IN THE SUPREME COURT OF THE STATE OF FLORIDA

LARRY THOMAS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

_____/

5th DCA Case No. 97-1691

Supreme Court Case No. 95,126

ORIGINAL

ON DISCRETIONARY REVIEW OF THE
DISTRICT COURT OF APPEAL,
FIFTH DISTRICT

MERITS BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

OTHER AUTHORITIES:

CERTIFICATE OF FONT

Respondent certifies that this brief was typed in 12 point Courier New, a font that is not proportionately spaced.

STATEMENT OF THE CASE AND FACTS

Petitioner, Larry Thomas (Thomas), was charged by an amended information with possession of a firearm by a violent career criminal; armed burglary of a dwelling; attempted robbery with a firearm; and two counts of robbery with a firearm. (R 11-14, Vol.1). The Office of the Public Defender was appointed to the case on January 30, 1997. (R 21, Vol.1). On March 4, 1997, the trial court entered an order granting the public defender's request to withdraw from the case. Special public defender James Sweeting (Sweeting) was appointed to the case. (R 32, Vol.1).

On March 10, 1997, Sweeting filed a Motion to Compel the Disclosure of All Evidence Favorable to the Defendant; a Demand for Discovery; a Demand for Disclosure of Criminal Records; and a Notice of Appearance of Counsel, Request for Copy of Charge, Waiver of Personal Appearance at Arraignment and Written Plea of Not Guilty. (R 33-39, Vol.1). Sweeting received the State's witness list which included the name of Jodie Molnar. (R 40-43, Vol.1).

On March 28, 1997, Sweeting filed a Motion for Leave to Bill at an Hourly Rate Pursuant to F.S. 925.036(1). (R 55, Vol.1).[1] Sweeting also filed two Applications for Issuance of Deposition Subpoenas. (R 57-59, Vol.1). On April 15, 1997, Sweeting filed a Motion to Pay Costs as to Marvin Blackmon, Sr., Special Process Server. (R 62-63, Vol.1). On April 18, 1997, Sweeting filed the defense's witness list and a Motion for Statement of Particulars.

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[1]This motion was later denied by the court. (R 69, Vol.1).

(R 71-75, Vol.1). Sweeting also appeared on behalf of Thomas for docket sounding on May 7, 1997, and May 9, 1997. (R 80-83, Vol.1). On May 19, 1997, trial was set for May 27, 1997. (R 89, Vol.1).

On May 27, 1997, the day of trial, counsel for the defense stated he had several matters to discuss with the court before selecting a jury. Sweeting first noted his concern that Thomas was not dressed out. Secondly, Sweeting noted that Thomas did not wish to sever the charge of possession of a firearm by a convicted felon. (SR 7, Vol.6). Thirdly, Sweeting advised the court that two of the victims, one being Jodie Molnar, did not show up for their depositions the previous week. (SR 8, Vol.6). As a final point, Sweeting pointed out some double jeopardy issues he believed existed. (SR 8-9, Vol.6). After a discussion was had regarding Thomas' desire to not have the case continued, and to go forward with the trial on all charges, Sweeting informed the court he had prepared a Motion to Withdraw.

In his written motion to withdraw, filed in open court, Sweeting alleged he "... has a close and intimate relationship" with the mother of one of the victims, Jodie Molnar. Ms. Molnar's mother had been previously employed by Sweeting's law firm. (R 112, Vol.1). After her separation from the firm, the Molnar family retained Sweeting's law firm to represent them in a lawsuit in which they were the defendants. In the written motion, Sweeting alleged that, as a result of his contacts and relationship with the family, he believed his loyalty to Thomas was impaired. (R 112-115, Vol.1).

During argument to the court on the motion, Sweeting again stated that one of the victims, Jodie Molnar, was the daughter of a former secretary to his law firm. Sweeting advised the court that Ms. Molnar's mother had separated from the firm in approximately 1995. Sweeting also mentioned the construction case involving Ms. Molnar's father's law firm which his firm had handled, but which had since been resolved. Sweeting did not reassert his allegation that he was in possession of any confidential information concerning the victim and/or her family which would impair his ability to represent Thomas, or that he could not properly cross-examine the victim. Sweeting told the court he wanted Thomas to be aware of the information and did not "want to have to visit these issues in the future." (SR 8-11. Vol.6). The trial court found that no conflict existed and denied Sweeting's motion to withdraw. (SR 11-12, Vol.6).

A jury trial was held before the Honorable O.H. Eaton, Jr. (T 1-444, Vols. 3-5). Sweeting's cross-examination of both Cassandra Gardner and Jodie Molnar was almost identical, as was their testimony. (T 262-274, 274-282, Vol.4). Thomas did not testify in his own defense. (T 334, Vol.4). After hearing all the evidence, the jury found Thomas guilty as charged. (R 281-286, Vol.2; T 440-442, Vol.5).

The trial court sentenced Thomas as an habitual offender to concurrent terms totaling 50 years imprisonment, including a 15-year minimum mandatory term for possession of a firearm by a violent career criminal and three-year minimum mandatory terms for

the remaining counts involving possession of a firearm. (R 330-339, 376-377, Vol.2).

Thomas appealed his judgment and sentence to the Fifth District Court of Appeal. The district court found that the trial court had not abused its discretion in denying counsel's motion to withdraw since the conflict alleged did not involve representation of clients or former clients with competing interests. Instead, the conflict arose from a personal relationship not shown to involve substantial emotional ties. The district court found that prejudice was not presumed in such circumstances and that Thomas had failed to demonstrated any prejudice which would establish reversible error. Thomas v. State, 725 So. 2d 1171, 1173 (Fla. 5th DCA 1998). Thomas filed a motion for rehearing or rehearing *en banc*. The district court denied the motion.

This Court accepted jurisdiction on June 8, 1999. This appeal follows.

SUMMARY OF ARGUMENT

Where a potential conflict of interest arises from a personal relationship rather than from a professional one, the trial court may properly determine whether an actual conflict exists requiring appointment of new defense counsel. Only where the defense counsel moves to withdraw from representation of a client based upon a conflict due to adverse or hostile interests between two clients, and an actual conflict is shown, must a trial court grant separate representation.

No conflict of interest was demonstrated in this case. Defense counsel's relationship with the parents of one of the victims did not create a conflict of interest. Since any potential conflict would have arisen from a personal relationship not shown to involve substantial emotional ties, prejudice is not presumed, but must be demonstrated by the defendant. Thomas has failed to demonstrate he has been prejudiced in any way. The appellate court properly determined reversible error had not occurred.

ARGUMENT

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING DEFENSE COUNSEL'S ELEVENTH HOUR MOTION TO WITHDRAW; PETITIONER WAS NOT DENIED THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

Petitioner, Larry Thomas (Thomas), contends that the Fifth District Court of Appeal (DCA) improperly affirmed the trial court's denial of defense counsel's motion to withdraw. Defense counsel, James Sweeting (Sweeting), moved to withdraw from Thomas' case on the day of trial. He based his motion upon a prior working relationship with one of the victims' mothers, and the fact that his law firm had represented the same victim's father's law firm in a construction case. The trial court determined that no actual conflict existed and denied the motion to withdraw. Respondents assert that the Fifth DCA properly affirmed the trial court's ruling since no showing of actual conflict or prejudice was made.

Absent a clear abuse of discretion, a trial court's denial of a motion to withdraw by counsel should not be disturbed. Weems v. State, 645 So. 2d 1098 (Fla. 4th DCA), rev. denied, 654 So. 2d 920 (Fla. 1995); Sanborn v. State, 474 So. 2d 309 (Fla. 3d DCA 1985). Abuse of discretion occurs when a trial court's ruling is arbitrary, fanciful, or unreasonable. Huff v. State, 569 So. 2d 1247 (Fla. 1990). A trial court's ruling on a discretionary matter will be affirmed on appeal unless no reasonable person would agree with the trial court. Hawk v. State, 718 So. 2d 159 (Fla. 1998).

Rule 4-1.7 of the Rules Regulating the Florida Bar is the general rule dealing with conflicts of interest. Subdivision (b) of this rule speaks to situations where the conflict arises in a context outside of the professional relationship,[2] and states:

> **(b) Duty to Avoid Limitation of Independent Professional Judgment.** A lawyer shall not represent a client if the lawyer's exercise of independent professional judgment in 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 interest...

A *possible* conflict does not, in and of itself, preclude representation. "The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client." R. Regulating Fla. Bar 4-1.7, comment. The comment section of 4-1.7 further states that:

> Conflicts of interest in contexts other than litigation sometimes may be difficult to assess. Relevant factors in determining whether there is potential for adverse effect

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[2]Subsection (a) of Rule 4-1.7 addresses situations where an attorney is faced with representing adverse interests of clients. That subsection reads:

> **(a) Representing Adverse Interests.** A lawyer shall not represent a client if the representation of that client will be directly adverse to the interests of another client...

> include the duration and intimacy of the lawyers' relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that actual conflict will arise, and the likely prejudice to the client from the conflict if it does arise. The question is often one of proximity and degree.

In order to show a violation of the right to conflict-free counsel a defendant "must establish that an actual conflict of interest adversely affected his lawyer's performance." Bouie v. State, 559 So. 2d 1113, 1115 (Fla. 1990), quoting Cuyler v. Sullivan, 446 U.S. 335, 350 (1980). To mandate withdrawal, the prejudice caused by continued representation must be more than *de minimis*. The party seeking withdrawal bears the burden of demonstrating that substantial prejudice will result if withdrawal is not allowed. Schwab v. State, 636 So. 2d 3, 5-6, (Fla. 1994); Ray v. Stuckey, 491 So. 2d 1211 (Fla. 1st DCA 1986); Cazares v. Church of Scientology, 429 So. 2d 348 (Fla. 5th DCA), review denied, 438 So. 2d 831 (Fla. 1983).

Thomas cannot meet this burden. Sweeting stated Ms. Molnar's mother had been employed for slightly more than two years with his law firm. Her employment had ended approximately two years prior to trial. After that time, Sweeting's law firm represented Ms. Molnar's father's law firm in a construction case which had concluded prior to trial. At no time was Ms. Molnar a client of Sweeting or his law firm - her father's business was the client. Therefore, Sweeting never had a professional relationship with

Jodie Molnar. In fact, Sweeting never even alleged he had personally met Ms. Molnar. Clearly, if any relationship existed between Sweeting and Ms. Molnar, it was of a personal nature. The relationship was not intimate, as prescribed by the comment to Rule 4-1.7.

Similarly, the duration of Sweeting's relationship with Ms. Molnar's parents was limited and had ended by the time Sweeting was appointed in Thomas' case. Ms. Molnar's mother had separated from Sweeting's law firm approximately two years prior to Thomas' trial. Sweeting's representation of Ms. Molnar's father's law firm began after Jodie's mother left the law firm and concluded before this case, suggesting protracted litigation was not involved. Since any relationship with Ms. Molnar's parents was of limited duration, any relationship with Ms. Molnar herself would have been correspondingly limited.

It is also important to note that Sweeting did not allege any conflict of interest or move to withdraw from the case until the day of trial, more than two months after he was appointed to the case. Sweeting was appointed as a special public defender in Thomas' case on March 4, 1997. (R 32, Vol.1). Sweeting received the witness list with Jodie Molnar's name on it approximately two weeks later. (R 40-43, Vol.1). He continued to represent Thomas and did not move to withdraw until May 27, 1997. As noted by the Fifth DCA, the motion to withdraw was filed long after Sweeting could have and should have asserted a conflict, if one truly existed. Thomas, 725 So. 2d 1173. Even when Sweeting did deal

with the alleged conflict of interest, it was only after addressing several other substantive matters with the court in preparation for trial. (SR 1-11, Vol.6).

As argued to the trial court, the conflict consisted solely of Sweeting's employment relationship with the victim's mother, at a time prior to the commission of the crime and trial, and his firm's representation of the victim's father's law firm in a completed construction case. Thomas, 725 So. 2d 1173. Sweeting never informed the court that he could not perform as a zealous advocate for Thomas. Since defense attorneys have the obligation to advise the court upon discovering a conflict of interest,[3] the filing of the motion to withdraw on the eve of trial made it incumbent upon the trial court to determine if an actual conflict existed.

The interests involved in Molnar's father's construction case were neither hostile nor adverse to Thomas' criminal case. The likelihood of any actual conflict arising between the daughter of a former construction client and Thomas was minimal at best. The same is true of the likelihood of any actual conflict arising between the daughter of a former secretary and Thomas. Additionally, even if there had been some conflict, it was not material as required by the Rules Regulating the Florida Bar. As the Fifth DCA found, any relationship between Ms. Molnar and Sweeting was attenuated. Thomas, 725 So. 2d at 1173. Also, there was no indication that any personal relationship between Sweeting

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3Holloway v. Arkansas, 435 U.S. 475, 486 (1978).

and the Molnar family was continuing or existed at the time of trial. When analyzing Sweeting's relationship to Ms. Molnar according the criteria set forth in the comment section of Rule 4-1.7, it becomes clear that Sweeting's relationship would not materially affect his representation of Thomas.

Moreover, even assuming there was some degree of conflict, there was no prejudice to Thomas. Thomas only alleged actual conflict for the first time in his brief to this Court. He is, however, mistaken in this claim. The testimony of Jodie Molnar was essentially the same as that of Cassandra Gardner. Ms. Molnar and Cassandra were together when the masked black man entered the bedroom where they were sleeping. Both testified the robber came into the room with a gun and ordered them to get down on the floor. Both Gardner and Molnar described the person in a similar fashion. Sweeting's cross-examination of both Cassandra Gardner and Jodie Molnar was almost identical. (T 262-274, 274-282, Vol.4). The Fifth DCA found that Sweeting's cross-examination of these victims was equally vigorous. Thomas, 725 So. 2d at 1173. Sweeting did not have an actual conflict with Ms. Molnar which affected his representation of Thomas.

Thomas alleges that one of the most prejudicial acts Sweeting committed was scheduling a hearing on motions, and then failing to appear. (Petitioner's Merits Brief, p.13). There is, however, nothing in the record to demonstrate the Sweeting failed to appear at any scheduled hearings. Likewise, Thomas has not demonstrated that the court would have likely granted a motion to suppress the

identification of his clothing, or that, even if the identification of the shirt was suppressed, the jury would not have convicted him on the additional evidence presented.

Thomas also states that "[o]nly a counsel whose loyalty to his client had been compromised would have advised his client not to testify in his own behalf and thereby give the jury his reasonable explanation for the presence of [his co-defendant] and the stolen property being in his car on the night of the crime." (Petitioner's Merits brief p.14). This assumption is invalid. During trial, Thomas informed the judge that, after discussing the matter with his attorney, it was Thomas' own choice not to testify. (T 334, Vol.4). It would be reasonable and prudent for an attorney to advise his client who qualifies as an habitual violent felony offender not to take the stand in order to prevent the defendant's criminal history from being related to the jury. It is just as reasonable to believe such a defendant would heed their attorney's advice. Because Thomas would have had to reveal his expansive criminal history to the jury if he had testified, and because he fails to state what his "reasonable explanation" would have been to overcome all the evidence presented against him, he has failed to demonstrate he was prejudiced by Sweeting's representation.

In each of the cases cited by Thomas where it was determined that a motion to withdraw should have been granted, there was first a determination that an actual conflict existed. It is only after an actual conflict has been demonstrated that the prejudicial denial of effective assistance of counsel is presumed. Cuyler v.

Sullivan, 446 U.S. 335 (1980). The cases where the conflict of interest arose in the context of counsel's professional representation and obligations (as regulated by Rule 4-1.7(a)) are the cases where the need to show prejudice has been eliminated. Where the relationship is of a personal nature, governed by Rule 4-1.7(b) of the Rules Regulating the Florida Bar, prejudice must be shown in order to establish reversible error.

In Guzman v. State, 644 So. 2d 996 (Fla. 1994), a case cited by Thomas, this Court found that an assistant public defender must be permitted to withdraw when he certifies that there is a conflict between two clients of the Public Defender's Office. This Court stated it could "think of few instances where a conflict is more prejudicial" than the one in Guzman, where one client is being called to testify against another client. Guzman, 644 So. 2d at 999.

The instant case did not involve a situation where one client was being called to testify against another client. Here, the alleged conflict arose from a personal relationship. Moreover, the personal relationship and/or representation was of the parents of the witness - not the witness herself. As the Fifth DCA found, not only did any conflict in Thomas' case not involve the representation of clients or former clients, any relationship that existed did not involve substantial emotional ties with witnesses. Thomas v. State, 725 So. 2d 1171, 1173 (Fla. 5th DCA 1998). In fact, Sweeting never alleged he met the witness. Guzman does not apply in situations where the potential conflict is of a personal

nature. Pena v. State, 706 So. 2d 1378 (Fla. 4th DCA 1998), rev. denied, 725 So. 2d 1109 (Fla. 1999).

In Williams v. State, 622 So. 2d 490 (Fla. 4th DCA 1993), another case cited by Thomas, defense counsel moved to withdraw from the case asserting conflict because he would have to cross-examine an investigator from his office. Defense counsel argued he owed the investigator a duty of loyalty and would therefore be precluded from effectively cross-examining him. The trial court denied counsel's motion to withdraw. During trial, Williams' defense counsel did not cross-examine the investigator at all despite the fact he told the court he had several grounds upon which to impeach the investigator's testimony. Williams, 622 So. 2d at 491. The Fourth DCA found an actual conflict existed and ruled that it was error for the trial court to deny counsel's motion to withdraw where counsel asserted he could not adequately represent his client because of counsel's loyalty to his investigator, *and* the denial of the motion to withdraw resulted in counsel's lack of a cross-examination prejudicing the client. Id. at 491-492.

Thomas' case is also distinguishable from Williams. In Williams, defense counsel was placed in a position of having to cross-examine one of his own investigators. Counsel's loyalty to his investigator in Williams ran so deep that, to the detriment of his client, the attorney did not cross-examine the investigator; the court made a determination that this created actual conflict. Unlike the relationship involved in Williams, the instant case

consisted of a personal relationship which was shown *not to involve substantial emotional ties*. Thomas, 725 So. 2d at 1173. Sweeting did cross-examine Ms. Molnar and did so as vigorously as he cross-examined Cassandra Gardner. Id. Sweeting did not have a personal relationship with Jodie Molnar, but rather, with her family. Additionally, Sweeting did not have a past working relationship with Ms. Molnar, nor would he have to work with her in the future. Furthermore, unlike the defense counsel Williams, Sweeting never informed the trial court that he was unable to properly cross-examine Ms. Molnar. Thomas failed to demonstrate that even any perceived conflict existed between Sweeting and Jodie Molnar, or that he was prejudiced in any way.

Moreover, the analysis of the Fourth DCA in Williams belies Thomas' main argument - that the trial court should have automatically granted Sweeting's motion to withdraw once Sweeting alleged a conflict. In reaching its decision, the court did not state that once Williams' defense counsel alleged a conflict the trial court should have automatically granted it. The court first analyzed the type of relationship that existed between the attorney and the witness. The court then found that, because of the nature of the relationship between defense counsel and the witness, an actual conflict existed. Williams, 622 So. 2d at 492. It was the fact that actual conflict existed that required reversal, not the fact that it was alleged. The trial court in Thomas' case properly engaged in the same type of analysis as the Fourth DCA did in Williams. The court in Thomas merely came up with a different

result - that there was no actual conflict based upon the type of relationship that existed between Sweeting and Ms. Molnar.

In Roberts v. State, 670 So. 2d 1042, 1044 (Fla. 4th DCA 1996), the court held that, where defense counsel had been placed in a position of actual conflict with his client on a pending matter, it was error to deny counsel's request to withdraw from the case. At sentencing, the Roberts alleged that his counsel had misled or coerced him into entering a guilty plea and that he now wished to withdraw his plea. At that point, defense counsel was then placed in a position of having to testify against his own client. An actual conflict was found to exist and prejudice was presumed.

Thomas' case, however, does not involve an actual conflict. Sweeting's alleged conflict stems from his personal relationship with Jodie Molnar's parents. The fact that there was an actual conflict arising from professional obligations distinguishes Roberts from the instant case.

Similarly, in Hope v. State, 654 So. 2d 639 (Fla. 4th DCA 1995), the court found that an actual conflict existed. Hope's defense counsel asserted a conflict on the basis that his office had previously represented the victim in an unrelated case. The court found that, under these circumstances, the interests of the victim and Hope were directly adverse. In the instant case, however, Sweeting had never represented Jodie Molnar. Since the victim's interests were not directly adverse to Thomas', no actual conflict existed. Sweeting had no prior professional relationship

with the victim, only her parents, and the relationship was not continuing at the time Sweeting's representation. Any alleged conflict did not rise to the level of directly or materially limiting Sweeting's representation of Thomas.

In Foster v. State, 387 So. 2d 344 (Fla. 1980), cert. denied, 464 U.S. 1052 (1984), this Court held where an actual conflict of interest or prejudice to the defendant is shown, it is reversible error to allow the defendant's representation by the conflicted attorney to continue. Foster's attorney was also representing one of the State's key witnesses. The professional obligations defense counsel owed to both of his clients created an actual conflict. The alleged conflict in Thomas' case is of a personal, rather than professional nature, so no actual conflict existed. For this reason, Thomas' case is distinguishable from Foster.

Volk v. State, 436 So. 2d 1064 (Fla. 5th DCA 1983), and Avera v. State, 436 So. 2d 1115 (Fla. 5th DCA 1983), both hold that where an actual conflict is shown, prejudice is presumed. In Volk, the court appointed another public defender from the same circuit to replace the attorney withdrawing due to a conflict of interest. Since both lawyers were from the same "law firm," the conflict which affected the withdrawing counsel applied to the newly appointed defense counsel. This situation demonstrated an actual conflict. There are no facts set forth in Avera defining the conflict, but it appears as if the two attorneys involved in the case were from the same law firm. Therefore, an actual conflict existed in that case. As stated before, Thomas' case does not

involve the representation of clients or former clients and no actual conflict was ever demonstrated in Thomas' case.

In his brief, Thomas seems to imply that the Fifth DCA should not have made any ruling regarding the need to show prejudice in a conflict of interest case, because this Court, in Babb v. Edwards, 412 So. 2d 859, 860-861, n.1 (Fla. 1982), stated that it did not consider in that case whether a trial court's refusal to grant a public defender's motion to withdraw based on conflict of interest will result in the reversal of a conviction without a showing of prejudice by the defendant. (Petitioner's Merits Brief, pp.11-12). This is an improper implication. Merely because this Court did not address an issue in a case does not preclude another court from ever reaching that particular issue in a different case. Instead, it is simply a statement by the Court which informs readers that the case cannot be cited for the proposition which was not addressed. Therefore, Thomas' reliance on Babb for the proposition that the Fifth DCA overstepped its authority in determining that prejudice needs to be shown to demonstrate a conflict is flawed.

It should not be presumed that in every situation where defense counsel knows someone involved in the case (or, as in Thomas' case, defense counsel knows someone who knows someone who is involved in the case) a conflict of interest exists. When personal relationships rather than professional commitments or responsibilities are involved, it is necessary for the trial court to make a determination as to whether the relationship involves an actual conflict which could materially affect defense counsel's

representation of the client. Ex parte Bell, 511 So. 2d 519 (Ala. Crim. Ct. 1987).

In Bell, the attorneys representing the defendant moved to withdraw from the case alleging they personally knew the victim, both grew up in the church where she was very active, both attended high school where she taught, and both had family members who were closely acquainted with her. One of the attorneys even attended the victim's funeral. The motion stated that their personal ties to the victim made it "extremely difficult, if not impossible" to free themselves of the vindictive feelings toward the person responsible for the victim's death. The trial court denied both attorneys' motions to withdraw. The Alabama Criminal Appeals Court upheld the judge's ruling finding the type of alleged conflict did not warrant a presumption of prejudice. The court properly reasoned that a personal relationship between the victim and defense counsel does not create a *per se* conflict of interest. Instead, some type of prejudice must be shown where the relationship was not of a professional nature. Id. at 522.

Likewise, the Supreme Court of Illinois has determined that it is only in instances where the alleged conflict arises in counsel's professional relationships and obligations that prejudice is presumed. People v. Lewis, 430 N.E. 2d 994, 999 (Ill. 1981). The court believed that if the *per se* prejudice rule were extended to include personal relationships as well as professional obligations, there would be no way to fashion an appropriate limit to that rule. If carried to its logical conclusion, it could very well prohibit

any localized practice by a criminal defense attorney. Id. at 1000.

The reasoning of the Arkansas and Illinois courts is equally valid in Florida. The record in the instant case does not support a finding that Sweeting was constrained by divided loyalties between his client and Ms. Molnar. The evidence shows that any relationship Sweeting had was with Ms. Molnar's parents, but was not continuing at the time Sweeting represented Thomas. If this Court were to permit the disqualification of an attorney based upon such an attenuated personal relationship with no accompanying demonstration of prejudice, it would have the effect of disqualifying much of the criminal defense bar from local practice. As the defense counsel became more experienced and met more people, he or she would then would also have to be removed from more and more cases for having a personal relationship with a witness. Additionally, as noted in Lewis, the ramifications of such a rule could also be applied to prosecutors who had personal relationships with witnesses. Id.

To remove the exercise of discretion from the trial judge to determine if an actual conflict exists in all instances where conflict is alleged by defense counsel would result in a harsh and arbitrary rule. Moreover, it could serve to severely handicap appointment of adequate defense counsel. Currently, a trial court is precluded from reweighing factors considered by defense counsel in determining that there is conflict is representing two adverse defendants. See Babb, supra; Nixon v. Siegel, 626 So. 2d 1024,

1025 (Fla. 3d DCA 1993). This practice is supported by the perennial need to protect attorney/client privilege and is in keeping with the requirements of Rule 4-1.7(a). It is not, however, *carte blanche* for defense counsel to obtain removal at any time at the mere suggestion of a conflict of interest. Allowing for removal of counsel where interests are shown to be hostile and adverse does not preclude a trial court from exploring the adequacy of the basis of defense counsel's statements that a conflict exists. Holloway v. Arkansas, 435 U.S. 475, 487 (1977). While a presumption of prejudice may be proper where defense counsel is hindered by a professional conflict of interest, such a presumption is unnecessary and would be unwieldy when dealing alleged conflicts of interest of a personal nature. Where no actual and adverse conflict is presumed, the trial court must be allowed to determine if an actual conflict exists, and the likelihood of any prejudice if a conflict does arise. The decision of the Fifth District Court of Appeal should be affirmed.

CONCLUSION

Based on the arguments and authorities presented herein, Respondent respectfully prays this honorable Court affirm the decision of the Fifth District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Merits Brief of Respondent has been furnished by U.S. mail to Larry Thomas, DC#100471, Avon Park Correctional Institution, Post Office Box 1100/MB#530, Avon Park, Florida 33826-1100, this 18th of August, 1999.

Ann M. Phillips
Of Counsel

*1171 725 So.2d 1171

24 Fla. L. Weekly D66

Larry J. THOMAS, Appellant,
v.
STATE of Florida, Appellee.

No. 97-1691.

District Court of Appeal of Florida,

Fifth District.

Dec. 18, 1998.

Rehearing Denied Feb. 22, 1999.

After defense counsel's motion to withdraw was denied, defendant was convicted in the Circuit Court for Seminole County, O.H. Eaton, Jr., J., of unlawful possession of a firearm by a violent career criminal, armed burglary of a dwelling, robbery with a firearm, and attempted robbery with a firearm, and he appealed. The District Court of Appeal, W. Sharp, J., held that defendant failed to establish that he was prejudiced by appointed defense counsel's prior relationship with victim's mother and his representing victim's family in completed civil case.

Affirmed.

Antoon, J., filed a specially concurring opinion.

Dauksch, J., filed a dissenting opinion.

1. CRIMINAL LAW 1152(1)
110 ----
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1152 Conduct of Trial in General
110k1152(1) In general.

Fla.App. 5 Dist. 1998.
Absent a clear abuse of discretion, a trial court's denial of a motion to withdraw by counsel should not be disturbed.

2. CRIMINAL LAW 1166.10(3)
110 ----
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1166.5 Conduct of Trial in General
110k1166.10 Counsel for Accused
110k1166.10(3) Conflict of interest; joint representation.

Fla.App. 5 Dist. 1998.
Defendant failed to establish that he was prejudiced by appointed defense counsel's prior relationship with robbery victim's mother, who had worked for his law firm, and his representing victim's family in a completed civil case, as was required to reversed robbery and firearms convictions on basis of conflict of interest.

3. CRIMINAL LAW 1163(2)
110 ----
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1163 Presumption as to Effect of Error
110k1163(2) Conduct of trial in general.

[See headnote text below]

3. CRIMINAL LAW 1166.10(3)
110 ----
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1166.5 Conduct of Trial in General
110k1166.10 Counsel for Accused
110k1166.10(3) Conflict of interest; joint representation.

Fla.App. 5 Dist. 1998.
In circumstances of attorney's alleged conflict of interest arising from a personal relationship not shown to involve substantial emotional ties, prejudice is not presumed and the defendant must demonstrate that he has been prejudiced in some way to establish reversible error.

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Robert A. Butterworth, Attorney General, Tallahassee, and Steven J. Guardiano, Senior Assistant Attorney General, Daytona Beach, for Appellee.

W. SHARP, J.

Thomas appeals after being convicted of unlawful possession of a firearm by a violent career criminal,

armed burglary of a dwelling, three counts of robbery with a firearm and attempted robbery with a firearm. (FN1) He argues the trial court erred by denying his motion for judgment of acquittal on the charge of attempted robbery, and that remarks by a state witness that Thomas was being chased by the police when he was arrested were so prejudicial he is entitled to a new trial. We find no merit to those arguments. However, the additional ground that the trial court erred in not allowing Thomas' trial counsel to withdraw based on a conflict is troubling.

Thomas was charged with unlawful possession of a firearm by a violent career criminal, armed burglary of a dwelling, three counts of robbery with a firearm and attempted robbery with a firearm. These charges arose from a night-time break in, and robbery of a condominium occupied by the Gardner family and a family friend, Jodie Molnar. Two men, at least one wearing a mask and gloves, wakened the occupants, told them to keep their heads down on their beds and rifled through their belongings. Less than an hour later, Thomas and his co-defendant were stopped for having a stolen vehicle. The police searched their vehicle and found a ski mask, gloves, numerous weapons and possessions belonging to the victims.

On March 4, 1997, James Sweeting was appointed by the court as defense counsel for Thomas. (FN2) Sweeting filed motions for discovery and received the state's witness list which included Jodie's name. Sweeting did not move to withdraw as Thomas' counsel until more than two months later, on May 27, 1997, at the beginning of Thomas' trial.

In his written motion to withdraw, Sweeting stated that Jodie's mother had worked for his law firm and that after she left, the Molnar family had retained his law firm to represent them in a lawsuit in which they were the defendants. Sweeting alleged that as the result of his contacts and relationship with the Molnar family, his loyalty to Thomas was impaired.

At the trial, Sweeting reaffirmed to the court that he was concerned because two of the victims, including Jodie, had not appeared for their depositions scheduled for the prior week. Sweeting stated that Jodie was the daughter of a former secretary at his office. Also, he told the court that his firm had represented Jodie's family in a construction case which had since been resolved. However, Sweeting did not reassert his allegation that he was in possession of any confidential information concerning the victim and/or her family which would impair his ability to represent Thomas or that he could not properly cross-examine the victim. The trial court denied the motion. (FN3)

[1] [2] Absent a clear abuse of discretion, a trial court's denial of a motion to withdraw by counsel should not be disturbed. *Weems v. State,* 645 So.2d 1098 (Fla. 4th DCA), *rev. denied,* 654 So.2d 920 (Fla.1995); *Sanborn v.* ***1173** *State,* 474 So.2d 309 (Fla. 3d DCA 1985). Here the motion was made on the eve of trial long after Sweeting could have and should have asserted a conflict, if one truly existed. Sweeting was appointed to represent Thomas on March 4th, filed motions for discovery in March, and had received the state's witness list, but he did not move to withdraw until two months later.

As argued to the trial court, the conflict consisted solely of Sweeting's employment relationship with the victim's mother, at a time prior to the commission of the crime and trial and his firm's representation of the victim's family in a completed civil case. This is sufficiently attenuated as to make this case distinguishable from *Guzman v. State,* 644 So.2d 996 (Fla.1994) where the public defender had information that he could have given to impeach the state's chief witness, whom he had represented and his office was still representing and *Crowe v. State,* 701 So.2d 431 (Fla. 5th DCA 1997) where the public defender had asserted that she had earlier represented the victim of the crime, that hostile interests existed between the defendant and the victim, and that she was privy to confidential information told to her by the victim. Sweeting's cross-examination of the victim at trial was as vigorous as his cross-examination of another victim.

[3] The conflict in this case did not involve representation of clients or former clients with competing interests. Rather the conflict arose from a personal relationship not shown to involve substantial emotional ties. In these circumstances, prejudice is not presumed and the defendant must demonstrate that he has been prejudiced in some way to establish reversible error. *See People v. Lewis,* 88 Ill.2d 429, 58 Ill.Dec. 743, 430 N.E.2d 994 (Ill.1981), *cert. denied,* 460 U.S. 1053, 103 S.Ct. 1501, 75 L.Ed.2d 932 (1983); *Ex parte Bell,* 511 So.2d 519 (Ala.Crim.App.Ct.1987).

Thomas has failed to show any acts or omissions by Sweeting which even remotely suggest that Sweeting was ineffective. Therefore we affirm.

AFFIRMED.

ANTOON, J., concurs specially with opinion.

DAUKSCH, J., dissents with opinion.

ANTOON, J., concurring.

I concur in the result reached by Judge Sharp, but write separately to emphasize that, in filing the motion to withdraw, defense counsel never asserted that an "actual conflict of interest" resulted from his representation of Mr. Thomas.

At the pretrial conference, after raising several other issues, defense counsel addressed his motion to withdraw, stating:

> Finally, one last thing, Your Honor, to get on the record here. I've also indicated to Mr. Thomas, and I have prepared a Motion to Withdraw, the Court is aware of it, I've given a copy to everyone, that Jodie M[o]lnar, which is one of the victims in the case, as a matter of fact, one of the victims that didn't show up for the depositions last week, is, in fact, the daughter of the former secretary of our office. And we are concerned and wanted to make sure Mr. Thomas knows, before he goes forward, that there is a relationship between the mother of Jodie M[o]lnar, who is a victim in this case, and that relationship came as a result of her working with my office for about two and a quarter years. She separated from us, I believe, in '95. We have also had a case involving--a construction case involving [Ms. M[o]lnar's] father's law firm which has been resolved, it's not active at this time. I think Mr. Thomas needs to be aware of that and that that forms the basis of a motion to withdraw. We're concerned because I don't want to have to visit these issues in the future.

Nothing in either this statement or the motion to withdraw suggested that defense counsel had ever acted as the victim's attorney. Of course, defense counsel would have had an actual conflict if the interest of Mr. Thomas had been so adverse or hostile to the interest of another client that he could not represent both clients. *See Guzman v. State,* 644 So.2d 996, 997 (Fla.1994). However, the transcript of the hearing on defense counsel's motion to withdraw does not reveal any such a conflict.

***1174.** I agree with Judge Dauksch that grounds, other than an "actual conflict," may exist which may require withdrawal, but no such grounds were asserted here. *See Roberts v. State,* 670 So.2d 1042 (Fla. 4th DCA 1996). Instead, it appears to me that, by filing the motion to withdraw, defense counsel was merely disclosing to the defendant his relationship with the victim's parents in order to discharge what he considered to be his ethical duty, and to avoid the issue from arising during postconviction proceedings. Given the argument of defense counsel, the trial court's denial of the motion to withdraw was not reversible error. 97-1691

DAUKSCH, J., dissenting.

I respectfully dissent.

Appellant should be given a new trial with a new lawyer. When Mr. Sweeting, a lawyer known to me to be a good, trustworthy, aggressive and competent lawyer, says he feels the need to withdraw because of a conflict of interest in representing a client, then that declaration should be honored virtually without question. It was error for the trial judge to have refused to do so; compounded by the majority's willingness to overlook the serious sixth amendment violation.

FN1. §§ 790.235, 810.02, 812.13, 777.04(1), Fla. Stat.

FN2. Since Sweeting was appointed as a Special Public Defender, he is subject to the same "conflict" rules as govern Public Defenders.

FN3. Mr. Sweeting also emphasized he wanted his client, Thomas (who was present in the courtroom) to know those facts before he proceeded in the case. The trial judge thought his ruling was one of law and thus he did not ask for Mr. Thomas' opinion. Had he done so, that might have avoided this appeal.