and by neglecting to balance that presumption against competing interests. Furthermore, the circuit court abused its discretion by disqualifying Hall in the absence

of any actual conflict of interest and by instead relying on a purely speculative and unrealistic potential conflict to override defendant's constitutionally shrouded counsel selection.

The Sixth Amendment affords a defendant who does not require appointed counsel the right to choose his or her preferred counsel. *Wheat v United States*, 486 US 153, 159; 108 S Ct 1692; 100 L Ed 2d 140 (1988). While this right is not absolute, the Sixth Amendment commands a presumption in favor of a defendant's counsel of choice. *Id.* at 164. The prosecution bears the burden of demonstrating an actual conflict of interest or a serious potential for conflict engendered by the defendant's selection. *Id.* at 162-163. Wrongful deprivation of a defendant's right to representation by chosen counsel creates structural error and mandates reversal of a subsequent conviction. *United States v Gonzalez-Lopez*, 548 US 140, 150; 126 S Ct 2557; 165 L Ed 2d 409 (2006).

In addition to protecting a defendant's Sixth Amendment right to counsel, "courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." *Wheat*, 486 US at 160. For example, "[a] court may remove a defendant's attorney on the basis of gross incompetence, physical incapacity, or contumacious conduct." *People v Johnson*, 215 Mich App 658, 663; 547 NW2d 65 (1996). Similarly, a court may disqualify counsel in the interest of protecting the demands of its calendar and to "enforce rules or adhere to practices that determine which attorneys may appear before it[.]" *Gonzalez-Lopez*, 548 US at 152.

When considering a prosecution motion to disqualify defense counsel, the trial court must "make a careful inquiry, balancing the constitutional right of the defendant to representation by counsel of [her] choosing with the court's interest in the integrity of its proceedings and the public's interest in the proper administration of justice." *People v Crawford*, 147 Mich App 244, 249-250; 383 NW2d 172 (1985), quoting *People v Reese*, 699 F2d 803, 805 (CA 6, 1983). See also *Akins*, 259 Mich App at 557. The *Crawford* court continued,

"Furthermore, even if an actual conflict of interests or a strong likelihood of conflict is demonstrated the defendant must be given an opportunity to waive his constitutional right to conflict-free representation. A voluntary waiver of this constitutional right, knowingly and intelligently made, must be honored by the court in the absence of compelling circumstances." [*Crawford*, 147 Mich App at 250, quoting *Reese*, 699 F2d at 805.]

"Compelling circumstances" include "when the defense counsel previously represented a prosecution witness and could not effectively cross-examine his former client without intruding into matters protected by the attorney-client privilege." *Id.* Generally, this form of conflict of interest arises when an attorney's effective representation of a client risks breaching duties of loyalty and confidentiality to another client.

Crediting Faraj's testimony rather than Hall's, the subject of Hall's prior representation of Faraj was limited to an expungement proceeding involving Faraj's 2006 misdemeanor conviction for assault and battery. Although the prosecution claims in its brief on appeal that this conviction has been expunged, it presents no evidence supporting that assertion, and neither Hall nor Faraj testified that an expungement had been granted. In any case, the conviction itself

was a matter of public record, Faraj has not denied that she first revealed it to Hall outside the confines of an attorney-client relationship, and the circuit court found that Hall learned of the conviction while representing Faraj's brother.

"The scope of the attorney-client privilege is narrow. It attaches only to confidential communications by the client to his adviser which are made for the purpose of obtaining legal advice." *Yates v Keane*, 184 Mich App 80, 83; 457 NW2d 693 (1990). Because Faraj revealed the conviction outside the confines of *her* attorney-client relationship with Hall, evidence of this conviction does not constitute a confidence or secret. See *Crawford*, 147 Mich App at 251.³

Other than the existence of the misdemeanor conviction, the prosecution has identified no information, evidence, or confidence revealed to Hall bearing even tangential relevance to its case against defendant. Nor has the prosecution identified any alternative "knowledge advantage" obtained by Hall through his relationship with Faraj that may impact these proceedings or that supplies fodder for impeachment. When given multiple opportunities at oral argument to articulate the dimensions of an actual existing conflict of interest or a serious potential conflict, the prosecutor was non-responsive. Instead, the prosecution strenuously contended that Faraj's emotional hostility toward Hall limits her effectiveness as a prosecution witness, thereby justifying the circuit court's decision to disqualify Hall.

The right to select one's own counsel "has been regarded as the root meaning of the [Sixth Amendment's] constitutional guarantee." *Gonzalez-Lopez*, 548 US at 147-148. We decline to hold that a witness's dislike or even contempt for opposing counsel supplies adequate grounds to override a defendant's Sixth Amendment right. While the prosecutor's concern about Faraj's ability to control herself during trial may be well-founded, it creates no conflict of

³ We emphasize that the public nature of the conviction does not compel our conclusion that Faraj's communication of information concerning her assault and battery conviction falls outside the attorney-client confidentiality rule. The privilege attaches to a communication between lawyer and client, rather than to its substance. Thus, Hall may not question Faraj as to the substance of any communications Faraj made to him when he acted as her counsel. During oral argument, we endeavored to learn whether Faraj had communicated any information to Hall in the context of an attorney-client relationship considered by the prosecutor to be relevant to the pending case. The prosecutor was unable to identify any such information.

We readily acknowledge that in other situations, the danger that an attorney questioning a former client will elicit privileged information supports the existence of an actual conflict of interest. Here, no actual conflict exists because Faraj disclosed the conviction in a non-privileged setting. Our conclusion is buttressed by the lack of any connection between Faraj's 2006 conviction and the facts of this case, the extremely brief and limited nature of the attorney-client relationship between Hall and Faraj (assuming that such a relationship ever truly existed), and the public nature of Faraj's conviction.

interest.⁴ Overriding the Sixth Amendment surely requires more than asserting that a witness might feel angry or uncomfortable under cross-examination by an attorney known to the witness outside the courtroom.

Lastly, we turn to the circuit court's rationale for disqualifying Hall, that a renewal of his relationship with Faraj would create an undeniable conflict of interest. The circuit court's concern lacks any substantiation in the record. It qualifies as entirely speculative and conjectural. Indeed, given the level of hostility expressed by Hall and Faraj toward each other, the circuit court's hypothesis of a future rapprochement is at best far-fetched. Mere speculation that a future conflict might materialize simply does not suffice to displace a defendant's constitutional right to counsel of choice.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher
/s/ Jane M. Beckering
/s/ Douglas B. Shapiro

⁴ We note that at least one appellate court has determined that “[p]rior sexual relationships do not give rise to the type of ethical violation requiring disqualification under the rules.” *Horaist v Doctor's Hosp of Opelousas*, 255 F3d 261, 268 (CA 5, 2001).