

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 3, 2010

David R. Schanker
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2008AP3187-CR

Cir. Ct. No. 2005CF1178

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

JOHN C. BERARD,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Waukesha County:
LEE S. DREYFUS, JR., Judge. *Reversed and cause remanded with directions.*

Before Brown, C.J., Anderson and Snyder, JJ.

¶1 ANDERSON, J. This is an appeal by the State from an order of the circuit court entered November 11, 2008, granting the postconviction motion of John C. Berard for a new trial on the ground that the attorney who represented him at his original trial had a possible conflict of interest and should not have

represented Berard. We disagree with the circuit court's order to vacate Berard's conviction granting him a new trial. We therefore reverse and remand.

¶2 Berard was charged in a criminal complaint with sexually assaulting a child under the age of thirteen, exposing a child to harmful material, and five counts of possessing child pornography, all as a repeater. Berard was convicted of all seven charges following a jury trial.

¶3 Berard filed a postconviction motion for a new trial on April 9, 2007, raising eleven claims of error, all but one involving ineffective assistance of counsel. Among the claims of ineffective assistance was Berard's assertion, made for the first time, that the attorney who represented him in the proceedings leading to his convictions, Jonathon Smith, had a conflict of interest. Berard argued a conflict existed because Attorney Smith had previously represented Peter B.

¶4 At the postconviction evidentiary hearings, the following was established. Peter B. was the person that Berard blamed for committing the crimes with which Berard was charged. Peter B. was convicted of sexually assaulting a child in a Langlade county case in 1995. Attorney Smith did not represent Peter B. in that case and was not familiar with its details. In 2003, Attorney Smith did represent Peter B. in a Waukesha county case where both Peter B. and Berard were charged with theft. Berard knew of Attorney Smith's representation of Peter B. on the theft charge because Berard accompanied Peter B. to Attorney Smith's office when Peter B. retained Attorney Smith to represent him on that charge.

¶5 Thereafter, when Berard was charged in the case at bar, his family retained Attorney Smith—Berard's former codefendant's attorney. In discussing his defense with Attorney Smith, Berard indicated that he thought his defense should be focused on implicating Peter B. because Peter B. had access to Berard's

computer, was in the residence during the pertinent time period and had a previous conviction for sexual assault of a child.

¶6 Attorney Smith stated that he did discuss with Berard whether to call Peter B. to the stand, but ultimately decided against it because he believed that Peter B. would not admit to anything and would likely invoke his Fifth Amendment privilege outside the presence of the jury. Attorney Smith also stated he “may well have argued,” when making his closing argument, that Peter B. had the opportunity to assault the victim.

¶7 Following the postconviction evidentiary proceedings, which were held on six separate days over almost nine months, the circuit court rendered an oral decision August 12, 2008, rejecting all of Berard’s claims. A written order denying Berard’s postconviction motion was entered the same day and filed on September 9, 2008.

¶8 Berard then filed a motion for reconsideration on January 15, 2009. After a hearing on the motion, the court rendered a decision. It reiterated its rejection of ten of Berard’s claims. However, it changed its ruling on Berard’s conflict of interest claim. The court opined that if it had known more of the details as to what Attorney Smith was told about why Berard had wanted to focus his defense on Peter B.’s culpability, “the likelihood is I would have required [Attorney] Smith to recuse himself in order for other counsel to be appointed just to eliminate any potential conflicts.” Based on this, the court granted Berard a new trial. The State appeals.

¶9 On appeal, the State argues that Attorney Smith did not have a conflict of interest prohibiting him from representing Berard simply because he

had previously represented, in an unrelated closed case, the person Berard wanted to blame for the crimes with which he was charged in this case.

¶10 A criminal defendant's right to effective assistance of counsel includes a corresponding right to representation that is free from conflicting interests. *State v. Street*, 202 Wis. 2d 533, 541, 551 N.W.2d 830 (Ct. App. 1996). In a criminal case, a defendant's conflict of interest claim regarding his attorney is treated analytically as a subspecies of ineffective assistance of counsel. *State v. Love*, 227 Wis. 2d 60, 68, 594 N.W.2d 806 (1999). Such a claim presents a question of law which we decide de novo. *Id.* at 67; *Street*, 202 Wis. 2d at 543.

¶11 However, unlike the usual ineffective assistance claim where a defendant has a dual burden to prove both that his attorney's performance was deficient and that the deficient performance prejudiced his defense, *State v. Allen*, 2004 WI 106, ¶26, 274 Wis. 2d 568, 682 N.W.2d 433, a defendant who claims that his attorney was ineffective because of a conflict of interest need only meet his burden on the performance part of the test, *Love*, 227 Wis. 2d at 70-71; *Street*, 202 Wis. 2d at 542. The defendant need not separately prove prejudice. *Street*, 202 Wis. 2d at 542. If the defendant shows deficient performance because of a conflict of interest, prejudice is presumed. *Id.*

¶12 That said, the postconviction test for assessing performance is a higher burden than the pretrial standard. Under the pretrial standard, establishing a *potential* conflict may be sufficient to disqualify an attorney in order to prevent an actual conflict from materializing. *Love*, 227 Wis. 2d at 73, 77 n.8. In contrast, under the postconviction test, in order to establish a Sixth Amendment violation on the basis of a conflict of interest, "a defendant who did not raise an objection at trial must demonstrate by clear and convincing evidence that his or her counsel

had an *actual* conflict of interest.” *Id.* at 71 (emphasis added). “An actual conflict of interest exists when the defendant’s attorney was actively representing a conflicting interest, so that the attorney’s performance was adversely affected.” *Id.*

¶13 No such conflict was shown. Berard’s postconviction showing that Peter B. was Attorney Smith’s former client in an unrelated case and that he wanted to pin his charged crimes on Peter B. does not equate to a showing of an *actual* conflict of interest. More is required.

¶14 Determining what constitutes an actual conflict of interest must be resolved by looking at the facts of the case. *Id.* An actual conflict of interest exists when, under the facts of a particular case, an attorney is required to make a choice between the interest of the defendant and the competing interest of another client. *Id.* at 71-72, 72 n.5. The choice attributable to the conflict must result in some deficiency in the attorney’s performance. *See id.* at 72 n.5. The attorney must do something that a reasonably competent attorney not burdened by a conflict would not have done or failed to do something that a reasonably competent attorney not burdened by a conflict would have done to effectively represent his client. *See State v. Thiel*, 2003 WI 111, ¶19, 264 Wis. 2d 571, 665 N.W.2d 305; *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990); *State v. Johnson*, 133 Wis. 2d 207, 217, 395 N.W.2d 176 (1986). An attorney’s acceptance of employment to act in opposition to a former client is not improper in itself. *City of Whitewater v. Baker*, 99 Wis. 2d 449, 454, 299 N.W.2d 584 (Ct. App. 1980).

The test of whether the attorney’s employment is inconsistent with his duty to a former client is whether acceptance of the new retainer will require him in forwarding the interest of the new client to do anything that

will injuriously affect a former client in any matter in which he formerly represented him and also whether the attorney will be called on, in his new relation, to use against a former client any knowledge or information acquired in the former relationship.

Id.

¶15 Upon examination of the record, it is evident that the trial court did not require Berard to make the proper showing of actual conflict of interest when it ordered a new trial “just to eliminate any *potential* conflicts.” (Emphasis added.) The court did not apply the applicable law to the facts of the case. We therefore reverse and remand with directions to hold a new hearing consistent with this opinion.¹

By the Court.—Order reversed and cause remanded with directions.

. Not recommended for publication in the official reports.

¹ We note that Berard could have, but did not, raise on appeal his other ineffective assistance of counsel claims. These issues are waived and cannot be directly appealed now. If Berard wants to pursue these claims, he will have to file a *Knight* petition. See *State v. Knight*, 168 Wis. 2d 509, 512-13, 484 N.W.2d 540 (1992).

