

STATE OF MICHIGAN  
COURT OF APPEALS

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS DAVID RICHARDSON,

Defendant-Appellant.

---

UNPUBLISHED

October 4, 2007

No. 278500

Alger Circuit Court

LC No. 07-001782-FC

Before: Sawyer, P.J., and White and Talbot, JJ.

PER CURIAM.

This case is before us on remand from the Supreme Court “for expedited consideration as on leave granted.” *People v Richardson*, \_\_ Mich \_\_ ; 732 NW2d 113 (2007). Defendant initially sought leave to interlocutorily appeal to this Court the circuit court’s order removing his trial attorney as defense counsel. A panel of this Court denied defendant’s application for leave to appeal.<sup>1</sup> The Supreme Court, in lieu of granting defendant’s application for leave to appeal, remanded to this Court. We reverse.

I

Defendant stands charged with open murder on the theory that he caused his wife to fall from a cliff to her death in Pictured Rocks National Park. Defendant engaged attorney Elmore while the incident was being investigated. Elmore served in that capacity throughout the investigation and into the early court proceedings. However, after the preliminary examination, the prosecutor moved for Elmore’s disqualification. The prosecutor initially maintained that Elmore would have to be called as a prosecution witness, then abandoned that theory and asserted that Elmore was a necessary defense witness. The putative problems with Elmore’s continued representation of defendant stem from a conversation Elmore had with Kelli Brophy, with whom defendant had developed a relationship.

---

<sup>1</sup> *People v Richardson*, unpublished Order of the Court of Appeals, entered May 4, 2007 (Docket No. 277547).

The investigation brought to light that defendant and Brophy had been in frequent contact since before defendant's wife's death, and mutual acquaintances sensed that their relationship was close. Contacts between them purportedly included a call from defendant on the day before his wife died. Brophy and defendant assert that they were "prayer partners." Brophy informed investigators that, several days after that incident, Elmore telephoned her and advised her not to talk to defendant or the police, and that she faced serious penal consequences as a possible accessory to a crime. Acquaintances of Brophy indicated that Brophy was upset by that call.

The prosecuting attorney asserted she would seek to show that Brophy's ability to testify candidly had been compromised, but that Elmore, as defense counsel, could neither testify to deny the allegations of improper influence nor inject his position through questions or assertions not based on admissible evidence. The prosecutor argued that Elmore was a necessary defense witness, see MRPC 3.7(a), who, in disavowing any intent to testify was violating his duty to refrain from undertaking a representation in conflict with his own interests, see MRPC 1.7(b). The theory was that the question would arise whether Elmore made the phone call in question on his own initiative, or did so at defendant's urging, but that, should defendant testify, he would feel pressure to do so in a way that protects his lawyer's interests, and thus would be unable to deny personal responsibility for any witness tampering. Another concern was that Elmore was the only person who could counter or confirm Brophy's account of what the two had discussed.

The circuit court conducted an evidentiary hearing. Brophy testified that she and defendant had a relationship of over a year's duration, which consisted largely of telephone conversations over religious matters. Brophy stated she believed that defendant loved his wife, but that defendant told her his wife had terminal cancer and would be dead by Christmas 2006, and asked her to wait for him. Brophy, however, testified that she and defendant were mere friends, that she had a boyfriend, and that she was surprised that defendant was interested in a more serious relationship with her. Brophy confirmed that defendant had called her from the Upper Peninsula shortly before his wife's death. In a subsequent call after the wife's death, defendant left a message on Brophy's answering machine informing her of the fatality. It was only after she returned the call that she learned the death was not from natural causes.

Brophy testified that defendant advised her to expect a call from his lawyer. When Elmore eventually called, he advised Brophy not to talk with defendant or anyone else, including the police, on the ground that she could face possible incarceration or loss of her child. However, Brophy stated she did not take the call seriously, and thereafter returned to her normal activities, although she was aware that defendant was being investigated for homicide at the time. Brophy testified that Elmore never instructed her to lie, or otherwise told her what to say.

An FBI agent testified that Elmore described Brophy as an unimportant witness, denied making the statements Brophy attributed to him, and indicated that he had called Brophy because defendant had asked him to.

The circuit court ruled as follows:

Now, it is clear that there is a real question of fact that the contents of the phone call from Mr. Elmore left . . . Miss Brophy deeply concerned. She has spoken of it in many, many terms, scary, and . . . has blown off some of the concern. And that concern could well affect her testimony as a witness.

The question then is whether . . . defendant[’s] . . . prompting [of] an eight-minute phone call from the attorney to a prospective witness so conflicts the attorney with his client that disqualification of the attorney is required by the Court. . . . [T]his Court would find that Mr. Elmore is a species of . . . necessary witness, one who may be necessary but unavailable, but that the necessity is so attenuated under these facts that the hardship provision would preclude this Court from removing defendant’s attorney . . . of choice.

The Court is mindful of the presumption in favor of the defendant’s right to . . . an attorney of his own choosing, but these are serious allegations. And are the allegations then so devastating that the conflict makes it impossible for Mr. Elmore to continue as [defendant’s] attorney?

Sources other than Miss Brophy have testified to her profound concerns as a result of the phone call. And although it may be disputed, the . . . conflicts do not go away. This is not focused in any way on whatever might be prejudicial to the prosecution. The Court concludes that the defendant can’t go forward without dwelling on the call and arguing the content. And the ripple effect from . . . that makes it impossible for him to continue.

Defendant sought leave to appeal that decision to this Court, but this Court denied the application. *People v Richardson*, unpublished order of the Court of Appeals, entered May 4, 2007 (Docket No. 277547). Defendant then proceeded to the Supreme Court, which, in lieu of granting leave, remanded the case to this Court “for expedited consideration as on leave granted.” \_\_\_ Mich \_\_\_; 732 NW2d 113 (2007).

## II

This Court reviews a trial court’s decision affecting a defendant’s right to the attorney of choice for an abuse of discretion. *People v Akins*, 259 Mich App 545, 556; 675 NW2d 863 (2003). An abuse of discretion occurs where a court reaches a result falling outside a principled range of outcomes. See *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

The Sixth Amendment of the United States Constitution guarantees that “[i]n all criminal prosecutions, the accused shall enjoy the right to . . . the assistance of counsel for his defense.”<sup>2</sup> The United States Supreme Court has held that “an element of this right is the right of a defendant who does not require appointed counsel to choose who will represent him.” *United States v Gonzalez-Lopez*, \_\_\_ US \_\_\_; 126 S Ct 2557, 2561; 165 L Ed 2d 409 (2006). This right is of such fundamental importance that erroneous denial of it is a structural error requiring reversal. 126 S Ct at 2564-2565.

---

<sup>2</sup> See also Const 1963, art 1, § 20.

Yet, this right is not absolute. See *id.* at 2565. An attorney has an ethical duty to refrain from undertaking a representation that presents conflicts with that attorney's own interests. See MRPC 1.7(b). However, where a criminal defendant offers to waive the right of conflict-free representation, the court should honor that waiver in the absence of compelling circumstances. *People v Crawford*, 147 Mich App 244, 250; 383 NW2d 172 (1985). But a defendant may not ultimately "demand that a court honor his waiver of conflict-free representation," because a trial court has wide latitude to balance "the right to counsel of choice against the needs of fairness and against the demands of its calendar." *Gonzalez-Lopez, supra* at 2565-2566. Moreover, the court has an independent interest in ensuring that trials are conducted within the legal profession's ethical standards and that legal proceedings appear fair to all observing them. *Id.* at 2566.

The circuit court held that "defendant can't go forward without dwelling on the call and arguing the content. And the ripple effect from . . . that makes it impossible for him to continue," apparently thinking that defendant and Elmore would both, personally, want to deny responsibility for the call, or that anything in it should have caused Brophy any distress. Further, the court did not engage in a colloquy with defendant to determine if he wished to waive the conflict, apparently concluding that the conflict was so great that it could not be waived. We conclude that the circuit court erred in both in finding that there is necessarily a conflict and that it is insurmountable.

Brophy's testimony regarding the call is inconsistent with the prosecutor's representations. Brophy maintained that Elmore did not threaten her and never told her to lie or say anything untruthful. She was not intimidated by the call, and was upset only that she might be dragged into the case. She asked whether she could talk to defendant, and Elmore informed her that she should not talk to defendant, and probably shouldn't talk to anyone, including the police. There was also evidence that Brophy's boyfriend, Ron Boling, contributed significantly to her anxiety over the situation.

Plaintiff suggests that, if Elmore indeed made the call, either on his own initiative or at defendant's behest, and in that call raised the specter of prison and loss of parental rights, he was doing something pernicious, such that he would want to be protected from revelation of those facts. The circuit court apparently agreed. However, these assumptions rest upon the prosecutor's characterization of the call. A far more benign view of the call is also supported by the evidence. For plaintiff and the circuit court to presume that both defendant and his attorney of choice would wish to deny being the initiator behind that call was to presume too much. Neither may feel any such need. And neither may feel much need to deny that counsel advised Brophy about the possible serious penalties a person suspected of homicide may face. Further, defendant may view any such conflict as minor when weighed against Elmore's continued representation.

For these reasons, the circuit court erred in concluding that a serious conflict between defendant's and Elmore's interests required that Elmore be removed from the case.

### III

MRPC 3.7(a) provides:

A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:

- (1) the testimony relates to an uncontested issue;
- (2) the testimony relates to the nature and value of legal services rendered in the case; or
- (3) disqualification of the lawyer would work substantial hardship on the client.

The circuit court stated that, even though Elmore might be a necessary witness, the “necessity is so attenuated” that that reason for removal was outweighed by the hardship defendant would suffer, thus invoking the exception set forth in subrule (3). However, plaintiff argues that disqualification was necessary because Elmore is a necessary defense witness, thus urging that theory as an alternative basis for affirmance. We agree with the circuit court that the defense’s need for Elmore to testify is minimal, and is readily overcome by the hardship exception set forth in subrule (3).

While the defense might have an incentive to have Elmore testify either to deny that the conversation with Brophy contained certain elements, or to confirm that it did while presenting wholly innocent motivations behind it, that incentive is minimal in light of Brophy’s own testimony, which adequately protects defendant’s interests, and the innocent explanations that may be argued by defense counsel, with or without supporting testimony from defendant or any other witness.

For these reasons, the circuit court’s holding that, to the extent that Elmore may be a necessary defense witness, he should not be disqualified for that reason because doing so would work too great a hardship on defendant, did not lie outside a principled range of outcomes. See *Babcock, supra*, 469 Mich at 269. We therefore must reject plaintiff’s alternative theory for affirmance.

Reversed and remanded for reinstatement of attorney Elmore as defendant’s counsel of choice. We do not retain jurisdiction.

/s/ David H. Sawyer  
/s/ Helene N. White  
/s/ Michael J. Talbot