IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JACINTO IGNACIO CRUZ-BRIZUELA, JORGE ALBERTO GUEVARA,	)	
Appellants,	)	NOT FOR PUBLICATION
v.	)	Case Nos. F-2014-279 F-2014-253
THE STATE OF OKLAHOMA,	)	
Appellee.	)	

OPINION

JOHNSON, JUDGE:

Appellants Jacinto Ignacio Cruz-Brizuela and Jorge Alberto Guevara were tried together by jury in the District Court of Oklahoma County, Case No. CF-2012-2694, and each was convicted of Aggravated Trafficking in Illegal Drugs (Cocaine), in violation of 63 O.S.2011, § 2-415. The jury assessed punishment for Cruz-Brizuela at fifteen years imprisonment and a $100,000.00 fine. Punishment for Guevara was assessed at thirty years imprisonment and a $250,000.00 fine. The Honorable Kenneth C. Watson, who presided at trial, sentenced each appellant accordingly.[1] Cruz-Brizuela and Guevara appeal.[2]

BACKGROUND

On April 25, 2012, Oklahoma City Police Officer Harold James stopped a semi-tractor trailer for a lane change violation on east bound I-40 around the

[1] Under 21 O.S.2011, § 13.1, Cruz-Brizuela and Guevara must serve 85% of the sentences imposed before they are eligible for parole.

[2] As both Cruz-Brizuela and Guevara are entitled to relief arising out of identical issues, we consolidate their appeals for disposition in a single opinion pursuant to Rule 3.3 (D), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2015).

Choctaw area. At the time of the stop the semi was driven by Jorge Alberto Guevara and was also occupied by Jacinto Ignacio Cruz-Brizuela who was along to help drive. Because Guevara was driving a commercial vehicle, he was required to show the officer five documents including his driver's license, valid and current medical card, vehicle registration, bill of lading and the drivers' log books. Upon examining Cruz-Brizuela's log book and finding what he believed to be irregular entries, Officer James asked Guevara and Cruz-Brizuela several questions about their trip. His suspicions were not dispelled and he asked Guevara if he could search the vehicle and trailer. Guevara gave consent for the search and James called for the assistance of a K-9 unit. When the dog arrived, it alerted for the odor of controlled dangerous substance on the trailer. The trailer was searched and twenty-three one kilogram packages of powder cocaine were found hidden in a partition at the front of the trailer. A cordless drill was also found in the truck. This drill had a bit that fit the Torx head screws used to secure the wood covering over the hidden compartment. Guevara and Cruz-Brizuela were arrested and each was charged with Trafficking in Illegal Drugs. They were tried together and represented at trial by the same attorney.

Evidence was presented at trial that Guevara lived in Riverside, California and was an independent semi-tractor trailer owner/operator. Guevara's friend, Cruz-Brizuela, had secured his commercial driver's license and was training with Guevara to drive Guevara's semi-truck so that he could

assist Guevara with driving on long trips. On April 23, 2012, Guevara drove from his home in Riverside to Van Nuys, California to pick up a 19,000 pound load of copier toner from Micro Solutions that he had secured through a broker. After his truck was loaded and sealed,[3] which took about two hours,[4] he drove back to Riverside where he picked up Cruz-Brizuela. The two left that same evening and drove to Hesperia, California where they stopped for the night because Guevara was waiting for an advance payment from the broker to purchase fuel. In the morning, they drove to Seligman, Arizona where they stopped again. From Seligman they drove to Albuquerque where they ate and refueled before driving to Amarillo, Texas. After stopping in Amarillo, they drove to Oklahoma City where they were stopped by Officer James for the traffic violation.

Officer James testified that he became suspicious after he looked at Cruz-Brizuela's log book and saw a notation showing that Guevara and Cruz-Brizuela stopped in Seligman for six hours. James testified that in his observations Seligman is not a place where truck drivers typically stop to refuel or eat. James found this stop additionally odd because there were two drivers, both had been off the road for three days before they started the trip and they had only driven 400 miles since the beginning of their trip when they stopped

[3] Although the trailer was sealed after the toner was loaded, there was evidence that the doors to the trailer could be opened without breaking the seal by unscrewing a bolt.

[4] Although Guevara testified at trial that it took two hours to load the toner into his truck, he only wrote down thirty minutes in his log so that it wouldn't impact the number of hours logged on his trip. He also testified that he sat in the cab of his truck while the toner was being loaded.

in Seligman. When asked about this stop, Guevara told James that they stopped to change drivers. When James inquired about the length of the stop, Guevara added that they ate while in Seligman and that Cruz-Brizuela was asleep. Cruz-Brizuela told James that they ate and watched TV in Seligman.

Guevara testified at trial that they only stayed an hour and a half in Seligman which was enough time to eat and check the truck. He said that he told Cruz-Brizuela to indicate sleep time in the log book so that Cruz-Brizuela could start driving. Guevara denied that he told Cruz-Brizuela to lie and claimed that the six hour notation in the log book was a mistake. Cruz-Brizuela also testified that the six hour Seligman stop entry in the drivers' log was a mistake.

The State's argument at trial was that the cocaine was placed in the trailer either before the toner was loaded at Van Nuys or during the six hour stop at Seligman. The prosecutor maintained that it was unlikely that somebody at Micro Solutions loaded nine million dollars' worth of cocaine into a hidden compartment of a semi-tractor trailer not knowing where the load was to be delivered. It was far more likely, the prosecutor argued, that the cocaine was loaded by Cruz-Brizuela and Guevara who had the necessary tools for removing and replacing the back wall of the trailer during the six hour stop in Seligman.

DISCUSSION

Cruz-Brizuela and Guevara were tried together and were represented by the same defense counsel at trial. Both argue on appeal that they were denied their Sixth Amendment right to the effective assistance of counsel because trial counsel owed each of them conflicting duties. These conflicting duties, they assert, created an actual conflict of interest which adversely affected counsel's representation. This issue was not raised below.

A defendant's Sixth Amendment right to the effective assistance of counsel includes the right to be represented by an attorney who is free from conflicts of interest. *See, e.g., Wood v. Georgia,* 450 U.S. 261, 271, 101 S.Ct. 1097, 67 L.Ed.2d 220 (1981); *Holloway v. Arkansas,* 435 U.S. 475, 481-82, 98 S.Ct. 1173, 1177, 55 L.Ed.2d 426 (1978). The right to the assistance of counsel free of conflicting interests extends to any situation in which a defendant's counsel owes conflicting duties to the defendant and some other person. *Wood,* 450 U.S. at 268-72, 101 S.Ct. at 1101-03; *Allen v. State,* 1994 OK CR 30, ¶ 11, 874 P.2d 60, 63. A conflict of interest is present whenever one defendant stands to gain significantly by counsel adducing probative evidence or advancing plausible arguments that are damaging to the cause of a codefendant whom counsel is also representing. *Ramirez v. Dretke,* 396 F.3d 646, 650 (5th Cir. 2005).

Claims of ineffective assistance of counsel are mixed questions of law and fact which are subject to *de novo* review. *Davis v. State,* 2005 OK CR 21, ¶ 7, 123 P.3d 243, 246. To succeed in an ineffective assistance of counsel claim, a defendant usually must establish his or her counsel was constitutionally deficient and the deficiency was prejudicial. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In the context of a conflict of interest claim where the defendant did not object at trial, however, the defendant must "demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Cuyler v. Sullivan,* 446 U.S. 335, 348, 100 S.Ct. 1708, 1718, 64 L.Ed.2d 333 (1980). "An actual conflict of interest results if counsel was forced to make choices advancing other interests to the detriment of his client." *United States v. Alvarez,* 137 F.3d 1249, 1252 (10th Cir. 1998). The defendant has the burden of showing specific instances to support his allegations of an actual conflict adverse to his interests. *United States v. Alvarez,* 137 F.3d at 1251. To show actual conflict of interest, the defendant must "point to specific instances in the record which suggest an impairment or compromise of his interests for the benefit of another party." *Id.*

1. Cruz-Brizuela

The defense relied upon at trial was that neither Cruz-Brizuela nor Guevara had knowledge of the cocaine concealed in the trailer. Cruz-Brizuela maintains on appeal that this common defense was pursued as a direct result of counsel's conflict which prohibited counsel from presenting a more

convincing defense for him, i.e., that he did not know about the cocaine but that Guevara did, because this would obviously be detrimental to Guevara. Cruz-Brizuela argues that this defense had support in the evidence presented at trial. Guevara was the owner/operator of the semi-tractor trailer in which the cocaine was found. The evidence showed that despite the fact that Guevara was short on diesel fuel necessary for the trip, he drove alone from Riverside to Van Nuys to load the trailer and then retraced his route and went back to Riverside to pick up Cruz-Brizuela. This not only added extra time and miles to the trip, it placed Guevara in possession and control of the tractor trailer to the exclusion of Cruz-Brizuela immediately before and during the time it was loaded with the toner. Defense counsel, however, because of the conflicting duties owed to Cruz-Brizuela and Guevara, could not develop this evidence in a way that would implicate Guevara to the exclusion of Cruz-Brizuela. Nor could he advance the plausible argument that Cruz-Brizuela did not know about the cocaine but that Guevara likely did know about it.

2. Guevara

The testimony presented at trial showed that Guevara, as the owner/operator, had the most access to the trailer prior to the trip. The prosecutor elicited evidence, however, suggesting that Guevara's possession and control of the trailer at least two weeks prior to the trip was not exclusive. On cross-examination the prosecutor asked Guevara why Cruz-Brizuela was pulled over by the California Highway Patrol two weeks before the stop in this

case while driving by himself. Guevara initially replied that he did not remember this and he then acknowledged that sometimes he had to let Cruz-Brizuela drive so that he could learn. Guevara testified that when Cruz-Brizuela drove, he was in the truck with him. The prosecutor asked again about the incident where Cruz-Brizuela got a ticket while driving the truck alone. Guevara stated that he did not allow Cruz-Brizuela to drive alone and he did not remember the incident to which the prosecutor was referring. Guevara's testimony in response to the prosecutor's questions was confused and inconsistent but did open the door to the possibility that Cruz-Brizuela had, on at least one occasion, sole possession of the truck without Guevara's knowledge. Defense counsel's conflict of interest prohibited him from exploring and developing this evidence in a way that would implicate Cruz-Brizuela to the exclusion of Guevara. Nor could counsel advance the plausible argument that Guevara did not know about the cocaine but that Cruz-Brizuela likely did know about it.

CONCLUSION

Given that the State's only real challenge in this case was to prove the defendants' knowledge of the cocaine hidden in the tractor trailer, the limitation placed on defense counsel by the actual conflict of interest was significant and material to both Cruz-Brizuela's and Guevara's defense. Both appellants have shown that an actual conflict of interest adversely affected their lawyer's performance with regard to his representation of them. Cruz-

Brizuela's and Guevara's convictions should be reversed and the cases remanded to the district court for new trials with conflict free counsel.

DECISION

The Judgments and Sentences of the district court are **REVERSED** and the cases are **REMANDED** for a **NEW TRIAL**. The Motions for Evidentiary Hearing are **DENIED**.[5] Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2015), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE KENNETH C. WATSON, DISTRICT JUDGE

[5] Cruz-Brizuela and Guevara each filed motions for an evidentiary hearing. This Court will order an evidentiary if "the application and affidavits . . . contain sufficient information to show this Court by clear and convincing evidence [that] there is a strong possibility trial counsel was ineffective for failing to utilize or identify the complained-of evidence." Rule 3.11(B)(3)(b)(i), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2015). Evidentiary hearings are not required in this case as the record sufficiently supports Cruz-Brizuela's and Guevara's claims of ineffective assistance of counsel due to actual conflict of interest.

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OPINION BY: JOHNSON, J.
SMITH, P.J.: Concur
LUMPKIN, V.P.J.: Dissent
LEWIS, J.: Dissent
HUDSON, J.: Specially Concur

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LUMPKIN, VICE-PRESIDING JUDGE: DISSENTING

I must respectfully dissent to the decision in this case. The opinion makes the mistake of speculation on what might have been rather than on what actually took place, thus engaging the Straw man argument. Defense counsel is granted wide latitude in the selection of defense strategies from among the options available. Regarding the choice of which defense to pursue, "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable". *Malone v. State*, 2013 OK CR 1, ¶ 19, 293 P.3d 198, 207 *citing Strickland v. Washington*, 466 U.S. 668, 690-91, 104 S.Ct. 2052, 2066, 80 L.Ed.2d 674 (1984). In this particular case, defense counsel chose to focus on the fact the evidence showed no direct knowledge or contact by the defendants with the drugs, but only inferences. Rather than choosing to raise antagonistic defenses for each client, the choice was made to hone in on the lack of direct evidence connecting them with the drugs in the truck. Thus, we have no actual conflict of interest due to the defense chosen.

The mere appearance or possibility of a conflict of interest is not sufficient to cause reversal. *Rutan v. State*, 2009 OK CR 3, ¶ 67, 202 P.3d 839, 852-853. In order to warrant reversal, the defendant must show an actual conflict of interest adversely effected defense counsel's performance. *Banks v. State*, 1991 OK CR 51, ¶ 38, 810 P.2d 1286, 1296. That has not been done

here. Speculation on what might have occurred had a different defense been chosen is not sufficient to warrant relief. In addition, desiring to present a different defense because the first choice did not work is not the basis upon which relief can be granted on appeal.

LEWIS, DISSENTS:

I respectfully dissent. I cannot agree that the record here sufficiently supports a conclusion that an impermissible conflict of interest violated the Appellants' Sixth Amendment rights. The rationale of the opinion is that, other matters being mostly equal, counsel's divided loyalties left him unable to develop evidence that each defendant might have possessed the truck at a time when the other did not, and thus might have loaded the cocaine without the other's knowledge. However, the evidence allegedly supporting more aggressive efforts by each defendant to inculpate the other emerged at trial; its persuasive impact on either defendant's guilt is doubtful.

The Sixth Amendment guarantees conflict-free representation, but does not prohibit joint representation of criminal defendants in a single trial. *Post hoc* allegations of conflict of interest are insufficient to overthrow the strong presumption that the trial proceedings were regular and that counsel fulfilled his constitutional obligations. Counsel is strongly presumed to have investigated the facts and presented the defense serving Appellants' best interests, consistent with ethical and constitutional rules. Post-trial speculations that a more focused effort to pin the crime on a co-defendant might have been presented are inevitable, but insufficient to impeach the verdicts. Appellants have not shown that the joint trial representation here violated their constitutional rights.

HUDSON, JUDGE: SPECIALLY CONCURRING

I concur in the majority opinion, but write separately to stress the cautionary tale this case imparts. In cases in which defense counsel sets out to dually represent codefendants at a single trial, defense counsel, the prosecutor and the trial judge should be ever mindful that a conflict of interest may exist or could arise. Defense counsel owes each client a "duty of loyalty, a duty to avoid conflicts of interest". *Allen v. State*, 1994 OK CR 30, ¶10, 874 P.2d 60, 63. "[I]n a case of joint representation of conflicting interests the evil – it bears repeating – is in what the advocate finds himself compelled to refrain from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process." *Id.* (quoting *Holloway v. Arkansas*, 435 U.S. 475, 490, 98 S. Ct. 1173, 1182, 55 L. Ed. 2d 426 (1978)). As defense counsel is best positioned to evaluate the potential for a conflict of interest and prevent such conflict from arising, defense counsel should be hyper aware of, and vigilant in its efforts to avoid, such a conflict.

Both the prosecution and the court also play a significant role in safeguarding a defendant's right to conflict free counsel. If it appears a defendant is prejudiced by joinder of defendants in a single trial, a trial judge should order a severance of defendants or provide whatever other relief justice requires. 22 O.S.2011, § 439. Generally, this issue is brought to the trial court's attention on motion of the defense. However, should this not occur and the trial court knows or reasonably should know that a particular conflict may exist, the court has a duty to initiate an inquiry. *See Cuyler v. Sullivan*, 446

U.S. 335, 347, 100 S. Ct. 1708, 1717, 64 L. Ed. 2d 333 (1980); *see also Wood v. Georgia,* 450 U.S. 261, 272, 101 S. Ct. 1097, 1104, 67 L. Ed. 2d 220 (1981) ("the possibility of a conflict of interest was sufficiently apparent at the time of the revocation hearing to impose upon the court a duty to inquire further.").

"The prosecution's duty to alert the court to defense counsel's potential and actual conflicts of interest is rooted not only in the defendant's right to effective and conflict-free representation, but also in the prosecutor's role as 'an administrator of justice, an advocate, and an officer of the court.'" *United States v. McKeighan,* 685 F.3d 956, 966 (10th Cir. 2012) (quoting ABA Standards for Criminal Justice 3–1.2(b) (3d ed. 1993)); *see also Berger v. United States,* 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935) (prosecutor's interest in a criminal prosecution is "not that it shall win the case, but that justice shall be done."). By disclosing potential or actual conflicts of interest, a prosecutor "facilitates the administration of justice by helping to avoid lengthy delays or retrials that could occur when conflicts render defense counsel's representation ineffective." *Id.* at 967.