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SUPREME COURT OF ARKANSAS

No. CR 11-7

CORNELIUS DALE EARL
APPELLANT

V.

STATE OF ARKANSAS,
APPELLEE

Opinion Delivered May 3, 2012

APPEAL FROM THE WHITE COUNTY CIRCUIT COURT,
[NO. CR-2008-224.1]
HON. ROBERT EDWARDS, JUDGE

AFFIRMED.

PAUL E. DANIELSON, Associate Justice

Appellant Cornelius Dale Earl appeals from the circuit court's order denying his petition for postconviction relief pursuant to Arkansas Rule of Criminal Procedure 37.1 (2010). In 2009, Earl was convicted on three counts of delivery of a controlled substance—cocaine—and was sentenced to a total of 960 months' imprisonment; the court of appeals affirmed his convictions and sentence. *See Earl v. State*, 2010 Ark. App. 186. On June 24, 2010, Earl filed his petition for postconviction relief, in which he alleged that his trial counsel operated under an actual conflict of interest due to his simultaneous representation of Earl and his live-in girlfriend, Sandra Kazmark, who also faced charges stemming from the same incident. Earl alternatively asserted that any waiver by him of the conflict was not knowing, voluntary, or intelligent, because the full ramifications of the joint representation were not adequately explained to him and that trial counsel rendered ineffective assistance of

counsel by representing him in a conflict situation. The circuit court denied Earl's petition, and he now appeals. His sole point on appeal is that the circuit court erred in denying the petition where he was not adequately warned of his trial counsel's conflict due to joint representation and any waiver thereof was insufficient. We affirm the circuit court's order.

On appeal, Earl argues that he was not properly advised on the record regarding his trial counsel's actual conflict of interest and the dangers of joint representation, nor was a proper waiver by him obtained. He contends that, while there was disclosure and a modicum of judicial inquiry, there was no real inquiry of him, no warning, and no waiver. He avers that the inquiry of him was insufficient where there was no meaningful inquiry and no warning issued to him, and he urges this court to hold that the insufficiency of inquiry mandates an automatic-prejudice rule.

The State responds that because trial counsel's joint representation of Earl and Kazmark was not a conflict of interest requiring a waiver, the circuit court did not clearly err in denying postconviction relief. It maintains that Earl fails to point to any actual conflict that adversely affected his counsel's performance, but instead seems to assert a per se conflict warranting a waiver. The State contends that a defendant alleging a conflict of interest due to joint representation must prove an actual conflict to be entitled to a presumption of prejudice and that Earl has not proved any such conflict.

In an appeal in a postconviction proceeding, we will not reverse a circuit court's decision granting or denying postconviction relief unless it is clearly erroneous. *See Rankin v. State*, 365 Ark. 255, 227 S.W.3d 924 (2006). A finding is clearly erroneous when, although

there is evidence to support it, the appellate court after reviewing the entire evidence is left with the definite and firm conviction that a mistake has been committed. *See id*.

This court has held that joint representation is inherently suspect. *See Harrison v. State*, 371 Ark. 474, 268 S.W.3d 324 (2007). However, joint representation is not per se violative of the constitutional guarantees of effective assistance of counsel. *See id*. Appointing or permitting a single attorney to represent codefendants does create a possible conflict of interest that could prejudice either or both clients, but because there is only a possibility of prejudice, there is no justification for an inflexible rule that would presume prejudice in all cases. *See McGahey v. State*, 362 Ark. 513, 210 S.W.3d 49 (2005). "Instead, prejudice is only presumed if the defendant demonstrates that counsel 'actively represented conflicting interests,' and 'an actual conflict of interest adversely affected his lawyer's performance.'" *Id*. at 516, 210 S.W.3d at 51 (quoting *Sheridan v. State*, 331 Ark. 1, 4, 959 S.W.2d 29, 31 (1998)). Here, Earl argues that no meaningful inquiry was made of him relating to any potential conflict from his trial counsel's joint representation of him and his live-in girlfriend. However, "[n]othing in the circumstances of this case indicates that the trial court had a duty to inquire whether there was a conflict of interest." *Cuyler v. Sullivan*, 446 U.S. 335, 347 (1980).

In *Culyer*, the United States Supreme Court examined whether a state trial judge must inquire into the propriety of multiple representation despite the lack of an objection by any party. Noting that nothing in its precedent "suggests that the Sixth Amendment requires state courts themselves to initiate inquiries into the propriety of multiple representation in every case," the Court held that "[u]nless the trial court knows or reasonably should know that a

particular conflict exists, the court need not initiate an inquiry." *Id.* at 346, 347. "Absent special circumstances, therefore, trial courts may assume either that multiple representation entails no conflict or that the lawyer and his clients knowingly accept such risk of conflict as may exist." *Id.* at 346–47.

A review of the record in the instant case reveals that while Earl's trial counsel represented both him and Kazmark, they were to be tried separately and faced different charges arising out of the same alleged drug transaction.[1] Kazmark testified on Earl's behalf at trial, and her testimony was aligned with Earl's defense of denial. The circuit court originally appointed separate public defenders for Earl and Kazmark, and only allowed the substitution of joint counsel after hearing from counsel and inquiring of Earl.

At the pretrial hearing in which the substitution of counsel was addressed and at which Earl was present, trial counsel informed the circuit court that he had discussed the "situation" with Earl and Kazmark, had talked to them separately, and had determined that there "should not be a conflict." Trial counsel further informed the circuit court that Earl and Kazmark would not have antagonistic defenses, with which Earl's then-public defender agreed. He further stated that should a conflict arise, another lawyer was available to represent one of them. The circuit court then inquired of Earl whether he was requesting that counsel be substituted, to which Earl responded in the affirmative. In a subsequent hearing, trial counsel raised to the circuit court's attention the possibility of calling Kazmark to testify on Earl's

[1]The record reflects that after Earl's trial, Kazmark entered into a plea agreement on the charges she faced that arose from the transaction.

behalf. Again, trial counsel relayed to the circuit court the fact that he had discussed with Earl and Kazmark "at length the potential of conflicts," that no antagonistic defenses were present, and that there was still no conflict "either ethically or from a legal standpoint."

"Defense counsel have an ethical obligation to avoid conflicting representations and to advise the court promptly when a conflict of interest arises during the course of trial." *Culyer*, 446 U.S. at 346. And, "[a]n 'attorney representing two defendants in a criminal matter is in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop in the course of a trial.'" *Id.* at 347 (quoting *Holloway v. Arkansas*, 435 U.S. 475, 485 (1978)). It is evident to this court that in this case, there was simply no basis on which the circuit court knew or reasonably should have known that a *particular* conflict existed, "which is not to be confused with when the trial court is aware of a vague, unspecified possibility of conflict, such as that which 'inheres in almost every instance of multiple representation.'" *Mickens v. Taylor*, 535 U.S. 162, 168–69 (2002). For this reason, we simply cannot conclude, on these facts, that the Sixth Amendment imposed on the circuit court a duty to inquire into the propriety of Earl's trial counsel's joint representation. Where there was no duty to inquire, we cannot hold that the inquiry made was insufficient. Accordingly, we affirm the circuit court's order denying postconviction relief.

Affirmed.