

No.

IN THE
SUPREME COURT OF THE UNITED STATES

JAMES DALE HOLCOMBE,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

**On Petition for Writ of Certiorari
to the Florida Fifth District Court of Appeal**

**APPENDIX TO
PETITION FOR WRIT OF CERTIORARI**

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Supreme Court of Florida

MONDAY, FEBRUARY 1, 2021

CASE NO.: SC20-1536

Lower Tribunal No(s):

5D18-3338;

642015CF103537XXXADL

JAMES DALE HOLCOMBE vs. STATE OF FLORIDA

Petitioner(s)

Respondent(s)

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution, and the Court having determined that it should decline to accept jurisdiction, it is ordered that the petition for review is denied.

No motion for rehearing will be entertained by the Court. *See* Fla. R. App. P. 9.330(d)(2).

CANADY, C.J., and POLSTON, LABARGA, LAWSON,
and MUÑIZ, JJ., concur.

A True Copy

Test:

[signature of John A. Tomasino]

John A. Tomasino [seal of Supreme Court
Clerk, Supreme Court of the State of Florida]

db

Served:

MICHAEL R. UFFERMAN

REBECCA ROCK MCGUIGAN

HON. LAURA E. ROTH, CLERK

HON. JAMES R. CLAYTON, JUDGE

HON. SANDRA B. WILLIAMS, CLERK

IN THE DISTRICT COURT OF APPEAL OF THE
STATE OF FLORIDA
FIFTH DISTRICT
NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

JAMES DALE HOLCOMBE,

Appellant,

v.

Case No. 5D18-3338

STATE OF FLORIDA,

Appellee.

_____ /

Opinion filed September 14, 2020

Appeal from the Circuit Court

for Volusia County,

James R. Clayton, Judge.

Michael Ufferman, of Michael Ufferman Law

Firm, P.A., Tallahassee, for Appellant.

Ashley Moody, Attorney General,

Tallahassee, and L. Charlene Matthews,

Assistant Attorney General, Daytona

Beach, for Appellee.

GROSSHANS, J.

James Holcombe (Appellant) appeals the judgment and sentence entered by the trial court after a jury found him guilty of racketeering and conspiracy to engage in a pattern of racketeering. We affirm on all issues, write to address Appellant's conflict-of-interest argument, and remand for correction of a scrivener's error.

Cash for Cards, a business operated and owned by Appellant, purchased gift cards and sold them to online vendors. Appellant employed various individuals, including William Hooper and Matt

Angell. Based on the large volume of cards purchased by the business, law enforcement began an eight-month investigation which resulted in the arrest of Appellant, Hooper, Angell, and others. During the course of that investigation, law enforcement learned that the business knowingly purchased gift cards from individuals who had obtained the gift cards through fraudulent means.

Ultimately, the State charged Appellant with racketeering and conspiracy to engage in a pattern of racketeering. In contrast, Angell and Hooper's charges consisted of multiple counts of dealing in stolen property.

Two attorneys from the same firm were retained to represent Appellant, Angell, and Hooper. At a pretrial hearing, the trial court addressed the possible conflict of interest stemming from the joint

representation of these individuals. The trial court explained to them some of the risks associated with joint representation but never advised them of the right to obtain separate attorneys.¹

Following this hearing, Angell and Hooper entered open guilty pleas to the charges against them. The trial court declined to sentence them until after Appellant's trial.

Prior to the selection of the jury for Appellant's trial, the prosecutor raised the conflict issue in light of Angell and Hooper's pleas. The prosecutor asserted that, in her view, the conflict was now non-waivable. Disagreeing with the prosecutor's position, the trial court concluded that any conflict had already been properly waived.

¹ Defense counsel represented to the trial court that Appellant and his codefendants had signed conflict waivers.

During the trial, the State called numerous witnesses—including Angell and Hooper—who testified about their interactions with the customers, Appellant’s role in the business, how often Appellant was present at the business, and the policies enacted by Appellant. Like other State witnesses, Angell and Hooper were cross-examined by defense counsel. Ultimately, the jury found Appellant guilty as charged on both counts, and the trial court sentenced him to a total of ten years in prison. This appeal timely followed.

On appeal, Appellant asserts entitlement to a “per se” reversal based on his attorney’s conflict of interest.² He claims that his attorney’s joint

² Appellant also contends that his convictions are not supported by sufficient evidence, assails certain evidentiary rulings, challenges the trial court’s decision to give the willful-blindness and principals instructions, faults the trial court for failing to exercise discretion when it declined to impose a downward

representation of him, Angell, and Hooper during the trial resulted in an actual conflict of interest, which he did not validly waive due to insufficient advisements by the trial court.³ According to Appellant, he need only show a conflict existed—not that the conflict adversely affected his counsel’s performance. We disagree.

“The issue of whether there was an actual conflict of interest is a mixed question of law and fact. Mixed questions of law and fact require an appellate court to defer to the trial court on factual matters but provide independent review of legal determinations.” *State v. Alexis*, 180 So. 3d 929, 934 (Fla. 2015) (first citing *Hunter v. State*, 817 So. 2d 786, 792 (Fla. 2002);

departure sentence, and challenges the assessment of two costs. We affirm as to each of these issues without further discussion.

³ Specifically, Appellant asserts that the trial court failed to advise him of his right to obtain other counsel. See *Larzelere v. State*, 676 So. 2d 394, 403 (Fla. 1996).

and then citing *State v. Glatzmayer*, 789 So. 2d 297, 301 (Fla. 2001); *Stephens v. State*, 748 So. 2d 1028, 1032 (Fla. 1999)).

The Sixth Amendment of the United States Constitution provides that a defendant shall have the right to counsel for his defense. Amend. VI, U.S. Const. “As a general matter, a defendant alleging a Sixth Amendment violation must demonstrate ‘a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’” *Mickens v. Taylor*, 535 U.S. 162, 166 (2002) (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)). Case law recognizes an exception for an actual conflict of interest, which the Supreme Court defines as a conflict that “adversely affected . . . counsel’s performance.” *Id.* at 174. Where this standard is met, prejudice is presumed—meaning that a defendant is

“spared . . . the need of showing probable effect upon the outcome.” *Id.* at 166.

Here, Appellant does not point to, nor does the record reflect, any adverse performance on the part of defense counsel. Appellant merely asserts that there was an “actual conflict” because defense counsel represented Appellant as well as Angell and Hooper during the trial. He emphasizes that defense counsel cross-examined Angell and Hooper, whom counsel still represented. However, such facts do not, without more, constitute an actual conflict for Sixth Amendment purposes. *See, e.g., West v. People*, 341 P.3d 520, 533 (Colo. 2015) (noting that a defendant must demonstrate an adverse effect on the representation in order to prove an actual conflict of interest).

Appellant relies on *Lee v. State*, 690 So. 2d 664 (Fla. 1st DCA 1997), for the proposition that he need

not demonstrate an adverse effect on counsel's representation in order to obtain a reversal. In *Lee*, the First District found that a defendant had not voluntarily waived his right to conflict-free counsel due to the trial court's failure to conduct a sufficient inquiry. *Id.* at 668. Citing *Holloway v. Arkansas*, 435 U.S. 475 (1978), the *Lee* court stated, "If . . . the defendant preserves the conflict issue by raising it before trial and does not validly waive the conflict, the trial court's failure to conduct an inquiry or appoint separate counsel . . . requires that the resulting conviction be reversed." 690 So. 2d at 668–69.

We conclude that *Lee* does not support a reversal here. *Lee* predates *Mickens* and does not discuss how the conflict adversely affected counsel's representation in that case. To the extent *Lee* could be interpreted to mean that an actual conflict occurs simply because

defense counsel represents a State witness, such an interpretation would be contrary to *Mickens* as noted by the Florida Supreme Court in *Alexis*. See *Alexis*, 180 So. 3d at 936 (“In order to demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an actual conflict of interest **adversely affected** his lawyer’s performance. . . . When the claim is that the trial court failed to conduct an inquiry about a potential conflict which it knew or should have known about, the claimant must show that a conflict of interest affected counsel’s performance.” (emphasis added) (internal quotation marks omitted) (first quoting *Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980); and then citing *Mickens*, 535 U.S. at 170–72)).

Accordingly, we affirm the judgment and sentence in all respects but remand for the limited purpose of correcting a scrivener’s error in the

sentencing scoresheet, which incorrectly indicates that Appellant did not proceed to trial.⁴

AFFIRMED; REMANDED for correction of scrivener's error.

COHEN and SASSO, JJ., concur.

⁴ Appellant properly raised this issue both on appeal and in the lower court.

In the Circuit Court, 7th Judicial Circuit
in and for Volusia County, Florida
Division CRIMINAL 07
Case Number 2015 103537 CFDL

STATE OF FLORIDA

v.

JAMES DALE HOLCOMBE

JUDGMENT

The defendant, JAMES DALE HOLCOMBE,
being personally before this court represented by
AARON D DELGADO, the attorney of record, and the
state represented by {SAO}, and having

 X been tried and found guilty by jury of the
following crime(s)

___ entered a plea of guilty to the following crime(s)

___ entered a plea of nolo contendere to the
following crime(s)

<u>Count</u>	<u>Crime</u>	<u>Offense Statute Number</u>
1	Racketeering Violation	895.03
2	Conspiracy to Commit Racketeering	895.03(4)

<u>Degree of Crime</u>	<u>Case Number</u>	<u>OBTS Number</u>
F/F	2015 103537 CFDL	6405025847
F/F	2015 103537 CFDL	6405025847

X and no cause being shown why the defendant should not be adjudicated guilty, IT IS ORDERED THAT the defendant is hereby ADJUDICATED GUILTY of the above crime(s)

___ and good cause being shown; IT IS ORDERED THAT ADJUDICATION OF GUILT BE WITHHELD

X and having been convicted or found guilty of, or

having entered a plea of nolo contendere or guilty, regardless of adjudication, to an offense specified in section 943.325, Florida Statutes, the defendant shall be required to submit blood or other biological specimens.

(continued to next page)

STATE OF FLORIDA

V.

JAMES DALE HOLCOMBE

Case Number 2015 103537 CFDL

FINGERPRINTS OF DEFENDANT

[fingerprints of defendant]

Fingerprints taken by:

[signature of deputy]

Deputy Sheriff

Name

Title

I HEREBY CERTIFY that the above and foregoing are the fingerprints of the defendant JAMES DALE HOLCOMBE and that they were placed thereon by the defendant in my presence in open court this date.

Defendant's Social Security

No./Reason for absence: _____

DONE AND ORDERED in open court in Volusia

County, Florida this 22 day of October, 2018.

[signature of James R. Clayton]

JAMES R. CLAYTON

Circuit Judge

(continued to next page)

SENTENCE

(As to Count 1)

The defendant, being personally before this court, accompanied by the defendant's attorney of record, AARON D DELGADO, and having been adjudicated guilty herein, and the court having given the defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why the defendant should not be sentenced as provided by law, and no cause being shown

(Check one if applicable.)

___ and the Court having on deferred imposition of sentence until this date

___ and the Court having previously entered a judgment in this case on now resentences the defendant

___ and the Court having placed the defendant on

probation/community control and having subsequently revoked the defendant's probation/community control.

It is The Sentence Of The Court that:

___ The defendant pay a fine of \$ ____, pursuant to section 775.083, Florida Statutes, plus \$ ____ as the 5% surcharge required by section 938.04, Florida Statutes.

X The defendant is hereby committed to the custody of the Department of Corrections.

___ The defendant is hereby committed to the custody of the Sheriff of Volusia County, Florida.

___ The defendant is sentenced as a youthful offender in accordance with section 958.04, Florida statutes.

To Be Imprisoned (Check One; unmarked

sections are inapplicable.):

___ For a term of natural life.

X For a term of 10 YEARS.

___ Said SENTENCE SUSPENDED for a period of
subject to conditions set forth in this order.

If “split” sentence, complete the appropriate paragraph.

___ Followed by a period of _____ on probation under
the supervision of the Department of
Corrections according to the terms and
conditions of supervision set forth in a separate
order entered herein.

___ However, after serving a period of _____
imprisonment in _____, the balance of the
sentence shall be suspended and the defendant
shall be placed on probation for a period of
_____ under supervision of the Department of

Corrections according to the terms and conditions of probation/community control set forth in a separate order entered herein.

In the event the defendant is ordered to serve additional split sentences, all incarceration portions shall be satisfied before the defendant begins service of the supervision terms.

(continued...)

SENTENCE

(As to Count 2)

The defendant, being personally before this court, accompanied by the defendant's attorney of record, AARON D DELGADO, and having been adjudicated guilty herein, and the court having given the defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why the defendant should not be sentenced as provided by law, and no cause being shown

(Check one if applicable.)

___ and the Court having on deferred imposition of sentence until this date

___ and the Court having previously entered a judgment in this case on now resentences the defendant

___ and the Court having placed the defendant on

probation/community control and having subsequently revoked the defendant's probation/community control.

It is The Sentence Of The Court that:

___ The defendant pay a fine of \$ ____, pursuant to section 775.083, Florida Statutes, plus \$ ____ as the 5% surcharge required by section 938.04, Florida Statutes.

X The defendant is hereby committed to the custody of the Department of Corrections.

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___ The defendant is sentenced as a youthful offender in accordance with section 958.04, Florida statutes.

To Be Imprisoned (Check One; unmarked

sections are inapplicable.):

___ For a term of natural life.

X For a term of 10 YEARS.

___ Said SENTENCE SUSPENDED for a period of
subject to conditions set forth in this order.

If “split” sentence, complete the appropriate paragraph.

___ Followed by a period of ___ on probation under
the supervision of the Department of
Corrections according to the terms and
conditions of supervision set forth in a separate
order entered herein.

___ However, after serving a period of _____
imprisonment in _____, the balance of the
sentence shall be suspended and the defendant
shall be placed on probation for a period of
_____ under supervision of the Department of

Corrections according to the terms and conditions of probation/community control set forth in a separate order entered herein.

In the event the defendant is ordered to serve additional split sentences, all incarceration portions shall be satisfied before the defendant begins service of the supervision terms.

(continued...)

In the event the above sentence is to the Department of Corrections, the Sheriff of Volusia County, Florida, is hereby ordered and directed to deliver the defendant to the Department of Corrections at the facility designated by the department together with a copy of this judgment and sentence and any

other documents specified by Florida Statute.

The defendant in open court was advised of the right to appeal from this sentence by filing notice of appeal within 30 days from this date with the clerk of this court and the defendant's right to the assistance of counsel in taking the appeal at the expense of the State on showing of indigency.

In imposing the above sentence, the court further recommends:

DONE AND ORDERED in open court at Volusia County, Florida, this 22 day of October, 2018.

[signature of James R. Clayton]

[e-signed 10/24/2018 11:34 AM]

JAMES R. CLAYTON

Circuit Judge

Excerpt from the transcript of a
pretrial hearing (July 26, 2018), page 7:

THE COURT: All right. Now, the other two
codefendants pled, didn't they?

MR. DELGADO [defense counsel]: Yes.

THE COURT: Are they testifying?

MS. SAMMON [the prosecutor]: I haven't
decided.

THE COURT: But you've worked that out with
him?

MR. DELGADO: They took the depos.

MS. SAMMON: They did. Yes.

THE COURT: Oh, good. Good. All right. Good deal. . . .

Excerpts from the transcript of the
trial (August 6, 2018), pages 5-11:

THE COURT: All right. Good deal. And then
what –

Okay. So I think the State is still concerned
about any potential possible conflict –

MS. SAMMON [the prosecutor]: Yes, Your
Honor.

THE COURT: – with the other two fellas?

MS. SAMMON: Yes, Your Honor.

Two of the co-defendants also represented by Mr.
Delgado and his firm in this case are testifying on
behalf of the State.

And so the issue is Mr. Delgado, or his co-counsel, cross examining their current client in representation of their current clients on trial in this case.

THE COURT: But how are – and is that Hooper and Angell?

MS. SAMMON: Matthew Angell, yes, Your Honor.

THE COURT: How are they – are they – is it to their detriment? I mean, they've already entered a plea. They just haven't been sentenced yet.

MS. SAMMON: Yes, Your Honor. Your Honor put off sentencing until after both defendants testified

at trial and basically determine whether or not they were cooperative and testified truthfully for the State.

Therefore, it's in their best interest to cooperate and testify truthfully in order to benefit from the plea discussions that the defendants and their counsel had with Your Honor during the time of their plea.

Their testimony will provide evidence for the State against the defendants. And, therefore, in order to represent his clients, Dale Holcombe and James Holcombe, Mr. Delgado will have to, in the State's position, cross-examine his current clients that he's representing which would be Matthew Angell and William Hooper.

....

... The circumstances have now changed. Two

of the defendants have entered a plea agreement – or has entered their pleas open pleas to the bench and are now witnesses for the State.

Circumstances now are much different than they were [when the trial court conducted the previous inquiry with the defendants regarding the conflict of interest]. There is a greater conflict that exists, one that the State's position is not waiveable.

THE COURT: Well, I disagree. I think it can be waived. I think ultimately defendants can – as long as they're adequately advised, which I think they were – all four were adequately advised, they were told exactly what would happen, and they waived it.

And I do remember looking at the waiver. And I remember having this issue when I was a private attorney – not with four of them, but two – where, you

know, theoretically they could be testifying against each other. They both wanted to waive it, and we put it in writing. And we made it and had the judge review it.

So I found that the waiver was valid. It was entered into freely, voluntarily, knowingly, intelligently, with full advice of the consequences.

....

Okay. So I find there's no conflict. I accepted the waiver previously somewhere along the line. I discussed it the other day with Hooper and Angell when they were here in front of me for sentencing, and I continued the sentencing, so I'm ready to go.

....

MR. DELGADO [defense counsel]: And, Judge and what I can do is if – and I don't know Mr. – we'll get to the two witnesses in question today. I mean, I can withdraw from their representation and have a public defender or somebody appointed. I think it would have to be conflict counsel.

THE COURT: I'm not going to do that.

Excerpts from the transcript of the
trial (August 8, 2018), pages 405-508:

MS. SAMMON [the prosecutor]: Thank you, your
honor.

THEREUPON,

WILLIAM HOOPER,

having been duly sworn by the clerk, was examined
and testified upon his oath as follows:

DIRECT EXAMINATION

BY MS. SAMMON:

Q Could you please state your name and spell it
for the record.

A My name is William Hooper, W-I-L-L-I-A-M,
last name H-O-O-P-E-R.

Q Mr. Hooper, where do you currently reside?

A I'm sorry, what was that?

Q Where do you currently reside?

A In Daytona Beach.

.....

[the prosecutor questioned Mr. Hooper over the
next 17 pages]

.....

THE COURT: Cross?

CROSS-EXAMINATION

BY MR. DELGADO [defense counsel]:

Q Good afternoon.

A Good afternoon.

Q You've been friends with James Holcombe a long time.

A Correct.

....

[defense counsel questioned Mr. Hooper over the next 25 pages]

....

MS. SAMMON: Thank you, Your Honor.

THEREUPON,

MATTHEW ANGELL,

having been duly sworn by the clerk, was examined

and testified upon his oath as follows:

DIRECT EXAMINATION

BY MS. SAMMON:

Q Good afternoon. Can you please state your name and spell it for the record.

A Matthew Angell, M-A-T-T-H-E-W, A-N-G-E-L-L.

Q Mr. Angell, where do you currently reside?

A At my parents' house in Holly Hill.

Q Volusia County?

A Volusia County.

.....

[the prosecutor questioned Mr. Angell over the
next 33 pages]

.....

THE COURT: Cross?

CROSS-EXAMINATION

BY MR. DELGADO:

Q Good afternoon, Mr. Angell.

A Good afternoon.

....

[defense counsel questioned Mr. Angell over the
next 17 pages]