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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0202**

State of Minnesota,
Respondent,

vs.

Tony Ray Walker,
Appellant.

**Filed February 10, 2020
Remanded
Smith, Tracy M., Judge**

Hennepin County District Court
File No. 27-CR-17-21798

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Nicole Cornale, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jennifer Lauermann, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Hooten, Presiding Judge; Smith, Tracy M., Judge; and Smith, John, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

SMITH, TRACY M., Judge

Appellant Tony Ray Walker appeals his conviction for third-degree sexual assault following a guilty plea, arguing that he received ineffective assistance of counsel. Because we conclude that Walker's attorney actively represented a personal conflict of interest that adversely affected his performance, we remand the case for an opportunity for Walker to move for plea withdrawal.

FACTS

On August 27, 2018, Walker pleaded guilty to third-degree sexual assault under Minn. Stat. § 609.344, subd. 1(g)(i) (2016), for forced sexual penetration of his 16-year-old daughter. Walker conceded the relevant facts at his plea hearing. He also stated that he understood the charge, was satisfied with his private counsel, and knew that he would not be able to withdraw the plea if he later changed his mind. The district court ordered Walker to participate in a psychosexual evaluation before sentencing.

At the psychosexual evaluation, the evaluator asked Walker about the charged offense. The evaluator's report stated:

Mr. Walker denied ever having touched his daughter in a sexual manner and said he never had sex with her. He indicated he is pleading guilty because he is "in fear of [his] life," explaining his attorney "scared" him by telling him he could have to register as a sex offender and go to prison for 15 years should he be found guilty at trial. The defendant also said he had taken ibuprofen and Percocet for injuries prior to going to court and pleading guilty.

Walker did not make a motion to withdraw his guilty plea. But, at the sentencing hearing, his lawyer addressed Walker's statements in the evaluator's report. Defense counsel first addressed the drug concern by stating, "I'd just note that I'm very thorough in covering the issues of, you know, drug use/intoxication before a plea." The lawyer continued, "I routinely ask if my clients are under the influence of alcohol or drugs, and I also ask if they are on any medication, if it affects their ability to know what they're doing in court."¹

Defense counsel then addressed Walker's general statement about the basis of his plea by stating, "And I agree with counsel [i.e., the prosecutor]. My client made a knowing and voluntary waiver of his rights" Defense counsel then discussed how strong the state's case is, emphasizing how powerful and believable the victim's testimony was and how there was DNA evidence against his client. Defense counsel then stated:

I'm not trying to justify the fact that he took a plea as he did that freely and voluntarily, and it was my advice to resolve the matter with a plea because I do not think this was a case I could have won based on the evidence that I knew from the facts, so to speak, and I say the facts so to speak because they have been presented in open court. But the information that would have come in open court from the police reports that were delivered to me made me think that this was a good resolution.

So, I'm going to ask that the Court sentence to the 48 months as we agreed to. It's a reasonable sentence, and my client said I scared him into taking this plea, but I will say this. I always have to warn clients that when the State files a *Blakely* notice for an upward departure, that the sentence out of the book doesn't really count anymore because you, as the judicial officer, has a right if you think the evidence supports an upward departure after a separate *Blakely* hearing to upward depart and

¹ Drug use relating to the validity of the plea is not at issue on this appeal.

give him more, significantly much more than the 48 months that we negotiated.

So, if he thinks that scared him, I have to be realistic in these cases. He had gotten advice from [his public defender]. He had gotten advice from me, and I don't sugarcoat my cases. I don't come into my cases telling people I'm Johnny Cochran and I can promise them some kind of grandiose victory because that's just going to cause me problems later if I lie to my client.

So, I told him the truth about it, but at the end of the day, there was a Y chromosome test done.

He concluded by stating, "So, at the end of the day, I think it's a proper and just sentence under the circumstances."

On allocution, Walker stated the following about his attorney:

[W]e never sat down and went over any evidence or anything. We never watched any videos or anything. I just feel that he didn't do his job properly with, you know, and according to that, he wasn't even prepared to go to trial. That's what I truly believe cause had he been prepared for trial, he'd know that [was] what I was going after instead of taking a plea. He did make me feel like there was no other option for me. I was under the influence, not because I took them because I knew I was coming to court. I took them because my knee was in very much pain.

The judge then stated:

Mr. Walker, often when people plead in front of me and they're set for sentencing, in your case two and a half months later, the reality of the case sets in and the fact that you pled guilty. Nothing that you have told me today makes me think that what happened here should not have happened. You pled guilty in front of me. I took that plea. You admitted guilt. Specifically, you were asked if anybody was forcing you to plead guilty, to which you said no.

I hear the frustration in your voice. However, I do not believe that it is valid for contesting where we are. You pled

guilty to third-degree criminal sexual conduct. I will accept that plea and find you guilty of that charge.

The court sentenced Walker to 48 months in prison. Walker appeals.

DECISION

Walker argues that he received ineffective assistance of counsel at his sentencing hearing. He frames this argument according to the two-prong test laid out in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984). Under *Strickland*, a defendant has been deprived of the constitutional right to counsel if the defendant demonstrates (1) objectively unreasonable performance by defense counsel and (2) resulting prejudice. See *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003). But, while *Strickland* outlines the standard test for an ineffective-assistance-of-counsel claim, the state correctly points out that a different test applies when the claim is based on a conflict of interest on the part of defense counsel. In that situation, when the defendant raised no objection at trial, the defendant “must demonstrate that defense counsel actively represented conflicting interests and this conflict adversely affected [the] lawyer’s performance.” *Cooper v. State*, 565 N.W.2d 27, 32 (Minn. App. 1997) (quotation omitted), review denied (Minn. Aug. 5, 1997). “[A] defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief.” *Cuyler v. Sullivan*, 446 U.S. 335, 349-50, 100 S. Ct. 1708, 1719 (1980).

Ineffective-assistance-of-counsel claims involve mixed questions of law and fact that appellate courts review de novo. *Rhodes*, 657 N.W.2d at 842.

A. Walker demonstrated that defense counsel actively represented conflicting interests.

Appellant must first demonstrate that a conflict existed. *State v. Miller*, 666 N.W.2d 703, 717-18 (Minn. 2003). “[U]ntil a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance.” *Gustafson v. State*, 477 N.W.2d 709, 713 (Minn. 1991) (quotation omitted). Minnesota courts use the Minnesota Rules of Professional Conduct to determine whether there is a conflict. *Pearson v. State*, 891 N.W.2d 590, 601 (Minn. 2017). According to the rules, “[a] concurrent conflict of interest exists if . . . there is a significant risk that the representation of one or more clients will be materially limited by . . . a personal interest of the lawyer.” Minn. R. Prof. Conduct 1.7.

Walker argues that his lawyer had a personal conflict of interest because, at sentencing, the lawyer was interested in defending the effectiveness of his own representation. Nothing in the record suggests that Walker asked his lawyer to seek to withdraw his guilty plea. But, at sentencing, defense counsel, on his own, raised the issue of the plea and defended his representation relating to the plea, apparently in response to the statements that Walker had made to his psychosexual evaluator that he was on drugs and that his attorney scared him into taking the plea.² This alone shows a conflict. Much of

² While there is no mention in the record about whether Walker asked his lawyer to bring a motion to withdraw his guilty plea, the sentencing transcript shows that, as the state says in its brief, “the parties appeared before the Court as if each understood that Appellant’s statements to the psychosexual evaluator amounted to a possible challenge to the validity of Appellant’s guilty plea provided on August 27, 2018.” Therefore, our analysis assumes that defense counsel understood that his client wanted to withdraw his plea.

what defense counsel said at the sentencing hearing was defensive of his own performance, and his entire argument was how the plea he advised his client to take was proper and just. Nothing defense counsel said supported his client's evident desire to withdraw his plea. Therefore, after reviewing the transcript of the sentencing hearing, we conclude Walker sufficiently established that defense counsel actively represented a conflicting personal interest.

B. The conflict adversely affected defense counsel's performance.

The second part of the analysis is whether the "conflict adversely affected [the] lawyer's performance." *Cooper*, 565 N.W.2d at 32 (quotation omitted). Walker does not address this element because it is not part of the *Strickland* test that he followed. The state, on the other hand, applying the correct test, argues that any conflict of interest did not adversely affect defense counsel's performance.

The state relies on *Butala v. State*, 664 N.W.2d 333 (Minn. 2003). In *Butala*, the petitioner filed a pro se motion to withdraw his plea, arguing in part that his attorneys were ineffective because the prosecutor made deals with them "behind the judge's back." 664 N.W.2d at 337. At the sentencing hearing, petitioner's lawyers declined to speak in support of the motion due to the conflict of interest, so the defendant made his own arguments. *Id.* The district court denied plea withdrawal, and petitioner filed a petition for postconviction relief. *Id.* The postconviction court denied his request, and he asserted two challenges on appeal, both of which the supreme court rejected. *Id.* at 338. He argued that the failure of the district court to appoint substitute counsel to argue his plea-withdrawal motion provided a "fair and just" basis for withdrawal of his plea. *Id.* at 340-41 (referencing Minn.

R. Crim. P. 15.01). The supreme court disagreed, writing that, while it would have been better to substitute counsel, “the record reflects the trial court gave the motion serious consideration, taking care to review appellant’s stated reasons and factual support as well as all of the relevant materials before making his ruling.” *Id.* at 341. Butala also argued ineffective assistance of counsel under *Strickland* based on his defense counsels’ negotiation of “off-the-record terms.” *Id.* at 341. The supreme court rejected that argument too, reasoning “[Butala] has failed to show with ‘reasonable probability’ that he would not have pleaded guilty but for the claimed errors of counsel.” *Id.* at 342.

This case is distinguishable from *Butala*. First, Butala argued that the district court erred by not appointing him new counsel, not that his lawyers acted in conflict with his interests. Second, in *Butala*, defense counsel recused themselves from the hearing and did not represent their personal interests, whereas, here, Walker’s lawyer actively argued against Walker’s interest in obtaining withdrawal of his guilty plea. This case is governed by the principles governing attorney conflict of interest, *see Cuyler*, 446 U.S. 335, 100 S. Ct. 1708, not by *Butala*.

Defense counsel’s performance at the hearing was affected by his personal interest. Many of his statements were defensive of his own performance, supporting his interest in showing that he appropriately advised Walker to take the plea deal. The second prong of the conflict-of-interest analysis is met. Walker was therefore denied effective assistance of counsel.

Walker asks that we reverse the district court’s conviction. But the remedy for the conflict-of-interest error is the opportunity for Walker to be represented at a plea-

withdrawal hearing by a lawyer without a conflict of interest. *See State v. Kaiser*, 469 N.W.2d 316, 320 (Minn. 1991) (reversing this court, reinstating the defendant's conviction, and remanding for another plea-withdrawal hearing because the district court erred by not letting the defendant testify about his lawyer's ineffectiveness at the initial plea-withdrawal hearing). We therefore leave the conviction intact and remand for the district court to permit Walker to bring a plea-withdrawal motion.

Remanded.