

IN THE SUPREME COURT OF THE STATE OF NEVADA

OLIVIA MCNALLY,
Petitioner,
vs.
THE THIRD JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF LYON;
AND THE HONORABLE DAVID A.
HUFF, DISTRICT JUDGE,
Respondents,
and
THE STATE OF NEVADA,
Real Party in Interest.

No. 59359

FILED

NOV 09 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER GRANTING PETITION

This original petition for a writ of mandamus challenges a district court order granting a motion by the real party in interest to disqualify petitioner's retained counsel based on counsel's representation of one of the State's witnesses. Having considered the petition and answer, we conclude that the district court manifestly abused its discretion in disqualifying petitioner's counsel because counsel did not represent the prosecution witness in the same or substantially related matter.

Petitioner Olivia McNally is awaiting trial on charges related to a robbery of a hotel in Fernley. She retained attorney Kenneth McKenna to represent her in the matter. The State moved to disqualify McKenna after learning from its witness, Sabrina Thomas, that McKenna had represented her approximately seven years earlier in a divorce

action.¹ Although Thomas had contacted McKenna's law office after the divorce action about representing her in two other matters, she did not retain him.² The State argued that McKenna's prior representation of Thomas created an irreconcilable conflict of interest. McNally disagreed. After an evidentiary hearing, the district court granted the State's motion and disqualified McKenna, concluding that he had a "concurrent, irreconcilable conflict of interest." McNally subsequently filed a motion for reconsideration after retaining co-counsel to cross-examine Thomas. The district court denied reconsideration, concluding that McNally's accommodation did not cure the conflict of interest. McNally filed a mandamus petition to challenge the district court's decision. See Waid v. Dist. Ct., 121 Nev. 605, 609, 119 P.3d 1219, 1222 (2005) ("Attorney disqualification orders are properly challenged through a petition for a writ of mandamus.")

¹It appears that Thomas, who is McNally's mother-in-law, will testify at trial that McNally confessed to her.

²Thomas testified that she contacted McKenna's law office and spoke to office personnel about the cost of McKenna representing her in an action to gain custody of McNally's daughter. Thomas also explained that she contacted McKenna about representing her in a bankruptcy matter but that he referred her to another attorney better suited to handle that matter. She further testified that she contacted McKenna "a few times" for "advice regarding child support, and things of those natures (sic)." To the extent that an attorney-client relationship resulted from any of Thomas' contacts with McKenna's office in the years after the divorce action, we conclude that those matters are not substantially related to McNally's prosecution and are insufficient bases for McKenna's disqualification. And contrary to the State's suggestion, there is no support for the conclusion that Thomas is a current client.

RPC 1.9(a) provides that “[a] lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person’s interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.” (Emphasis added). In determining whether two matters are substantially related, the district court is required to make three determinations: “(1) make a factual determination concerning the scope of the former representation, (2) evaluate whether it is reasonable to infer that the confidential information allegedly given would have been given to a lawyer representing a client in those matters, and (3) determine whether that information is relevant to the issues raised in the present litigation.” Waid, 121 Nev. at 610, 119 P.3d at 1223 (adopting test set forth in Westinghouse Elec. Corp. v. Gulf Oil Corp., 588 F.2d 221, 225 (7th Cir. 1978)). The district court must also be mindful of the strong presumption favoring a non-indigent criminal defendant’s right to counsel of her own choosing. Ryan v. Dist. Ct., 123 Nev. 419, 428, 168 P.3d 703, 709 (2007) (observing that “criminal defendants ‘who can afford to retain counsel have a qualified right to obtain counsel of their choice’” but that “the right to retain one’s own counsel may clash with the right to conflict-free representation” (quoting United States v. Ray, 731 F.2d 1361, 1365 (9th Cir. 1984))).

Here, the district court summarily concluded that an irreconcilable conflict warranted McKenna’s disqualification. We disagree. Looking to the Waid framework, Thomas’ testimony at the hearing shows: (1) McKenna represented Thomas in a divorce action approximately seven years ago and was contacted by Thomas, but not retained, about other

matters, (2) the prior representation was the type in which it is reasonable to infer that Thomas gave McKenna confidential information, and (3) that there is reason to believe that confidential information is irrelevant to the issues raised in McNally's criminal prosecution. We therefore conclude that Thomas' divorce action and McNally's prosecution do not involve substantially related matters. Accordingly, the district court manifestly abused its discretion by granting the State's motion and disqualifying McKenna in this matter. See Waid, 121 Nev. at 609, 119 P.3d at 1222 (observing that district court has broad discretion in attorney disqualification matters). Accordingly, we

ORDER the petition GRANTED AND DIRECT THE CLERK OF THIS COURT TO ISSUE A WRIT OF MANDAMUS instructing the district court to vacate its order granting the State's motion to disqualify Kenneth McKenna in this matter.³

Cherry, J.
Cherry

Gibbons, J.
Gibbons

Pickering, J.
Pickering

³We vacate the stay imposed on October 10, 2011.

cc: Hon. David A. Huff, District Judge
Kenneth J. McKenna
Lyon County District Attorney
Attorney General/Carson City
Lyon County Clerk