

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

UNPUBLISHED  
July 18, 2013

v

MELISSA DZIERWA,

Defendant-Appellant.

No. 314462  
Livingston Circuit Court  
LC No. 12-021045-AR

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PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

v

RONDA ROSZAK,

Defendant-Appellant.

No. 314468  
Livingston Circuit Court  
LC No. 12-021046-AR

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Before: SAWYER, P.J., and METER and DONOFRIO, JJ.

PER CURIAM.

Defendants appeal by leave granted the circuit court's orders denying their applications for leave to appeal the district court's order granting the prosecutor's motion to disqualify their defense attorney from representing both defendants. We affirm.

The constitutional right to counsel encompasses the right of a defendant to choose his own retained counsel. US Const, Am VI; US Const, Am XIV; Const 1963, art 1, §§ 13 and 20; *United States v Gonzalez-Lopez*, 548 US 140, 144; 126 S Ct 2557; 165 L Ed 2d 409 (2006); *People v Aceval*, 282 Mich App 379, 386; 764 NW2d 285 (2009). An erroneous deprivation of a defendant's right to retained counsel of his choice is a structural error requiring reversal. *Gonzalez-Lopez*, 548 US 148-149. However, the right is not absolute, and a court must balance the defendant's right to counsel of choice against the public's interest in the prompt and efficient administration of justice. *Aceval*, 282 Mich App at 386-387.

It is well-established that the constitutional right to counsel also encompasses the right to

effective assistance of counsel. *Strickland v Washington*, 466 US 668, 686; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Joint representation or multiple representations of multiple defendants by a single attorney “is not per se violative of constitutional guarantees of effective assistance of counsel.” *Holloway v Arkansas*, 435 US 475, 482; 98 S Ct 1173; 55 L Ed 2d 426 (1978). However, a conflict of interest may arise if multiple criminal defendants are represented by a single attorney. See *id.* at 482-483. “Joint representation of conflicting interests is suspect because of what it tends to prevent the attorney from doing.” *Id.* at 489-490. “[P]rejudice is presumed when counsel is burdened by an actual conflict of interest. In those circumstances, counsel breaches the duty of loyalty, perhaps the most basic of counsel’s duties. Moreover, it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests.” *Strickland*, 466 US at 692.

In *Wheat v United States*, 486 US 153, 161-162; 108 S Ct 1692; 100 L Ed 2d 140 (1988), the United States Supreme Court noted the dilemma faced by trial courts:

[T]rial courts confronted with multiple representations face the prospect of being ‘whipsawed’ by assertions of error no matter which way they rule. If a district court agrees to the multiple representation, and the advocacy of counsel is thereafter impaired as a result, the defendant may well claim that he did not receive effective assistance. On the other hand, a district court’s refusal to accede to the multiple representation may result in a challenge [that the defendant was denied counsel of choice]. Nor does a waiver by the defendant necessarily solve the problem, for we note, without passing judgment on, the apparent willingness of Courts of Appeals to entertain ineffective-assistance claims from defendants who have specifically waived the right to conflict-free counsel. [Citations omitted.]

In Michigan, pursuant to court rule, criminal codefendants may be represented by the same retained attorney. MCR 6.005(F); *People v Portillio*, 241 Mich App 540; 616 NW2d 707 (2000). However, although MCR 6.005(F) allows multiple representation, it also places restrictions on the ability of codefendants to retain the same counsel. It provides as follows:

Whenever two or more defendants who have been jointly charged or whose cases have been joined are represented by the same retained lawyer or lawyers associated in the practice of law, the court must inquire into the potential for a conflict of interest that might jeopardize the right of each defendant to the undivided loyalty of the lawyer. The court may not permit the joint representation unless:

(1) the lawyer or lawyers state on the record the reasons for believing that joint representation in all probability will not cause a conflict of interests;

(2) the defendants state on the record after the court’s inquiry and the lawyer’s statement, that they desire to proceed with the same lawyer; and

(3) the court finds on the record that joint representation in all probability will not cause a conflict of interest and states its reasons for the finding.

In this case, the court inquired into the possibility of a conflict of interest in the defense attorney's representation of both defendants. The defense attorney stated on the record that he did not believe there was a conflict of interest because his clients' defenses were identical and there was no "finger pointing." He also stated that he had "thoroughly discussed the matter with both of them", and both stated on the record that they did not see a problem with the same attorney representing both of them; they agreed to his representation. Therefore, the requirements of subsections (1) and (2) are satisfied.

As for subsection (3), the trial court indicated that it was concerned that while there "may be no conflict at this time, but in the future . . . if there is an offer for one to testify against another that would definitely pose a conflict and [defense counsel] would have to remove [himself] from both cases in my understanding."

Defendants argue that *Portillo* shows that there must be an actual conflict of interest in order for the trial court to prohibit joint representation. Defendants assert that there was not an actual conflict of interest because the prosecution had not yet made a plea offer to anyone. In *Portillo*, the defendant argued in part that he was denied effective assistance of counsel because he had joint representation with a codefendant. *Portillo*, 241 Mich App at 543. However, this Court concluded that the trial court had complied with the requirements of MCR 6.005(F). The Court additionally concluded that the defendant had "agreed to the joint representation," and that "the record does not factually support defendant's claim that an actual conflict of interest adversely affected his lawyer's performance." *Id.* at 544.

*Portillo* is factually distinguishable. First, the defendant in the case was appealing following conviction. *Id.* at 541. Second, because the language employed by the Court indicates that the defendant had argued that an actual conflict existed (likely because the appeal followed conviction), the Court's response should be understood as addressing the specific argument raised. In other words, the Court was not making a general statement that an actual conflict must be found in all cases. MCR 6.005(F)(3) clearly directs that joint representation may be refused if there is a "probability" of a conflict of interest.

Further, in *Wheat*, the United States Supreme Court held that "the district court must be allowed substantial latitude in refusing waivers of conflicts of interest not only in those rare cases where an actual conflict may be demonstrated before trial, but in the more common cases where a *potential for conflict* exists which may or may not burgeon into an actual conflict as the trial progresses." *Wheat*, 486 US at 163 (emphasis added). The Court explained that although a district court "must recognize a presumption in favor of [a defendant's] counsel of choice . . . that presumption may be overcome not only by a demonstration of actual conflict but by a showing of serious potential for conflict." *Id.* at 164.

Defendants argue that there is no potential for a conflict of interest because both have already determined that they are not going to accept a plea offer. In light of the prosecutor's assertion that the prosecution intends to make a plea offer, the potential for a serious conflict of interest exists despite defendants' representations of the unity of the defense posture. Certainly the possibility exists that one of them might have a change of heart.

Defendants also assert that the waiver requirements in MRPC 1.7 have been satisfied. In Michigan, MRPC 1.7 provides in part:

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risk involved.

The requirements of MRPC 1.7(b) mirror those of MCR 6.005(F)(1) and (2), and, as noted above, the requirements of the latter were satisfied. What is at issue, however, is MCR 6.005(F)(3), which does not have a corresponding section in MRPC 1.7(b).

Defendants also cite to the following comment from MRPC 1.7: "Where the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question. *Such an objection should be viewed with caution, however, for it can be misused as a technique of harassment.*" (Emphasis added.) Defendants rightly indicate that such gamesmanship is a concern. However, there is nothing of record that indicates that the court did not view the matter with caution.

In sum, the trial court, in its discretion, found that the potential conflict was sufficient to mandate that defendants obtain separate counsel. The district court's decision was not outside the range of principled decisions and was, therefore, not an abuse of discretion.

Affirmed.

/s/ David H. Sawyer  
/s/ Patrick M. Meter  
/s/ Pat M. Donofrio