

IN THE SUPERIOR COURT OF GILMER COUNTY

STATE OF GEORGIA



ORIGINAL

STATE OF GEORGIA,

v.

INDICTMENT NO. 2014 CR-391

FIELDS BENJAMIN CHAPMAN,

Defendant,

Filed in office of Clerk of Superior Court
Gilmer County, Georgia (By: _____)
Time: 10:50 M Date: 11-21-14


Glenda Sue Johnson, Clerk

**ORDER ON THE STATE'S MOTION TO DISQUALIFY THE LAW FIRM OF
MCCAMY, PHILLIPS, TUGGLE & FORDHAM, LLP**

The above-styled case came before this Court for a hearing on the State's Motion to Disqualify the law firm of McCamy, Phillips, Tuggle & Fordham, LLP on October 23rd, 2014. Based upon the testimony offered, oral arguments of the attorneys, the motion and response, and relevant Georgia law, the Court hereby finds and rules as follows:

The right of every criminal defendant to the assistance of counsel is provided for in the sixth amendment to the U.S. Constitution. Furthermore, the U.S. Supreme Court has held that an intrinsic part of this right is the criminal defendant's right to counsel of his own choosing. See *Powell v. Alabama*, 287 U.S. 45, 53, 53 S.Ct. 55, 77 L.Ed. 158 (1932); *Wheat v. United States*, 486 U.S. 153, 159, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988); *United States v. Gonzalez-Lopez*, 548 U.S. 140, 144, 126 S.Ct. 2557, 2561, 165 L.Ed. 2d 409 (2006). However, a conflict of interest may warrant a limitation of the right.

Mr. Steven Williams is counsel of record for Andrew Haynes, a Defendant in this case. Mr. Williams is also a managing partner at McCamy, Phillips, Tuggle & Fordham, LLP. Mr. Samuel Sanders is a partner at McCamy, Phillips, Tuggle & Fordham, LLP, and is also representing Rhett Harper, a witness in the case. The State alleges the firm McCamy, Phillips, Tuggle & Fordham, LLP has a conflict of interest because lawyers from the firm represent both a defendant and a witness in this case.

Rule 1.10(a) of the Georgia Rules of Professional Conduct states: "While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7: Conflict of Interest: General Rule, 1.8(c): Conflict of Interest: Prohibited Transactions, 1.9: Former Client or 2.2: Intermediary." Thus, for purposes of analyzing a potential conflict of interest, partners of the same law firm are to be treated as one in the same. Accordingly, the firm McCamy, Phillips, Tuggle & Fordham, LLP will be considered a single entity representing both Haynes and Harper. The Court must then consider whether this representation constitutes a conflict of interest.

Rule 1.7(a) of the Georgia Rules of Professional Conduct states: "A lawyer shall not represent or continue to represent a client if there is a significant risk that the lawyer's own interests or the lawyer's duties to another client, a former client, or a third person will materially and adversely affect the representation of the client." The critical consideration for this Court is not whether there is any risk of conflict, but whether there is a significant risk of a conflict of interest. Furthermore, the conflict of interest should either materially or adversely affect a lawyer's representation of a client.

The State argues that the representation of both Haynes and Harper by lawyers from the same firm is a violation of Rules 1.7(a) and 1.7(c)(3). Rule 1.7(c)(3) which states that a client cannot overcome a conflict with informed consent where the conflict “involves circumstances rendering it reasonably unlikely that the lawyer will be able to provide adequate representation to one or more of the affected clients.” It is the position of the State that when Mr. Williams is required to cross-examine Harper he will be forced to choose between the best interests of his clients, choosing either Haynes or Harper. The State bases its argument on the idea that because Harper is a prosecution witness he will require a vigorous cross-examination. The State contends that such a cross-examination will be precluded because Harper will in effect be cross-examined by his own lawyer. This cross-examination, so argues the State, will cause the examining attorney to have to choose which client’s interests to represent adequately. In support of this position, the State cites *Heidt v. State*, 292 Ga. 343 (2013).

In *Heidt*, the Georgia Supreme Court considered the case of a lawyer representing a defendant in a criminal case and a prosecution witness against that defendant. Upon initial consideration *Heidt* would appear to support the State’s position. However, a more careful examination of *Heidt* reveals that in fact it cuts against the State’s argument for disqualification in this case.

In *Heidt*, the defendant was convicted of, among other things, the murder of his brother. The witness to testify against him was his deceased brother’s wife with whom he had been carrying on an affair before the murder took place. The lawyer who was disqualified represented both Heidt and his brother’s widow. The widow was accused of intimidating a witness in the case against Heidt. Eventually the State offered to drop the charges against the widow in

exchange for securing her testimony against Heidt. This put the lawyer in a position of having to advise one client on whether to undertake an act that would be materially adverse to another. The Supreme Court noted that the attorney having both advised the widow on taking the deal to testify against another client of his, as well as potentially cross-examining her at trial would be a serious ethical problem.

The State wishes to cite *Heidt* for the proposition that where the same counsel represents both a criminal defendant and a witness in the defendant's case, the cross-examination will entail serious ethical problems. It is the opinion of this Court that this is a misreading of *Heidt*. While the Supreme Court certainly found that to be the case under the facts of *Heidt*, the facts in this case are distinguishable.

In *Heidt*, the witness who was adverse to the defendant was accused of a crime in the same case, and in exchange for a drop in those charges, she elected to testify adversely the defendant. In the present case, Harper has been accused of no crime, and he has not agreed to testify against Haynes in exchange for any concessions from the State. Additionally, in *Heidt* the lawyer was forced to advise one client to do something materially adverse to another client. Namely, testifying against him. In the present case, Harper is not testifying against Haynes, and his testimony does not appear to be adverse to Haynes. The defense has asserted that Harper would be a witness for the defense if the State had not chosen to call him as well. The final difference, and the most important one, has to do with the potential cross-examination. In *Heidt*, the lawyer would have been in the awkward position of cross-examining his client about actions he in fact advised her to take. This in and of itself would be a conflict for the attorney. It would be a serious ethical issue to cast aspersion on a client for testifying in exchange for immunity,

when that very deal was in fact taken at the advice of the cross-examining attorney. That situation does not exist here. The State has failed to establish that cross-examination of Harper would materially and adversely affect the representation of Haynes based on the evidence presented during the hearing.

Finally, the State has presented no evidence that Harper's testimony is antagonistic to Haynes. At the hearing on this motion, Harper testified and was subject to extensive examination by the State. Harper's testimony at the hearing did not reveal a version of events that was antagonistic to Haynes. Harper's testimony appeared to establish a timeline of events, and identifies various parties who were there when the alleged incident took place. However, at no point did Harper's testimony appear to be antagonistic to Haynes. While this could certainly change, at this point there is no evidence that Harper's testimony will create a conflict with Haynes. Mere conclusory statements by the State about the substance of Harper's testimony and its potential for conflict with Haynes are not enough to warrant this Court finding antagonism between their accounts. See *Carraher v. Harman*, 220 Ga.App. 690, 692(1), 469 S.E.2d 443 (1996); *Lewis v. State*, 312 Ga.App. 275, 287, 718 S.E.2d 112, 121 (2011).

It has been well established in Georgia that where co-defendants do not have antagonistic defenses, a single attorney may be permitted to represent them both. See *Burns v. State*, 281 Ga. 338 (2006); *Lamb v. State*, 267 Ga. 41 (1996); *Taylor v. State*, 320 Ga. App. 596 (2013). As there does not appear to be any antagonism between Harper and Haynes this Court finds that they may be adequately represented by a single attorney.

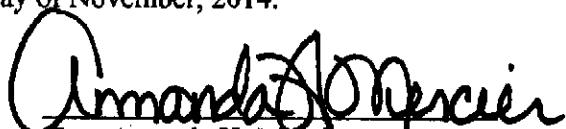
"The right to select counsel of one's choice...has been regarded as the root meaning of the constitutional guarantee." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 147-48, 126 S. Ct.

2557, 2563, 165 L. Ed. 2d 409 (2006). Thus, any decision by this Court to circumscribe that right must be undertaken with due care.

“Whether a lawyer should be disqualified from representing an accused in a criminal prosecution as a result of a conflict of interest is a question committed to the sound discretion of the trial court.” *Heidt v. State*, 292 Ga. 343, 346, 736 S.E.2d 384, 389 (2013), *reconsideration denied* (Jan. 7, 2013) quoting *Registe v. State*, 287 Ga. 542 at 544(2), 697 S.E.2d 804 (2010). While this Court can see a cause for concern about a risk of a conflict of interest arising, the Court does not find that risk to be significant based on the extensive testimony provided at the hearing. Furthermore, the Court finds, based on the evidence presented at the hearing, that should a conflict arise it will not adversely or materially affect the representation of either Harper or Haynes.

Therefore, the State’s Motion to Disqualify the law firm of McCamy, Phillips, Tuggle & Fordham, LLP is hereby Denied.

It is SO ORDERED this 21st day of November, 2014.



Hon. Amanda H. Mercier
Gilmer County Superior Court
Appalachian Judicial Circuit
State of Georgia

IN THE SUPERIOR COURT OF GILMER COUNTY

STATE OF GEORGIA

STATE OF GEORGIA,

v.

CASE NO. 2014CR303

FIELDS BENJAMIN CHAPMAN,
ANDREW HAYNES, and DAMON
AVERY JOHNSON,

Defendants.

CERTIFICATE OF SERVICE

This is to certify that I have this date served opposing counsel with a copy of the within and foregoing ORDER ON THE STATE'S MOTION TO DISQUALIFY THE LAW FIRM OF MCCAMY, PHILLIPS, TUGGLE & FORDHAM, LLP, by depositing a copy of same in the United States Mail with sufficient postage affixed thereto and properly addressed as follows:

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Mr. Stephen A. Williams
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This the 21st day of November, 2014.



Gregg J. Conley
Law Clerk to
Hon. Amanda H. Mercier, Judge