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SUPREME COURT OF ARKANSAS

No. CR-11-1171

OSIRES GUEVARA

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered September 27, 2012

APPEAL FROM THE BENTON
COUNTY CIRCUIT COURT
[NO. CR2008-1627]

HON. ROBIN F. GREEN, JUDGE

AFFIRMED.

KAREN R. BAKER, Associate Justice

A Benton County jury convicted appellant Osires Guevara of possession of a controlled substance with intent to deliver methamphetamine and sentenced appellant to life imprisonment without parole. This court has jurisdiction pursuant to Ark. Sup. Ct. R. 1-2 (a)(2) (2012). Appellant now challenges his conviction on the basis that his right to effective counsel was violated by a conflict of interest and that the trial court abused its discretion in allowing evidence of gang affiliation during the sentencing hearing. We affirm.

On November 3, 2008, Deputy Cory Coggin of the Benton County Sheriff's office and other officers were conducting surveillance on a residence where they suspected drug activities occurring. After speaking with an informant living at the residence, the deputy searched the residence with the informant's consent and found narcotics and weapons. The informant then volunteered to give Deputy Coggin information about a supplier of methamphetamine. The informant told Deputy Coggin that a white Honda coming from a second residence nearby would be carrying four ounces of methamphetamine. The

informant then led the officer to this residence. Deputy Coggin and the other officers started observing the second residence.

The officers observed a white Honda leaving the residence. Deputy Coggin asked Deputy Eric Lyle, also with the Benton County Sheriff's Office, to follow the white Honda and to find probable cause to stop the car. Deputy Lyle stopped the white Honda for failing to signal one hundred feet before turning. The white Honda was driven by appellant with Jose A. Mancía-Sandoval riding as passenger. When Deputy Lyle approached appellant, he appeared nervous. Deputy Lyle brought out a drug dog, which alerted that there were narcotics in the car. Deputy Lyle conducted a search of the car but found no narcotics. Deputy Lyle then contacted Deputy Coggin. When Deputy Coggin arrived, he conducted his own search of the white Honda and found four ounces of methamphetamine. Appellant and Mancía-Sandoval were placed under arrest for possession of a controlled substance. Appellant and Mancía-Sandoval were later charged with possession of a controlled substance with the intent to distribute.

Originally, both appellant and his codefendant, Mancía-Sandoval, were defended by Bruce J. Bennett. Bennett represented both criminal defendants in multiple pretrial hearings including a suppression hearing on July 27, 2009. The motion for suppression was granted by the circuit court, but that ruling was overturned by this court. *State v. Mancía-Sandoval*, 2010 Ark. 134, 361 S.W. 3d 835. Later, Bennett's license to practice law was suspended and his cases were assumed by Byran Powell. Powell represented appellant and Mancía-Sandoval at many of the pretrial hearings. Powell also received offers for plea bargains and conveyed them to both defendants, and both defendants rejected the offers. On April 18, 2011, one day before both appellant and Mancía-Sandoval were set to stand

trial, Powell asked to be removed as defense counsel for one of the codefendants because one of them had raised a possible conflict of interest. Powell, the State, and the trial court had the following colloquy:

MR. CARTER (for the State): Judge, we are set for trial tomorrow with a pretrial today. This is the case that Mr. Powell and I came and visited you about last week that he has declared a conflict on, so I suppose we need to hit the reset button.

THE COURT: Is that correct, Mr. Powell?

MR. POWELL: Yes, Your Honor. My client has arisen a possible – raised a conflict and I believe he’s correct. I don’t believe I can try both of these cases tomorrow.

THE COURT: Okay. Mr. Mancía-Sandoval, you are ordered to secure another attorney as quickly as possible. Your attorney now has a conflict in representing you and your co-defendant – I’m not certain of his name.

MR. POWELL: Osires.

THE COURT: Osires Cue – Guevara.

MR. POWELL: Correct. Yes, Your Honor.

THE COURT: Okay. Your attorney cannot ethically represent both you and Mr. Guevara, so you will need to find another attorney, sir. If you cannot afford one, then you need to see the Public Defender’s Office and complete their paperwork before your next court date. Do you understand, sir?

MR. MANCÍA-SANDOVAL: Yes.

THE COURT: Okay, I will vacate the jury trial for tomorrow and order a pretrial hearing to be held May 9th.

MR. CARTER: Judge I’ll – that’s during my vacation week. Could we have it the next week?

THE COURT: Okay. Is that acceptable, Mr. Powell?

MR. POWELL: I'll be here that week.

THE COURT: Mr. Mancía-Sandoval, you're ordered to appear May 16th at 8:00 a.m. with an attorney or having completed the Public Defender paperwork. Time is excluded for purposes of speedy trial. We will see you May 16th with an attorney, sir.

The trial court removed Powell as Mancía-Sandoval's defense counsel, ordered Mancía-Sandoval to find a new attorney, and scheduled a new trial date for Mancía-Sandoval.

Powell continued to represent appellant throughout the course of his trial. During the sentencing hearing, the prosecution called an officer with the Benton County Sheriff's Office with special training regarding street gangs. The officer provided information about MS-13, a street gang. Defense counsel objected that such information was not relevant unless the gang was tied to appellant. The court then asked the prosecution to first tie appellant to the gang before talking about the gang itself. The officer identified appellant as a member of MS-13 based on the clothes he was wearing and the tattoos he had. Defense counsel did not raise any other objections to the testimony concerning MS-13. The jury sentenced appellant to life without the possibility of parole. At no point during the trial did appellant raise the issue of ineffective assistance of counsel.

On appeal, appellant first argues that he was deprived of his Sixth Amendment rights due to his attorney's conflict of interest by representing appellant and Mancía-Sandoval. Appellant points to multiple potential objections defense counsel failed to make at trial and defense counsel's failure to renew the motion to suppress evidence from the search. In addition, appellant asserts that the conflict was apparent and that the trial court was required to inquire further even in the absence of an objection.

This court reviews cases involving an alleged conflict of interest under the standard set forth in *Cuyler v. Sullivan*, 446 U.S. 335 (1980). *Cook v. State*, 361 Ark. 91, 99, 204 S.W.3d 532, 536 (2005). In *Cuyler*, the United States Supreme Court held that in order for a defendant, who did not raise an objection at trial, to establish a violation of the Sixth Amendment right to counsel, he must demonstrate that an actual conflict of interest adversely affected counsel's performance. 446 U.S. at 348. It is well established, however that in order for this court to review a claim of ineffective assistance of counsel on direct appeal, the issue must be raised to the trial court. *Willis v. State*, 334 Ark. 412, 419, 977 S.W.2d 890, 894 (1998).

Here, appellant did not object to Powell or Bennett representing him at any pretrial hearing or at trial. While Powell did ask to be removed as trial counsel for one of the defendants based on an asserted conflict of interest, appellant never made an objection to Powell's representation of him at trial. Neither did appellant object to or make a conflict of interest argument regarding Bennett's representation to the trial court. As a result, we are precluded from reviewing Appellant's ineffective assistance claim in the direct appeal because he did not raise it at the trial court level. *Id.*

Next, appellant argues that the trial court erred in overruling his objection to admitting evidence of gang affiliation during the sentencing phase of the trial. This issue was also not preserved for appeal. At trial, appellant objected to the testimony about the gang MS-13 on the grounds of relevancy because the prosecution had not tied appellant to MS-13. The trial court then directed the prosecution to lay a foundation connecting appellant to MS-13 before proceeding. The witness then testified that appellant's clothing and tattoos were consistent with gang membership in MS-13. Appellant received the exact relief he

requested and raised no further objection to the gang-affiliation evidence. When an appellant receives the only relief he requested, he cannot appeal the issue. *Odum v. State*, 311 Ark. 576, 577, 845 S.W.2d 524, 524 (1993). On appeal, appellant asserts for the first time that the evidence of gang affiliation was “irrelevant and highly inflammatory.” However, “a party cannot change the grounds for an objection or motion on appeal but is bound by the scope and nature of arguments made at trial.” *Ayers v. State*, 334 Ark. 258, 264, 975 S.W.2d 88, 91 (1998). Finally, arguments made for the first time on appeal will not be considered. *Id.*

In addition to the arguments raised by appellant, we have reviewed the record pursuant to Arkansas Supreme Court Rule 4-3(i) (2011), and we have found no prejudicial error that would warrant reversal.

Affirmed.

Matthews, Campbell, Rhoads, McClure & Thompson, P.A., by: *Kimberly R. Weber*, for appellant.

Dustin McDaniel, Att’y Gen., by: *Rachel Hurst Kemp*, Ass’t Att’y Gen., for appellee.