

IN THE SUPREME COURT OF THE STATE OF NEVADA

BRUCE H. BIRCH, AKA, BRUCE
HARRISON BIRCH,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 47163

FILED

AUG 03 2006

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. P. [Signature]*
CHIEF DEPUTY CLERK

This is an appeal from a judgment of conviction, pursuant to a guilty plea, of one count of conspiracy to possess a forged instrument. Second Judicial District Court, Washoe County; Jerome Polaha, Judge. The district court sentenced appellant Bruce H. Birch to serve a jail term of 6 months with credit for 123 days time served.

Birch's sole contention is that his case must be remanded to the district court for a new sentencing hearing where he can be represented by conflict-free counsel. Birch argues that the district court did not err in granting counsel Jack Alian's motion to withdraw, but that the court did err in appointing "the Washoe County Public Defender generally, and Ms. Pusich specifically" to represent him because Pusich was counsel for his codefendant. We disagree.

"The Sixth Amendment guarantees a criminal defendant the right to conflict-free representation."¹ In order to establish a violation of this right, a defendant must demonstrate that "an actual conflict of

¹Coleman v. State, 109 Nev. 1, 3, 846 P.2d 276, 277 (1993); Clark v. State, 108 Nev. 324, 831 P.2d 1374 (1992); see also U.S. Const. amend. VI.

interest adversely affected his lawyer's performance.”² The existence of an actual conflict of interest must be established on the specific facts of each case, but “[i]n general, a conflict exists when an attorney is placed in a situation conducive to divided loyalties.”³

We conclude that Birch’s contention is not supported by the record. Birch cannot demonstrate the existence of an actual conflict or that he was adversely affected by counsel’s performance. In fact, despite Birch’s extensive criminal history, counsel secured a sentence that was much less than that recommended by the Division of Parole and Probation and the State. Additionally, counsel informed the district court that although she had represented Birch’s codefendant, his case was closed, and according to both counsel and Birch, they would not be calling the codefendant to testify at the sentencing hearing. Counsel also informed the district court that she was currently representing Birch in a pending and unrelated criminal action. And finally, Birch asked the district court to allow Pusich to represent him in both cases. Therefore, we conclude that the district court did not err by allowing Pusich to represent Birch at sentencing.⁴

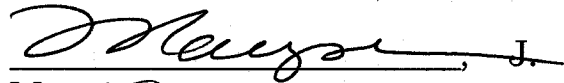
²Cuyler v. Sullivan, 446 U.S. 335, 350 (1980); see also Burger v. Kemp, 483 U.S. 776, 783 (1987) (prejudice is presumed “only if the defendant demonstrates that counsel actively represented conflicting interests and that an actual conflict of interest adversely affected his lawyer’s performance” (citation omitted)).


³Clark, 108 Nev. at 326, 831 P.2d at 1376 (quoting Smith v. Lockhart, 923 F.2d 1314, 1320 (8th Cir. 1991)).

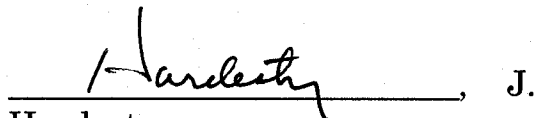
⁴See Leibowitz v. Dist. Ct., 119 Nev. 523, 529, 78 P.3d 515, 519 (2003); see also SCR 157.

Having considered Birch's contention and concluded that it is without merit, we

ORDER the judgment of conviction AFFIRMED.⁵


Maupin J.


Gibbons J.


Hardesty J.

cc: Hon. Jerome Polaha, District Judge
Washoe County Public Defender
Bruce H. Birch
Attorney General George Chanos/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

⁵Because Birch is represented by counsel in this matter, we decline to grant him permission to file documents in proper person in this court. See NRAP 46(b). Accordingly, this court shall take no action and shall not consider the proper person documents Birch has submitted to this court in this matter.