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The Enormity of Our Fiduciary Responsibilities

Court decides two important cases in the criminal law context

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The lawyer's fiduciary duty is, without question, one of our most important duties to clients and nonclients alike. It is a multifaceted duty that has expanded over the years to embrace the duties of competence, communication, confidentiality and conflicts avoidance. Throughout the years, our Supreme Court has helped us understand the enormity of our fiduciary responsibilities with numerous decisions that define its constituent elements and how they apply in various substantive practice areas. Breach of any of the facets of the duty can bring serious consequences from both the ethical and malpractice perspectives, especially where the breach has caused the client any damage. Our Supreme Court has also given us a clear understanding, in cases such as *Conklin v. Hannoeh Weisman*, 145 N.J. 395 (1996), that in the malpractice setting, the breach of the duty need only be one of numerous possible causes of any damage, so long as it is a "substantial factor" in causing the harm.

By and large, our Supreme Court decisions in the area of fiduciary duty have been in the area of civil law. Cases such as *St. Pius X, et al. v. The Diocese of Camden*, et al 88 N.J. 571(1982); *Grunwald v. Bronkesh*, 131 N.J. 483 (1993); *Petrillo v. Bachenberg*, 139 N.J. 472 (1995); and *Packard-Bamberger v. Collins*, 167 N.J. 427 (2001), just to name a few of many, have given us a wealth of understanding into the contours



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and parameters of the fiduciary duty. But this past term, the Court has given us the opportunity to see how fiduciary duty and proximate cause operate in the arena of criminal law.

Malpractice in underlying criminal defense cases is usually premised on the constitutionally rooted theory of "ineffective assistance of counsel" and proving proximate cause is a lot more difficult than in civil cases. The Court decided two important cases, in the criminal law context, which show the interplay of fiduciary duty and proximate cause in criminal law.

The first, *State v. Allegro*, 193 N.J. 352 (2008), clearly stated the two-pronged standard for proving ineffective assistance of counsel, while the second,

State v. Cottle, 194 N.J. 449 (2008) addressed squarely how an attorney's own legal troubles can create a per se conflict of interest, which of course is one of the pillars of the fiduciary duty. Taken together, these two cases establish the Court's deference to an attorney's strategic decisions in how to represent a client and try a case, but not when the attorney himself or herself faces legal problems that could compromise the duty owed to a client.

Allegro arose out of "Skip" Allegro's conviction for maintaining or operating a controlled dangerous substance production facility — a marijuana-growing facility inside a Bradley Beach apartment — and second-degree possession of a controlled dangerous substance with

intent to distribute. After a fire at an apartment inhabited by Allegro, Bradley Beach police and fire investigators discovered a large marijuana-growing facility. A trial resulted in Allegro's conviction. In an application for post-conviction relief ("PCR"), Allegro claimed that his attorney, L. Gilbert Farr ("Farr"), was ineffective. According to Allegro, Farr was under the influence of drugs and disciplinary charges were pending against him at the time of trial. Moreover, Allegro claimed that Farr had failed to prepare and call at trial certain witnesses that he claimed could exonerate him by establishing that he was living in Belmar during the time of the fire.

The PCR court denied Allegro's application, finding that "the defendant was guilty of what he was charged with at trial. He got a fair trial." On Allegro's R. 1:7-4(b) motion for reconsideration, the PCR court reversed itself. It found that counsel had not fully prepared the case because he had failed to interview certain witnesses. As a result, the PCR court could not be fully confident that counsel had prepared the case properly and it reversed Allegro's conviction and sentence and ordered a new trial. An interlocutory appeal was taken. A divided appellate panel reinstated the conviction, finding that the trial amounted to a "credibility contest" that the jury should have been permitted to decide — which it did when it convicted Allegro in the first instance.

On an appeal as of right (due to the divided appellate panel), the Supreme Court reiterated its well-established standard for claims of ineffective assistance of counsel, as set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), and *State v. Fritz*, 105 N.J. 42 (1987). Taken together, the *Strickland/Fritz* analysis requires a defendant challenging the effectiveness of his or her counsel at trial to prove: (1) that counsel's performance fell below an objective standard of reasonableness; and (2) that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. While there is no hard-and-fast rule as to what conduct by an attorney will satisfy the first prong of the *Strickland/Fritz* test, there is a "strong presumption that coun-

sel's conduct falls within the wide range of reasonable professional assistance." *State v. Allegro* 193 N.J. 352 (2008),] citing *Strickland*, 466 U.S. at 688-689. Moreover, mere trial strategy decisions, or "strategic miscalculations" will not warrant reversal of a criminal conviction on the basis of alleged ineffective assistance of counsel.

However, even if the misconduct somehow is determined to have violated the first *Strickland/Fritz* prong — the conduct by the attorney was not objectively reasonable — the defendant still must prove the "but for" causation that the unreasonable conduct was the reason for the conviction. Stated differently, an ineffective assistance claim requires a showing that there is a reasonable probability that "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Allegro* citing *Strickland*, 466 U.S. at 315. The Court described this standard as "exacting," so much so that the defendant must prove that counsel's representation "undermine[d] the court's confidence in the jury's verdict or the result reached." *Allegro* citing *State v. Castagna*, 187 N.J. 293, 315 (2006) (citations omitted). This, of course, is a significantly higher burden of proof than cases of malpractice where underlying transactions or civil litigation are involved. In those cases, the breach of duty by the lawyer can be one of multiple causes of damage so long as it was a "substantial factor in bringing about the ultimate harm" to the client. *Conklin v. Hannoeh Weisman*, 145 NJ 395, 422 (1996).

Turning to the facts of Allegro's conviction, the Court determined that there was no proof sufficient to meet the two-pronged burden of *Strickland/Fritz*. Although Allegro alleged that his counsel was under the influence of drugs during the trial, the PCR judge (who presided over the trial) found that there was no basis for believing Farr was so impaired during the trial. A mere allegation of drug use by an attorney, without more, is not sufficient to warrant post-conviction relief.

Likewise, even counsel's pending disciplinary proceeding did not create a per se presumption of ineffective assistance of counsel. Relying on cases from various

other jurisdictions, the Court found "no reason to depart from that unbroken line of precedent" and concluded that allegations of drug use or pending disciplinary action are "standing alone, insufficient to establish that defense counsel's performance fell below an objective standard of reasonableness," as required by *Strickland/Fritz's* first prong. Likewise, the Court found that the evidence allegedly not developed by counsel due to his purportedly deficient conduct cannot be said to have made the difference between conviction and acquittal. It is not reasonably probable that the witnesses Farr failed to produce at trial would have led the jury to acquit Allegro.

All of this said, the Court remanded the matter for further analysis of whether counsel's assistance was ineffective in connection with plea discussions and negotiations. On this issue, the record was not fully developed, but the Court found troubling the fact that Farr had been disbarred for conduct "substantially similar to that alleged by defendant in respect of the plea discussions and negotiations."

Despite Allegro's holding that a pending disciplinary action against an attorney did not give rise to a per se claim of ineffective assistance of counsel and kept the burden of proof on the party seeking to prove his or her attorney had been ineffective, *State v. Cottle* shifts the burden of proof to the attorney when he or she is under indictment in the same county as his or her client. *Cottle* creates a per se conflict-of-interest rule — which conflict may be formally waived by the client — when an attorney and his client are both under indictment in the same county and being prosecuted by the same prosecutor's office. Failure to obtain knowing and written waiver of the per se conflict renders the attorney's representation ineffective.

Mylee Cottle was a juvenile in 1995, when he was charged with murder and certain weapons offenses. Attorney Steven Olitsky represented him, without advising him that just several months before Cottle's arrest and charges, Olitsky had been indicted for third- and fourth-degree stalking and for violating a restraining order.

In April 1996, county prosecutors admitted Olitsky into pretrial interven-

tion (“PTI”), a “statewide program that allows eligible defendants charged with first-time, non-violent offenses to avoid prosecution by receiving supervisory or rehabilitative treatment for a period not to exceed three years.” *Cottle* citing N.J.S.A. 2C:43-12(a) and -13(c). If the defendant successfully completes PTI, the criminal charges are dismissed. N.J.S.A. 2C:43-13(d); R. 3:28(c). As part of his PTI program, Olitsky was obligated to undertake certain tasks, including, but not limited to obtaining an acknowledgement from each of his clients of their knowledge of his participation in the PTI program, and to submit a copy of the acknowledgement to the county prosecutor’s office.

Unrelated to his pending indictment, on the first day of Cottle’s trial, Olitsky was advised that the Disciplinary Review Board (“DRB”) had recommended his suspension from the practice of law for three months due to commingling of personal and client funds in 1994. (Olitsky ultimately was disbarred for, among other things, continuing to practice law while suspended.) After trial, the defendant was convicted of all counts of the indictment, and was sentenced to life, with a 30-year parole ineligibility on the murder charge (the sentences for his other convictions were merged into the murder sentence).

Cottle filed a motion for post-conviction relief, claiming that Olitsky committed several errors, including his failure to inform Cottle of his own pending legal troubles which inhibited his defense of Cottle. Cottle also claimed that there were trial-related mistakes that rose to the level of ineffective assistance of counsel: the failure to develop alibi witnesses; the failure to effectively consult with defendant; allowing two jurors to see defendant in prison clothing; and wrongly advising the defendant not to testify on the mistaken belief that his juvenile record could be used to impeach him at trial. Another nod to Olitsky’s ineffective representation was the Court’s note that Olitsky’s opening statement — at a murder trial — took up little more than one transcript page.

Both the PCR court and the Appellate Division denied PCR, finding that Cottle could not satisfy the dual prongs of *Strickland/Fritz*. Both courts relied on

the notion (shown to be erroneous by the Court) that while in PTI, a person is not under indictment. Yet this is not true. N.J.S.A. 2C:43-13(b) clearly states that an indictment remains pending while a defendant is enrolled in a PTI program. The indictment is dismissed only after PTI has been successfully completed. However, as *Allegro* shows, the pending disciplinary actions themselves do not create per se ineffective assistance of counsel, so the Appellate Division upheld the conviction.

The Court certified the question of whether “Olitsky’s representation of defendant, while both attorney and client were simultaneously under indictment in Essex County and subject to prosecution by the Essex County Prosecutor’s Office, constituted a per se conflict of interest and therefore ineffective assistance of counsel.” Cottle advocated a “per se rule” finding a conflict of interest under such circumstances because the attorney’s own pending criminal matter restrains the attorney from vigorously challenging the prosecutor in whose hands his or her own fate lies. The Association of Criminal Defense Lawyers (“ACDL”), as amicus, also advocated a per se rule. The state argued against a per se rule, arguing that a fact-sensitive conflict-of-interest standard should be applied to each individual case. As amicus, the Attorney General argued for the state’s position.

Reiterating the paramount fiduciary obligation of an attorney — the duty of loyalty to a client — the Court cited *State ex rel. S.G.*, 175 N.J. 132, 139 (2003), for the proposition that an “attorney should never place himself in the position of serving a master other than his client or an interest in conflict with the client’s interest.” (Other citations omitted.) In Olitsky’s case, his pending indictment eviscerated his own personal incentive to challenge the prosecutor’s office in his client Cottle’s case, for fear his own case would be dealt with more harshly. It is for this reason that the Court’s comment regarding PTI — that the indictment remains pending during the completion of PTI — is significant. Citing cases from other jurisdictions, the Court held that because Olitsky remained subject to prosecution, had he failed to complete his own

PTI program, he was dependent on the very prosecutor’s office he was supposed to be challenging on behalf of his client, thereby undermining his professional independence. Citing *People v. Edebohls*, 944 P.2d 552 (Colo. Ct. App. 1996), and *People v. Castro*, 657 P. 2d 932, 945 (Colo. 1983).

Thus, there was, in the words of the Court, a “material risk” that Olitsky’s representation of Cottle was “materially limited” by his own indictment and pending charges, and by his “dependency on the Essex County Prosecutor’s Office during the period he was enrolled in the PTI program.” Citing RPC 1.7. Thus, the Court established a per se rule holding that an attorney “at the mercy of the very prosecutor’s office trying his client for murder has a conflict of interest.”

With that rule in mind, the Court considered whether the conflict of interest in this case amounted to ineffective assistance of counsel. Relying on *State v. Bellucci*, 81 N.J. 531, 545-546 (1980) — that absent a valid waiver, a per se conflict exists when an attorney or law firm represented two criminal co-defendants and, if not waived constitutes ineffective assistance of counsel — the Court applied the *Bellucci* rule to the facts of this case and held that when the per se conflict arises, failure to obtain a valid waiver of the conflict amounts to per se ineffective assistance of counsel.

The Court noted that an indictment pending in a county different from where the client is being prosecuted — or, presumably, in a different jurisdiction — would not create the per se conflict, because the loyalties of the attorney do not necessarily run counter to those of the client. However, when the attorney’s indictment and the client’s prosecution are pending in the same county or jurisdiction, there will be a conflict of interest and per se ineffective assistance of counsel, absent a clear waiver. Waiver must be clear — the defendant “must be informed in court and on the record of the attorney’s criminal predicament that may be adverse to the best interests of the client. Then, after full disclosure, the defendant must knowingly, intelligently, and voluntarily agree to pro-

ceed with the conflict-tainted attorney.” Moreover, the attorney himself or herself must state that despite the conflict, he or she believes that he or she will be able to provide competent and diligent representation.

In this specific case, there was no evidence of Olitsky informing his client of his pending legal troubles. Thus, the Court vacated Cottle’s conviction and remanded for retrial.

Taken together, both *Allegro* and *Cottle* establish that the deference given to attorneys when claims are made of ineffective assistance of counsel can erode when the attorney is in a position that could only give rise to a conflict of interest, such as the attorney’s own pending criminal prosecution. Once that conflict arises and the usual deference to the attorney shifts to the client, there must be a clear waiver of the conflict

of interest or ineffective assistance of counsel will be found, per se. Although, hopefully, the factual scenario giving rise to *Cottle* is rare, the lesson is important — that even in the face of one’s own criminal prosecution, the lawyer still owes the paramount duty of loyalty to the client and must take whatever steps are necessary to adhere to that duty of undivided loyalty. That, after all, is the essence of our fiduciary duty. ■