UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2565

September Term, 2014

JONATHAN BLAIR COPELAND

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Arthur,
Kenney, James A., III
(Retired, Specially Assigned),

JJ.

Opinion by Eyler, Deborah S., J.

Filed: May 13, 2016

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After accepting his not guilty plea on an agreed statement of facts, the Circuit Court for Cecil County convicted Jonathan Blair Copeland, the appellant, of first-degree murder and conspiracy to commit first-degree murder.[1] The court sentenced the appellant to concurrent terms of life in prison, all but 45 years suspended.

The appellant noted this appeal, presenting one question for review:

> Must this Court dismiss the charges because the State failed to timely disclose a conflict of interest and, thus, failed to establish good cause for postponing the trial beyond the *Hicks* date?

For the following reasons, we shall affirm the judgments of the circuit court.

FACTS AND PROCEEDINGS

On October 23, 2013, Jeffrey Adam Myers was fatally shot in his driveway in Port Deposit. Myers was a heroin addict, and the appellant thought he had stolen drugs and money from him. In the days before Myers's death, witnesses heard the appellant and John Green demand that Myers return the stolen goods and threaten "consequences" if he did not comply.

Hours before Myers was shot, the appellant obtained a handgun from an acquaintance in Pennsylvania. Witnesses then observed a "loud heated" confrontation between Myers, Green, and the appellant in the driveway of Myers's house. One witness

[1] The appellant was also charged with two counts of solicitation, second-degree murder, accessory to first-degree murder, possession with intent to distribute heroin, and simple possession. On January 30, 2015, the State *nol prossed* these charges at sentencing.

saw Green shoot Myers as the appellant stood several feet away.[2] On October 24, 2013, the appellant was arrested in connection with Myers's murder. He was transported to the Cecil County Detention Center ("CCDC").

At the CCDC, the appellant shared a cell with Donald Payne. Payne had been placed in the drug court program by Cecil County Assistant State's Attorney Mary Burnell, but was being held in the CCDC for committing nine "drug court" probation violations. For most of the two years he was in drug court, and until he was sentenced on January 2, 2014, Payne was represented by Assistant Public Defender Thomas E. L. Klenk.

In November of 2013, Payne approached investigators with information that the appellant had confessed to him about a murder. Burnell, who also was assigned to prosecute the appellant's case, expressed interest in hearing what Payne had to say. On November 7, 2013, members of the Cecil County Police Department ("CCPD") interviewed Payne. No attorneys were present during his interview. In the interview, which was video recorded, Payne stated that the appellant said that he (the appellant) had instructed Green to "bust" a man over "seven logs of heroin" as the man sat in his car in his driveway. In Burnell's view, the jailhouse confession was the "cherry on top" of the State's already strong case against the appellant.

The appellant made his initial appearance in the circuit court on November 22, 2013. Klenk, unaware of Payne's cooperation in the appellant's prosecution, was

[2] Green was tried separately for his role in the murder.

assigned to defend the appellant. He entered his appearance on December 3, 2013. The court scheduled trial to commence on May 12, 2014. The *Hicks* date was May 21, 2014.[3]

Prosecutors Burnell and Steven Trostle provided Klenk with initial discovery in the appellant's case on February 6, 2014. The discovery identified 21 potential witnesses and disclosed the existence of a "confidential source." Payne was that source, but, due to concerns about his safety, Burnell and Trostle did not reveal his name at that time.

Between February and April of 2014, the State provided additional rounds of discovery to Klenk. The State revealed Payne's name for the first time on March 11, 2014, when it included, among numerous other items, a notice that Payne would be a witness and a compact disc that included the video recording of his November 7, 2013 interview with the CCPD.

On April 8, 2014, the State provided supplemental discovery to Klenk that detailed Payne's involvement as a witness.[4] At about the same time, Burnell and Trostle advised

[3] *State v. Hicks*, 285 Md. 310 (1979). In *Hicks*, the Court of Appeals discussed the requirement that criminal cases be brought to trial within 180 days after the earlier of the appearance of counsel or the first appearance by the defendant in circuit court and held that dismissal of the charges pending against a defendant is the sanction for a failure to bring the matter to trial within the 180 day time frame. *See also* Md. Rule 4-271(a). The 180th day is referred to as the "*Hicks* date."

[4] The State's April 8, 2014 supplemental discovery states:

> Donald Payne, a State's witness who has previously been identified to the Defendant, is an inmate in the DOC, D/O/B 2/17/88, and he will be called to testify at trial regarding jail-house statements made by Jonathan Copeland. Mr. Payne's statements have previously been provided to the Defendant. Mr. Payne is currently serving three consecutive 18 month jail

(Continued…)

Klenk that he would have a conflict of interest in representing the appellant after having represented Payne in drug court.

During an April 25, 2014 pretrial conference and motions hearing, Klenk moved orally to preclude Payne from testifying at trial. Klenk argued that he would have a conflict cross-examining Payne because he had represented Payne as a defendant in drug court until approximately mid-January 2014. It was during that period of representation that Payne had negotiated with the State to testify against the appellant (unknown to Klenk), and Klenk had become the appellant's lawyer in the instant case. In Klenk's view, to zealously represent the appellant in this case, defense counsel would need to "basically destroy" Payne's credibility.

When asked by the court why he had been assigned to represent the appellant, in light of his representation of an adverse witness, Klenk responded, "Because I wasn't told Mr. Payne was a witness." The court raised the concern that Klenk's conflict of interest might necessitate a postponement of the appellant's trial.

(…continued)

> sentences. The Defendant is being put on notice that the State, at the time that the witness Mr. Payne proffered information about Mr. Copeland's jail-house statements to the State, the State in return offered to advocate for Mr. Payne at any future sentencing reconsideration hearing(s). No specific terms were offered nor agreed to. The contingency to secure the State's assistance at Mr. Payne's future sentencing reconsideration hearing(s) is that Mr. Payne testify truthfully and consistently with what he proffered to the State previously. There are no other promises or inducements made by the State to this witness.

Klenk advised the court that he had entered his appearance for the appellant on December 3, 2013, and had received the "first round of discovery" from the prosecutors on February 6, 2014, which did not disclose Payne as a potential witness. According to Klenk, he did not receive actual notice that Payne was a witness until March 11, 2014[5]—approximately 60 days before trial—and then, "it was just slipped in amongst the other discovery," even though "there isn't anybody in the State's Attorney's Office who doesn't know that I'm the drug court attorney." Indeed, Payne had revealed in the first few minutes of his November 7, 2013 interview that he was being held on a drug court warrant.

Klenk conceded that he had seen "Mr. Payne's name" among the numerous potential witnesses when it was first disclosed by the State in March of 2014. He did not see a conflict at that time, however, because he no longer was representing Payne, and the prosecutors may have been intending to call Payne about "something tangential." It was not until approximately April 4, 2014, he said, when the State was denied a postponement based on the expectation of new ballistics evidence, that Burnell and Trostle advised him that he may have a conflict in representing the appellant after having represented Payne.

Although neither he nor the appellant wanted a postponement, Klenk represented to the court that he could not continue as the appellant's attorney if Payne were allowed to testify because the State's case, already strong, would be "wrap[ped] up in a nice little

[5] The State claimed that the defense received the supplemental discovery on March 12, 2014.

package with a very shiny bow on top" with Payne's testimony unless Payne were "eviscerated as a witness"; and it would be impossible for Klenk to separate his knowledge about Payne from drug court from his cross-examination of Payne during the appellant's trial. He sought to exclude Payne's testimony so he could remain the appellant's attorney without the necessity of a postponement. Klenk acknowledged that, if the court denied his motion and permitted Payne to testify, his conflict of interest would be "clear and unavoidable." As such, he had spoken with another attorney who could represent the appellant, but only if the case were postponed to give that attorney adequate time to prepare.

When the court inquired why Klenk had not raised the conflict issue in the four weeks since he had become aware of it, Klenk repeated that he had not known initially about the "centrality of Mr. Payne's effect on the case." In addition, although he had "wrestled around with what to do . . . for a while," he had felt the need to speak with his immediate supervisor and the deputy public defender before addressing the court.

Trostle responded that the State had acted in good faith and that Klenk had not complained of any delay or delinquency on the part of the State in providing discovery. He argued that Klenk also had not filed a motion to compel production of the name of the confidential source disclosed in February 2014, pursuant to Rule 4-263(i). Moreover, the defense had notice of Payne's name as a witness at least two months prior to trial, and Payne's identification as a witness could not have surprised or unfairly prejudiced the appellant because it was the appellant himself who created the evidence by confessing to

Payne. Trostle argued that a postponement would have been necessary the moment Klenk realized he had a conflict of interest.

Klenk replied that the State would have known on December 3, 2013, when he entered his appearance for the appellant, that he would have a conflict of interest because the State was aware that Payne was a drug court client likely represented by Klenk; and at no time before he ceased representing Payne on January 24, 2014, was he notified that Payne had given critical evidence against the appellant. As such, the State should have notified him in December of 2013 that he could not represent the appellant, when there would have been sufficient time for the appellant to select new counsel who could prepare for trial. To force him (Klenk) off the case so close to trial would negatively affect the appellant's right to his choice of counsel.

The court ruled that Payne would not be permitted to testify at the appellant's trial. It noted that the appellant's rights to a speedy trial and effective assistance of counsel outweighed the right of the State to present its case, and found that the prosecutors, knowing that Payne was one of their primary witnesses and that his role as a State's witness would create a conflict of interest for Klenk, had failed to give timely notice of the conflict of interest to Klenk. Although the State could have handled the problem in "December if not earlier," the court continued, it did not do so.

The prosecutors objected to the court's finding that they had notice of the conflict in December of 2013 and advised the court that the State was planning to file a motion for reconsideration. The State filed such a motion on April 28, 2014. In it, the State

disputed the court's finding that the prosecutors had had actual knowledge of Klenk's conflict of interest any time before March of 2014.

On May 2, 2014, the court heard argument on the State's motion for reconsideration. Before the prosecutors presented their argument, Klenk corrected a statement he had made at the April 25, 2014 hearing. Specifically, he had stated at that hearing that he had represented Payne at his violation of probation hearing on January 24, 2014. Upon further thought, he realized that another lawyer, Mr. Downs,[6] had represented Payne at the VOP hearing, although Klenk did recall representing Payne until that date.[7]

Trostle argued that, during the April 25, 2014 hearing on the appellant's motion to exclude Payne as a witness, the court had accepted for evidentiary purposes proffers by the attorneys, without objection from either side. Based on the proffers, the court found that the State had actual knowledge of Klenk's conflict of interest as early as December of 2013 and that it had failed to give Klenk timely notice of the conflict. Trostle maintained that that finding was clearly erroneous because he and Burnell had discussed *Downs's* (not Klenk's) involvement in Payne's case, and "the only thing that the State knew" at that time was that Payne had violated his probation and wanted to negotiate

[6] Downs's first name is not in the record.

[7] Later, Klenk represented to the court that it was Downs who coordinated Payne's nine cases to get into drug court, but that he (Klenk) had represented Payne from the time Payne was placed in drug court until his VOP hearing on January 24, 2014, and that the November 7, 2013 interview with the CCPD took place when Klenk was representing Payne.

some consideration for the jail time he was facing. Neither prosecutor was aware that Payne's violation of probation was related to his tenure in drug court.[8] Therefore, in 2013, both prosecutors believed that Payne was represented by Downs; and that belief persisted until late March or early April of 2014, when they "connected the dots" and realized that Payne had been in drug court and that it may have been Klenk who had represented him there. As such, Trostle argued, the court had made "a wrong decision based on that incorrect conclusion based on incorrect information."

The court recognized that neither side had done anything wrong, but asked Trostle if he agreed that he or Burnell should have asked Klenk in March of 2014 whether Klenk had represented Payne and, if so, whether that created a conflict for him. Trostle responded that as soon as he and Burnell had actual knowledge of the conflict, "it was mere days before we discussed it with Mr. Klenk," and that their disclosure of Payne's name as a witness to the defense took place before the State had actual knowledge of the conflict. He did not believe, however, that the prosecutors were obligated to "go out of [their] way to find defense counsel's conflicts."

Klenk responded that the "real problem d[id]n't happen in March or early April," but during the State's initial conversation with Payne on November 7, 2013. The CCPD officers involved knew then that Payne was in drug court and that it was Burnell who had

[8] Trostle conferred with the CCPD officer who interviewed Payne in November of 2013 (who was present at the hearing) and confirmed that the CCPD officers had picked Payne up at the CCDC for his interview, at which no lawyer was present and no discussion was had regarding the identity of Payne's attorney.

put him there almost two years earlier. Because Payne was awaiting the imposition of a sanction in drug court at that time, Klenk, as his attorney, should have been apprised and made available to speak with him. Had that happened in November of 2013, Klenk never would have taken on the appellant's representation in this case, and there would be no issue before the court.

The court ruled that it had excluded Payne's testimony based on the erroneous proffer that the State had known about Klenk's conflict of interest as early as December of 2013; therefore, it was going to vacate its previous ruling and permit Payne to testify at the appellant's trial. The court found that it was not possible for new defense counsel to prepare for trial in the ten days remaining before the May 12, 2014 trial date. On that basis, and over the appellant's objection, the court found good cause for a postponement. The appellant, with another attorney advising him of his speedy trial rights, advised the court that he refused to waive the *Hicks* date, his right to a speedy trial, or his right to counsel, which would require the appointment of, and preparation by, a new attorney in less than two weeks. The court continued the matter for four days to permit the attorneys to ensure they were "up to speed on the case law" regarding speedy trial rights.

On May 6, 2014, the court reconvened the hearing and repeated that Klenk had an irredeemable conflict of interest in representing the appellant. Notwithstanding the appellant's refusal to waive the *Hick's* date, the court found that there was no panel attorney who could go forward on the scheduled May 12, 2014 trial date and again found good cause to postpone the trial.

On May 13, 2014, Gary Proctor entered his appearance on behalf of the appellant, in place of Klenk. On May 28, 2014, the appellant's trial was rescheduled to commence on January 28, 2015.

On October 8, 2014, the appellant entered a not guilty plea to the charges of first-degree murder and conspiracy to commit first-degree murder, on an agreed statement of facts. The State agreed that, if he were convicted of those charges, it would recommend concurrent sentences of life in prison, suspend all but 45 years, and that sentencing be deferred until after Green's trial, so the appellant would not be required to assert his Fifth Amendment right against self-incrimination if called to testify.[9]

On the agreed statement of facts, the court convicted the appellant of first-degree murder and conspiracy to commit first-degree murder. For the appellant's safety, the trial court sealed the record of the proceedings until Green's trial and the appeal period had been completed. On January 30, 2015, the appellant was sentenced in accordance with the plea agreement.

DISCUSSION

Under Maryland Code (2001, 2008 Repl. Vol.), section 6–103(a) of the Criminal Procedure Article ("CP"), and Rule 4–271(a)(1), "'the trial in a circuit court criminal

[9] The State further agreed that should the court find a violation of the appellant's probation as a result of a conviction in the pending matter (almost a certainty), a sentence concurrent to any imposed in the murder case would be appropriate. Indeed, the appellant was sentenced to 3 ½ years in the Division of Corrections for his violation of probation, the portion of his earlier sentence that had been suspended in favor of probation.

prosecution must begin no later than 180 days after the earlier of (1) the entry of the appearance of the defendant's counsel or (2) the first appearance of the defendant before the circuit court.'" *Peters v. State*, 224 Md. App. 306, 357–58 (quoting *State v. Huntley*, 411 Md. 288, 290 (2009)), *cert. denied*, 445 Md. 127 (2015). The 180 day *Hicks* rule is "mandatory and dismissal of the criminal charges is the appropriate sanction for violation of that time period" if good cause has not been established.[10,11] *Ross v. State*, 117 Md. App. 357, 364 (1997).

The *Hicks* rule provides, however, that "[o]n motion of a party, or on the court's initiative, and for good cause shown, the county administrative judge or that judge's designee may grant a change of a circuit court trial date" beyond the 180 day deadline. Md. Rule 4–271(a)(1).[12] "'[A] determination of what constitutes good cause is dependent upon the facts and circumstances of each case as the administrative judge, in the exercise

[10] The *Hicks* rule was adopted to facilitate the prompt disposition of criminal cases and serves "'as a means of protecting society's interest in the efficient administration of justice. The actual or apparent benefits [CP § 6-103] and Rule 4-271 confer upon criminal defendants are purely incidental.'" *Choate v. State*, 214 Md. App. 118, 140 (2013) (alteration in original) (quoting *State v. Price*, 385 Md. 261, 278 (2005)). Unlike the Sixth Amendment speedy trial guarantee, "the *Hicks* rule is a statement of public policy, not a source of individual rights." *Id*.

[11] "[T]he critical postponement for purposes of Rule 4–271 is the one that carries the case beyond the 180 day deadline." *State v. Brown*, 355 Md. 89, 108–09 (1999). In the case at bar, there was one postponement of the initially scheduled May 12, 2014 trial.

[12] In the instant case, the presiding judge was not the administrative judge, but the administrative judge had authorized the presiding judge to decide whether to grant a postponement beyond the *Hicks* date.

of his discretion, finds them to be.'" *Peters*, 224 Md. App. at 358 (alteration in original) (quoting *State v. Toney*, 315 Md. 122, 132 (1989)).

A decision to postpone a trial beyond the *Hicks* date is subject to "'wide discretion'" and carries a "'heavy presumption of validity.'" *Fields v. State*, 172 Md. App. 496, 521 (2007) (quoting *Tapscott v. State*, 106 Md. App. 109, 122 (1995)), *rev'd on other grounds*, 432 Md. 650 (2013). We will reverse the court's postponement of a trial beyond the *Hicks* date only when the defendant demonstrates "either a clear abuse of discretion or a lack of good cause as a matter of law." *State v. Frazier*, 298 Md. 422, 454 (1984). In other words, "[t]he determination that there was or was not good cause for the postponement of a criminal trial . . . [is] a discretionary matter [for the administrative judge or his designee], rarely subject to reversal upon review." *Id.* at 451 (footnote omitted).

The appellant does not dispute that Klenk had a conflict of interest such that he no longer could represent him in this case.[13] He maintains that the postponement of his trial beyond the *Hicks* date was not brought about by that conflict, however, but by the State's

[13] "The constitutional right to counsel, under the Sixth Amendment of the United States Constitution and Article 21 of the Maryland Declaration of Rights, includes the right to have counsel's representation free from conflicts of interest." *Austin v. State*, 327 Md. 375, 381 (1992). Additionally, the Maryland Rules of Professional Responsibility prohibit an attorney from representing a client if that representation involves a conflict of interest. *Duvall v. State*, 399 Md. 210, 222 (2007).

An attorney's "representation results in an impermissible conflict when [he] represents one client 'whose interests are adverse to those of another client.'" *Pugh v. State*, 103 Md. App. 624, 636 (1995) (quoting *Att'y Grievance Comm'n v. Kent*, 337 Md. 361, 379 (1995)). If such a conflict is found, and the conflict prejudices the defendant, any judgment against the defendant cannot stand. *Duvall*, 399 Md. at 233.

failure to make a timely disclosure of the conflict. In the appellant's view, the State's dereliction of duty negated any good cause for the postponement beyond the *Hicks* date.

The crux of the appellant's argument is that there was no good cause for the postponement because the State failed to disclose the conflict to Klenk "as soon as possible," that is, in February of 2014, when it provided the defense with its first round of discovery, revealing that it had a "confidential source" that it knew to be Payne. Had it done so, he argues, a new attorney could have entered his appearance in sufficient time to prepare for the May 12, 2014 trial date. By withholding its disclosure of the conflict until early April 2014, the State "all but assured a postponement."

The problem with this argument is that it contradicts the court's factual findings, which were not clearly erroneous. The court found that: 1) when prosecutor Burnell put Payne in the drug court program, in approximately 2011, Payne was represented by defense attorney Downs; 2) when Payne approached investigators with information about the appellant's case, Burnell and Trostle knew he was seeking some consideration in a VOP sentencing, but they did not know that the VOP related to his drug court cases; 3) until early April 2014, both prosecutors believed that Payne had been represented by Downs, not Klenk, a belief shown to be reasonable when Klenk conceded that Downs had represented Payne in getting his nine cases into drug court in 2011 and again at the end of his two-year tenure in drug court in January of 2014; 4) on April 4, 2014, within "mere days" of discovering that Klenk had a conflict of interest, the prosecutors told Klenk of it; 5) Klenk waited until April 25, 2014, to raise the issue of his conflict with the

trial court; 6) on November 7, 2013, the day of Payne's interview, the appellant had been charged with but not indicted for Myers's murder, and Klenk had not yet been appointed to represent him; and 7) in that interview, conducted by the CCPD, no attorneys were present and there was no discussion about the identity of Payne's defense attorney.

On these facts, which were supported by material evidence in the record, the trial court concluded that the State notified Klenk of his conflict of interest in representing the appellant quickly after it discovered that the conflict existed and, through no fault of the prosecutors, by the time the conflict came to the attention of the court, it was too late for new counsel to enter an appearance for the appellant in time to prepare for the May 12, 2014 trial date. Under the circumstances, the court did not abuse its discretion by denying the appellant's motion to dismiss on the grounds of a *Hicks* violation and finding good cause to postpone the trial beyond the *Hicks* date.

JUDGMENTS OF THE CIRCUIT COURT FOR CECIL COUNTY AFFIRMED; COSTS TO BE PAID BY THE APPELLANT.