

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellant,	:	
v.	:	No. 12AP-100 (C.P.C. No. 96CR-12-6787)
Robert J. Caulley,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on June 14, 2012

Ron O'Brien, Prosecuting Attorney, and *Seth L. Gilbert*, for appellant.

Timothy Young, Ohio Public Defender, and *Kimberly S. Rigby*, for appellee.

ON MOTION FOR LEAVE TO APPEAL

KLATT, J.

{¶ 1} Plaintiff-appellant, the State of Ohio, seeks to appeal, as a matter of right and with leave of court, a judgment of the Franklin County Court of Common Pleas granting defendant-appellee, Robert J. Caulley, a new trial. This case presents the question of whether the state can appeal the trial court's grant of a motion for new trial when it is undisputed that the criminal defendant's trial counsel had an affair with the defendant's wife before and during the trial. Because the State does not have an absolute right to appeal, and because the State has failed to sufficiently demonstrate a probability that the claimed errors occurred, we deny the State's motion for leave to appeal and dismiss the State's appeal.

I. Factual and Procedural Background

{¶ 2} In 1997, a jury found Caulley guilty of killing his parents and the trial court sentenced him accordingly. This court affirmed those convictions. *State v. Caulley*, 10th Dist. No. 97AP-1590, 2002-Ohio-1078.

{¶ 3} In April 2011, after a number of unsuccessful postconviction challenges, Caulley filed in the trial court a "Motion for Leave to File a Delayed Motion for New Trial" pursuant to Crim.R. 33(B). Caulley alleged that he recently discovered his trial counsel had engaged in a romantic affair during his trial with his then-wife Celeste Bowman. Caulley alleged that the affair was the "epitome of a conflict of interest" and resulted in Caulley receiving ineffective assistance of counsel. The trial court granted Caulley leave to file the motion for a new trial and then held a hearing on Caulley's motion.

{¶ 4} At that hearing, Bowman, now Caulley's ex-wife, described the affair she had with Caulley's trial counsel. She testified that the affair began before the start of Caulley's trial, continued throughout the trial and extended for a period of time thereafter. Although Caulley's trial counsel did not testify at the hearing, he admitted to the affair in an affidavit. Investigators who worked on the case with Caulley's trial counsel testified that his trial preparation seemed deficient. One investigator, Felicia Crawford, testified that trial counsel provided her with 265 names of potential witnesses for her to interview only 10 days before the beginning of Caulley's trial. Crawford opined that as a result, she was not able to conduct an adequate investigation. Caulley also presented DNA evidence that would have been favorable to him had it been presented at trial. Based upon the evidence presented, the trial court concluded that trial counsel's affair with Caulley's then-wife was a conflict of interest that adversely affected his representation of Caulley. Accordingly, the trial court granted Caulley's motion for a new trial. The State seeks to appeal that decision.

II. R.C. 2945.67(A) and the State's Right to Appeal

{¶ 5} The State's right to appeal a trial court's decision is governed by R.C. 2945.67(A), which provides that:

A prosecuting attorney, village solicitor, city director of law, or the attorney general may appeal as a matter of right any decision of a trial court in a criminal case * * * which decision grants a motion to dismiss all or any part of an indictment, complaint, or information, a motion to suppress evidence, or a

motion for the return of seized property or grants post conviction relief * * * and may appeal by leave of the court to which the appeal is taken any other decision, except the final verdict, of the trial court in a criminal case.

{¶ 6} This statute grants the State a substantive, but limited, right of appeal. *State v. Slatter*, 66 Ohio St.2d 452, 456-57 (1981). The State has an absolute right of appeal where the trial court's decision falls within one of four categories stated in the statute: (1) a motion to dismiss all or part of an indictment, complaint, or information; (2) a motion to suppress evidence; (3) a motion for the return of seized property; or (4) a petition for postconviction relief. *State v. Matthews*, 81 Ohio St.3d 375, 377-78 (1998). At first glance, the trial court's decision to grant Caulley a new trial would not fall under any of these categories. However, the State argues that the decision, in essence, granted Caulley postconviction relief, which would be appealable as a matter of right under R.C. 2945.67(A). We disagree. Caulley filed a motion for a new trial, not a petition for postconviction relief, and the trial court granted Caulley a new trial in accordance with Crim.R. 33. It did not grant postconviction relief pursuant to R.C. Chapter 2953. See *State v. Burke*, 10th Dist. No. 06AP-656, 2006-Ohio-4597, ¶ 7 (state could not appeal as a matter of right a decision granting new trial).

{¶ 7} The State also seeks leave of this court to appeal the decision. The State may appeal "any other decision" of the trial court, except the final verdict, only if the State first obtains leave from the appellate court to take the appeal. *Matthews* at 378; R.C. 2945.67(A). The decision to grant or deny the State leave to appeal rests solely within the discretion of the court of appeals. *State v. Fisher*, 35 Ohio St.3d 22, 23 (1988); *Burke* at ¶ 8. When the State seeks leave from the court of appeals to appeal an order or judgment of the trial court, its motion for leave must set forth the errors it claims occurred in the proceedings of the trial court. The motion must also be accompanied by affidavits or by the parts of the record upon which the State relies to demonstrate the probability that the claimed errors occurred. *State v. Holzapfel*, 10th Dist. No. 10AP-17, 2010-Ohio-2856, ¶ 10, citing App.R. 5(C).

{¶ 8} The State has presented three claimed errors in its motion:

[1]. THE TRIAL COURT ABUSED ITS DISCRETION BY GRANTING DEFENDANT A NEW TRIAL.

[2]. THE TRIAL COURT ABUSED ITS DISCRETION BY GRANTING DEFENDANT LEAVE TO FILE A DELAYED NEW-TRIAL MOTION.

[3]. THE TRIAL COURT IMPROPERLY DENIED THE STATE ACCESS TO OPD'S INVESTIGATIVE FILES AND OWEN'S TRIAL FILES.

III. Caulley's Motion for Leave to File a Delayed Motion for New Trial

{¶ 9} For ease of analysis, we address the State's claimed errors out of order. In its second claimed error, the State contends the trial court abused its discretion by granting Caulley leave to file a delayed motion for new trial without a hearing.

{¶ 10} Pursuant to Crim.R. 33(B), motions for a new trial shall be filed within 14 days of a jury verdict, unless the defendant demonstrates by clear and convincing proof that he or she was unavoidably prevented from filing the motion. A party is "unavoidably prevented" from filing a motion for a new trial if the party had no knowledge of the existence of the grounds supporting the motion and could not have learned of that existence within the time prescribed for filing the motion in the exercise of reasonable diligence. *State v. Lee*, 10th Dist. No. 05AP-229, 2005-Ohio-6374, ¶ 7. A decision granting a motion for leave to file a delayed motion for new trial is subject to an abuse of discretion review. *State v. Townsend*, 10th Dist. No. 08AP-371, 2008-Ohio-6518, ¶ 8. An abuse of discretion implies that the trial court's decision is unreasonable, arbitrary, or unconscionable. *Burke* at ¶ 14.

{¶ 11} Caulley based his motion for leave to file a delayed motion for new trial on his alleged recent discovery that his trial counsel had an affair with his then-wife during his trial. The State initially argues that the trial court failed to find that Caulley was unavoidably prevented from filing the motion. We disagree. The trial court made that finding when it granted Caulley leave to file his motion for new trial after concluding that the "prevention of the discovery of meaningful evidence was unavoidable." (Entry Nunc Pro Tunc, Sept. 5, 2011.) Moreover, a trial court is not required to explicitly state in its decision the basis for granting a motion for leave to file a delayed motion for new trial. The basis is presumed. *State v. Mosely*, 10th Dist. No. 07AP-860, 2008-Ohio-951, ¶ 8 (because the trial court denied the motion for leave, "we must presume that the court

found appellant had failed to demonstrate that he was unavoidably prevented from discovering the evidence relied upon in the motion").

{¶ 12} The State also argues that after learning of the affair, Caulley waited too long before he filed his motion. In addition to demonstrating that he was unavoidably prevented from discovering the evidence relied upon to support the motion for new trial, a defendant seeking leave to file a delayed motion for new trial also must show that the motion for leave was filed within a reasonable time after discovering the evidence relied upon to support the motion for new trial. *State v. Berry*, 10th Dist. No. 06AP-803, 2007-Ohio-2244, ¶ 37; *State v. Elersic*, 11th Dist. No. 2007-L-104, 2008-Ohio-2121, ¶ 20; *State v. Cleveland*, 9th Dist. No. 08CA009406, 2009-Ohio-397, ¶ 49. If there has been a significant delay, the trial court must determine whether the delay was reasonable under the circumstances or whether the defendant has adequately explained the reason for the delay. *Id.*

{¶ 13} Caulley filed his motion for leave on April 20, 2011. In affidavits filed with the motion, Bowman stated that she had an affair with Caulley's trial counsel during the trial in 1997 and that the affair lasted until sometime in 1998. After ending the affair, Bowman left Ohio in 1999 and divorced Caulley in 2000. She did not tell Caulley of the affair until June 2010 and she did not believe that Caulley knew the affair occurred during his trial until January 2011, when she informed Caulley's public defender about the affair. Caulley's April 2011 affidavit states that he found out about the affair "a few years ago" from his sister and Bowman's mother but assumed that the affair occurred only after the trial. He explained that he did not know until January 2011 that the affair started before his trial and that it lasted throughout the trial.

{¶ 14} Although Caulley admittedly knew about his trial counsel's affair with his wife for a few years before he filed this motion, he did not know until January 2011 that the affair occurred before and during his trial. That distinction is critical because the basis for Caulley's claims is that the existence of the affair before and during his trial created the conflict of interest. An affair at some later time would not create a conflict of interest. Caulley filed his motion four months after he learned of this important fact. Given only a four-month delay, we cannot say that the State has demonstrated a probability that the trial court abused its discretion by concluding that Caulley filed this

motion within a reasonable time after discovering the evidence relied upon to support the motion for new trial.

{¶ 15} The State also argues that the trial court should have held a hearing before granting Caulley's motion because the motion relied heavily on affidavits that contained "glaring credibility problems" and the State should have been able to question the affiants. The decision whether to grant or hold an evidentiary hearing on a defendant's request for leave to file a delayed motion for new trial falls within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of that discretion. *State v. McConnell*, 170 Ohio App.3d 800, 2007-Ohio-1181, ¶ 19 (2d Dist.); *State v. Carson*, 10th Dist. No. 07AP-492, 2007-Ohio-6382, ¶ 22. The State did not request a hearing on Caulley's motion until its motion for reconsideration, which was filed after the trial court had granted Caulley leave. In fact, the State argued to the trial court that it should deny the motion for leave "even if [the] court accepts the affidavits as true." (State's Reply to Memorandum Contra Motion to Strike at 2.) Given these circumstances, the State has failed to sufficiently demonstrate a probability that the trial court abused its discretion by granting Caulley's motion for leave to file a new trial without a hearing.

IV. Caulley's Motion for New Trial – The Procedure

{¶ 16} In its first claimed error, the State argues the trial court erred in granting Caulley a new trial because procedurally, he choose the wrong vehicle to raise his claims regarding his trial counsel's conduct and, on the merits, he failed to prove that his trial counsel's conflict of interest adversely affected his trial performance. We first address the state's procedural arguments.

{¶ 17} In order to bring his trial counsel's affair to the trial court's attention, Caulley filed a motion for new trial based upon newly discovered evidence pursuant to Crim.R. 33(A)(6). The State claims the trial court erred in considering Caulley's motion on two procedural grounds: (1) the new trial motion was, in reality, an untimely petition for postconviction relief, and (2) Caulley's claim of ineffective assistance of counsel is not recognizable under Crim.R. 33(A)(6). We disagree with both of these arguments.

{¶ 18} We reject the State's argument that Caulley's motion had to be treated as a petition for postconviction relief. As this court has stated, the Crim.R. 33 procedures for a

new trial exist independently from the R.C. 2953.21 procedure for postconviction relief. *State v. Lee*, 10th Dist. No. 05AP-229, 2005-Ohio-6374, ¶ 13; *Burke* at ¶ 10.

{¶ 19} Caulley sought a new trial based on his trial counsel's alleged conflict of interest in maintaining an affair with his then-wife while representing him at trial. A conflict of interest claim is a species of an ineffective assistance of counsel claim, a claim that is cognizable in a motion for a new trial pursuant to Crim.R. 33(A)(1) or (5). *State v. Lei*, 10th Dist. No. 05AP-288, 2006-Ohio-2608, ¶ 25; *State v. Lordi*, 140 Ohio App.3d 561, 569 (7th Dist.2000). We recognize that Caulley's motion was premised on Crim.R. 33(A)(6), which provides for a new trial when new evidence material to the defense is discovered that the defendant could not with reasonable diligence have discovered and produced at trial. Ineffective assistance of counsel claims are generally not recognizable under that section. Any error in proceeding under that section, however, was harmless, as the trial court's decision did not analyze Caulley's motion under Crim.R. 33(A)(6) but, instead, considered whether or not there was a conflict of interest such that a claim of ineffective assistance of counsel warranted a new trial. Such a claim is cognizable in a motion for new trial.

V. Caulley's Motion for a New Trial —The Merits

{¶ 20} We now turn to the merits of the trial court's decision to grant Caulley a new trial. A motion for new trial pursuant to Crim.R. 33(B) is addressed to the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *Burke* at ¶ 14, citing *State v. Schiebel*, 55 Ohio St.3d 71 (1990), paragraph one of the syllabus.

{¶ 21} Caulley based his motion for a new trial on the alleged conflict of interest that existed when trial counsel represented him during his trial. The Sixth Amendment guarantees a criminal defendant the effective assistance of counsel and, in doing so, secures him the assistance of counsel free from conflicts of interest. *State v. Leonard*, 157 Ohio App.3d 653, 2004-Ohio-3323, ¶ 26 (1st Dist.), citing *Glasser v. United States*, 315 U.S. 60 (1942). The Supreme Court of the United States has described a conflict of interest as a "struggle to serve two masters." *Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980). The possibility of a conflict of interest exists when counsel has a reason to further or serve interests that are different from those of his client. An actual conflict of interest

exists when counsel is actively representing, furthering, or serving those other interests (that are different from those of his client). *State v. Cranford*, 2d Dist No. 23055, 2011-Ohio-384, ¶ 62.

{¶ 22} In order to satisfy a claim of ineffective assistance of counsel based on a conflict of interest, a criminal defendant must demonstrate that an actual conflict of interest adversely affected trial counsel's performance. *State v. Alexander*, 10th Dist. No. 05AP-192, 2006-Ohio-1298, ¶ 20, citing *State v. Keith*, 79 Ohio St.3d 514, 535 (1997). Although most conflict of interest cases involve an attorney's representation of other clients, conflicts of interest may arise in other circumstances, such as when counsel's personal interests conflict with those of the client. *State v. Foster*, 10th Dist. No. 90AP-05 (Nov. 6, 1990); *State v. Bryant*, 6th Dist. No. L-84-249 (Oct. 18, 1985). A number of decisions in other states recognize that having an affair with a client's spouse is an actual conflict of interest. *See People v. Singer*, 226 Cal. App.3d 23, 38-41 (1990) (noting that "the relationship here between defense counsel and defendant's wife deprived defendant of his constitutional right to the undivided loyalty and effort of his attorney"); *Hernandez v. State*, 750 So.2d 50, 52 (Fla.App.1999) (concluding that an attorney sleeping with client's wife during trial was a conflict of interest), vacated on rehearing, 750 So.2d 55 (Fla.App.1999) (concluding that defendant could not establish that affair affected counsel's performance). Here, the State does not dispute that trial counsel's affair with Caulley's then-wife during the trial constituted an actual conflict of interest. However, the State argues that the conflict of interest did not adversely affect trial counsel's representation.

{¶ 23} The trial court concluded that the conflict of interest did adversely affect trial counsel's performance. The State claims that this conclusion was erroneous for two reasons. The State first argues that Caulley did not prove that counsel's conflict of interest actually caused his poor performance. We disagree. A conflict of interest arose when trial counsel had an affair with his client's then-wife during his client's murder trial. This conflict of interest divided his loyalties between his client and the affair with Bowman. The trial court concluded that this division of loyalties adversely affected his performance. Given the evidence before the trial court concerning trial counsel's performance, we cannot say that this conclusion was probably an abuse of discretion.

{¶ 24} The State also argues that Caulley did not prove that trial counsel's performance was adversely affected. However, Caulley presented significant testimony indicating that trial counsel spent substantial time with Bowman during the trial when he should have been preparing for trial. Although the State points to the numerous steps trial counsel took in defending Caulley, the State has failed to demonstrate a probability that the trial court abused its discretion by concluding that counsel's conflict of interest adversely affected his performance.

{¶ 25} For these reasons, the State has failed to demonstrate a probability that the trial court's decision granting Caulley a new trial was an abuse of discretion.

VI. Discovery Issues

{¶ 26} In its third claimed error, the state argues that the trial court erroneously denied it access to files from both the Ohio Public Defender's Office and from trial counsel. The State sought these files in order to prepare for the hearing on Caulley's motion for a new trial. Specifically, the State requested trial counsel's entire trial file to determine, among other things, why trial counsel did not call a witness who had been interviewed by one of the investigators provided by the Ohio Public Defender's Office. Pursuant to Crim.R. 17(C), the state filed subpoenas requesting the documents. Both Caulley and the Ohio Public Defender's Office objected and moved to quash the subpoenas, claiming an array of privileges and also asserting that the production of the documents would be unreasonable and oppressive. The trial court denied the State access to those files based on the work product and attorney-client privileges.

{¶ 27} Under Crim.R. 17(C), a subpoena may be used to command a person to produce in court books, papers, documents, and other objects. However, the court upon motion of a party may quash or modify the subpoena if compliance would be unreasonable or oppressive. Crim.R. 17(C). Generally, an appellate court applies an abuse of discretion standard when reviewing a trial court's decision to quash a subpoena. *State v. Wasumus*, 10th Dist. No. 94APA07-1013 (Apr. 27, 1995); *State v. Strickland*, 183 Ohio App.3d 602, 2009-Ohio-3906, ¶ 37 (8th Dist).

{¶ 28} The State argues that trial counsel's file was not privileged under the self-protection exception to the attorney-client privilege. R.C. 2317.02(A) codifies the attorney-client privilege. The Supreme Court of Ohio has noted certain exceptions to that

privilege, including the self-protection exception. *Squire, Sanders & Dempsey, L.L.P. v. Givaudan Flavors Corp.*, 127 Ohio St.3d 161, 2010-Ohio-4469, ¶ 53. That exception permits an attorney to testify concerning attorney-client communications when necessary to establish a claim for legal fees on behalf of the attorney or to defend against a charge of malpractice or other wrongdoing in litigation between the attorney and the client. *Id.* We note that the State never asserted this exception as grounds for production and, therefore, the trial court did not even address the exception. More importantly, the exception would not apply to the facts of this case in any event. The issue here does not involve trial counsel attempting to recover fees or to defend a legal malpractice claim.

{¶ 29} The State also argues that the trial court erroneously applied the work-product privilege. That privilege provides a qualified privilege protecting the attorney's mental processes in preparation of litigation, establishing " 'a zone of privacy in which lawyers can analyze and prepare their client's case free from scrutiny or interference by an adversary.' " *Id.* at ¶ 55, quoting *Hobley v. Burge*, 433 F.3d 946, 949 (C.A.7, 2006). Pursuant to Crim.R. 16, materials subject to the work-product privilege include reports, memorandum, or other internal documents made by defense counsel or their agents in connection with the investigation of the case. Given the scope of the State's request, the State has failed to demonstrate that the trial court abused its discretion in prohibiting the production of documents that would necessarily fall under this privilege.

{¶ 30} For these reasons, the State has failed to demonstrate a probability that the trial court's decision quashing the State's subpoenas was an abuse of discretion.

VII. Conclusion

{¶ 31} The State has failed to sufficiently demonstrate a probability that the trial court erred when it granted Caulley's motion for new trial. Accordingly, we deny the State's motion for leave to appeal. The State's appeal is dismissed.

Motion for leave to appeal denied; appeal dismissed.

TYACK and CONNOR, JJ., concur.
