No. 72,795

IN THE

COURT OF CRIMINAL APPEALS

OF TEXAS

DARLIE LYNN ROUTIER,
Appellant

v.

THE STATE OF TEXAS,
Appellee

APPELLANT'S REPLY BRIEF

On Appeal from the
Criminal District Court No. 3 of
Dallas County, Texas
Trial Court No. F96-39973-J

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TABLE OF CONTENTS

INDEX OF AUTHORITIES CASES:

STATUTES:

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TO THE HONORABLE JUDGES OF THE COURT OF CRIMINAL APPEALS:

COMES NOW DARLIE LYNN ROUTIER, Appellant in the above styled and numbered cause and files this her Appellant's Reply Brief in support of her prayer that the judgment of conviction be reversed and the cause remanded for a new trial and, as appropriate, the Court order further hearings in the trial court as requested herein.

STATEMENT OF THE CASE

Appellant was indicted for the capital murder of a child under the age of six. TEX.PENAL CODE ANN. §19.03(a)(8). A jury found Appellant guilty as charged, CR.1A: 150, and by operation of the jury's answers to the two special issues, CR.1A: 220-1, punishment was assessed at death, CR.1A: 220.

For purposes of this reply brief, Appellant would point out the following additional facts which are inconsistent with, or place in the proper context, the State's recitation of the "facts" as set forth in its brief:

1. Following Appellant's surgery, she was moved to the intensive care unit in part due to the doctor's concern that, upon learning of her children's deaths, she "might be in a very precarious psychological state;" RR.30: 739;

2. "[T]he dust on the windowsill was undisturbed" (State's Brief, p. 10) as well when, in a courtroom demonstration the prosecution had one of the lead detectives climb through the same window twice; RR.35: 2300-1;

3. The suggestion that there was "mulch outside the window" (State's Brief, p. 10-11) through which the defense argued Appellant's assailant entered and exited the house is misleading at best. Photographs plainly show there was no mulch directly outside this window. State's Exhibit Nos. 13A, 13B, and 13C; RR.40: 5782, 5783, 5784. Further, while someone could have walked through the mulch to the back yard gate, such a path was obstructed by a large toy and turned over chair. Given these obstacles, the paved walkway was clearly the more efficient route to the gate;

4. The "life insurance policies on the dead boys" (State's Brief, p. 11) were $5,000.00 riders to Darin's $700,000.00 (or $800,000.00) policy and Appellant's $200,000.00 (or $250,000.00) policy; RR.5: 314-5; RR.43: 4504-5;

5. As to the purported "flat effect" of Appellant at the hospital (State's Brief, p. 11), in fact she was noted as being "tearful," "frightened," "crying," "visibly upset," and "very emotional;" RR.30: 782-4; RR.31: 951; 1104-5; 1109-1110;

6. Appellant "contemplated" suicide around May 3, 1996, but never "attempted" to commit suicide; RR.36: 2648; RR.44: 4910.

While there were other misrepresentations of the facts in the State's brief, Appellant will forego correcting the less significant of these. Further, Appellant will discuss additional important factual errors in her reply under the relevant points of error.

PRELIMINARY STATEMENT

Appellant's reply will be limited to certain points of error but should not be construed as agreeing with the State's Brief or waiving any of the complained-of errors on which no reply is made.

POINT OF ERROR NUMBER ONE
(Restated)

APPELLANT'S SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WAS VIOLATED BECAUSE HER LEAD COUNSEL HAD AN ACTUAL CONFLICT OF INTEREST AND THE TRIAL COURT DID NOT CONDUCT A HEARING ON THE STATE'S MOTION TO DETERMINE WHETHER HE SHOULD BE DISQUALIFIED.

ARGUMENT AND AUTHORITIES

The State claims Doug Mulder "did not have a formal attorney-client relationship with Darin" and that, even if he did, "Mulder was not actively representing conflicting interest at the time of trial." State's Brief, p. 25. This language appears to have merged several case authorities to come up with an assertion that may superficially ring true but which actually fails to apply the proper legal standards to the facts presented. The issue of a "formal relationship" will be examined first.

"Formal Relationship"

The first appearance of Doug Mulder's name in this appellate record appears in the State's Motion For Dismissal Of Court-Appointed Attorneys filed September 19, 1996. CR.1B: 474-5. This motion claims Mulder had advised the trial court on September 12, 1996, that he represented Appellant. There is nothing in the record to support this claim.

However, on September 20, 1996, Mulder did appear in court and announced he was representing both Darlie Kee and Darin Routier on their separate show cause orders for alleged contemptuous violations of the court's gag order. The legal significance of the show cause order against Darin Routier must be examined.

The court's gag order prohibited any witness from making any out-of-court statement described as follows which could be reasonably expected to be made public:

1. statements concerning the expected testimony of the defendant or any witness, or the character, reputation or credibility of any witness;

2. statements concerning the existence or contents of any confession or statement given by the defendant herein, or the refusal or failure of anyone to make a statement;

3. statements concerning the nature of any evidence which may be presented, or the performance of any tests, the results thereof, or the refusal to perform or to allow to be performed any examination or test.

CR.1A: 11-16.

This gag order specifically warns of the penalty range for a violation thereof: "confinement in the county jail for up to six months and/or a fine not to exceed $500." CR.1A: 16. See TEX.GOV'T CODE ANN. §21.002. Having been subpoenaed, Darin was a "witness" as contemplated by the gag order. RR.8: 12.

Following a motion filed by the State, CR.1B: 275, Darin allegedly violated the gag order by "providing statements and information concerning [the case] to the KRLD radio talk show hosted by Rick Roberts which was aired July 25, 1996..." CR.1B: 310. Darlie Kee's act(s) of

contempt similarly were alleged to have been by making certain statements "during a live interview on KRLD-AM Radio with Rick Roberts which aired on July 25, 1996." CR.1B: 316.

A contempt-of-court proceeding is quasi-criminal in nature and should conform as near as practicable to those is criminal cases. Ex parte Sanchez, 703 S.W.2d 955 (Tex. 1986). It is clear that the contempt charge(s) against Darin were for criminal contempt rather than civil (or coercive) contempt. See generally Ex parte Werblud, 536 S.W.2d 542, 545-6 (Tex. 1976). Criminal contempt is punitive in nature and carries a fixed punishment. Ex parte Werblud, supra.

With up to six months in jail, a contempt charge is the practical equivalent of a Class B misdemeanor. TEX.PENAL CODE ANN. §12.22. Given the gag order prohibited "any statement" and the show cause order accused Darin of "[p]roviding statements" (emphasis added), it is conceivable Darin was exposed to much more than six months in jail, especially since there was no challenge to the adequacy of the notice provided Darin in the show cause order. One has a right to a jury trial in a contempt case where the punishment may exceed six months in jail. Ex parte Sanchez, supra.

Darin was certainly entitled to effective assistance of counsel himself in this proceeding. (Cf. Lawson v. State, 467 S.W.2d 486 (Tex.Crim.App. 1971) and Warren v. State, 744 S.W.2d 614 (Tex.Crim.App. 1988), overruled by Jordan v. State, 54 S.W.2d 783 (Tex.Crim.App. 2001) only so as to require writ of habeas corpus to challenge validity of prior or underlying conviction.)

Even though Mulder advised the court that he agreed to represent Darin "this morning," he was familiar with the contents of the tape recording of the radio program on which Darlie Kee and Darin appeared. RR.8: 10. He obviously also was aware of both the gag order, the State's motion and the show cause order. RR.8: 12. As to his representation of Darin, Mulder is presumed to have rendered effective assistance of counsel since there is no evidence to the contrary. Strickland v. Washington, 466 U.S. 668, 689 (1984). In her original brief, Appellant outlined the minimum conduct required of Mulder in his defense of Darin. Appellant's Brief, pp. 32-4. For the State to assert that "Mulder had no direct knowledge of Darin's actions with regard to the gag order" (State's Brief, p. 26) is plainly wrong based on the record.

That the hearing was "brief" adds nothing to the State's argument as to whether Mulder had a "formal" attorney-client relationship. The length of any court proceeding has never been a factor in determining a conflict issue. For the State to describe Mulder's services to Darin as being "simply representing Darin for the brief gag order hearing" displays a casualness about defending someone facing six months (or more) in jail that could only come from never having been faced with such a task or been subjected to such a punishment.

The State cites Mulder's affirmative responses to the trial court's questions as to whether he represented Kee and Darin "for the purposes of this hearing only" as the basis for concluding that the scope of Mulder's relationship with the two was only that. Again, the Sate is exaggerating the meaning of this colloquy. First, the only matter before the trial court involving Kee and Darin was the contempt proceeding so of course Mulder represented them for that "hearing only." Second, it is plain from later statements that day, Mulder actually represented Kee as a "consultant" as well. RR.8: 17. As for Darin, there was never any questioning of him as to any other matter on which Mulder may have then been representing

him. At the hearing on the State's motion to dismiss Appellant's appointed counsel, the court only asked Darin whether he or Appellant had hired Mulder to represent Appellant. RR.8: 16-17. The issue of additional representation of Darin by Mulder after the contempt hearing was not addressed by anyone nor was it even a relevant subject matter for the court or the prosecution.

Regardless of whether there was any on-going professional services to be rendered personally to Darin by Mulder following the contempt hearing, the circumstances reveal Mulder and Darin certainly had a "formal relationship."

"Actively Representing Conflicting Interests"

The State cites Ex parte Morrow, 952 S.W.2d 530, 538 (Tex. Crim.App. 1997) as the basis for this phrasing of the legal standard to be applied. While accurate in a general sense, the issue raised by Appellant is better addressed by cases analyzing conflict issues which arise in the specific instance of concurrent or successive representation of clients. While the factors to be considered are often many, the Fifth Circuit has established its "guiding principle" as being "whether counsel's allegiance to the accused was compromised by competing obligations owed to other clients." Perillo v. Johnson, 205 F.2d 775, 798 (5th Cir. 2000). See also, Brink v. State, No. 14-00-01439-CR (Tex.App. - Hous. [14th Dist.] Dec. 6, 2001). This "guiding principle," when applied to the State's four-part argument against a finding of its proposed standard ("actively representing conflicting interests"), reveals an actual conflict of interest by Mulder.

The State first asserts, without benefit of citation, that since Darin was never charged or indicted with the same offense as Appellant, then there was no conflict. Of course the simple answer to this argument is that no case law restricts conflicts to only those charged together with a crime. While there are cases which present those facts, such is not a line of demarcation. For instance, if an attorney was hired by one client who was not yet even arrested but who confessed to the attorney, could that lawyer later represent someone who ultimately was charged and put on a defense blaming his first client?

If, based on anything Darin said or anything Mulder otherwise learned from any source, Mulder had information implicating Darin, Mulder would have been precluded from using such information on Appellant's behalf because of its potential detriment to Darin. An attorney has a duty that extends beyond just confidentiality. An attorney also has a duty of loyalty to a client, whether a current or former client. Perillo, supra, at 801. It should be enough to say that the presentation of a "blame shifting" defense for Appellant against Darin would be the ultimate act of disloyalty and Mulder was conclusively barred from doing so as a conflict to Darin's interest.

The State's second argument is that Darin was a defense witness rather than a State's witness and thus there was no conflict. In a conflict analysis, it is wholly irrelevant whether the witness is called (or not called) by the State or the defense. See Nethery v. State, 29 S.W.3d 178 (Tex.Crim.App. 2000); Hess v. Mazurkiewicz, 135 F.3d 905 (3d Cir. 1998); United States v. Gonzales, 105 F.Supp. 2d 220 (S.D.N.Y. 2000). It should be remembered additionally that the State subpoenaed Darin and his testimony was essentially nailed down by virtue of his written statement and his sworn testimony at the "no bond" hearing. While the State could have called him in its case-in-chief or in rebuttal, a more reasonable strategy was to count on the defense to call him on the belief that the chosen intruder theory defense

all but required the defense to put Darin on the stand. Indeed, Darin being called as a "defense witness" could even be considered the fruit of Mulder's conflict.

The State further reasons that Appellant and Darin had virtually identical interests in the outcome of the trial. This is not true in view of the actual conflict shown by Appellant that arose from the viable defense strategy of blaming Darin for the crimes, a strategy prohibited due to Mulder's representation of Darin. This "identical interests" argument is nonsensical in the face of the actual conflict alleged: Darin's true interest was in not being accused by his own lawyer of the crime for which his wife was on trial. After all, the State had alleged in writing that it had evidence implicating him in the crime and/or the cover-up. Therefore, to ascribe a single interest value to Appellant and Darin fails to account for the conflicted interests demonstrated by the record.

The third part of the State's argument is that Appellant had other members on her defense team for whom no conflict claim has been raised. In support, the State tenders one case wherein the defendant had affirmatively waived conflict-free counsel. More importantly, and in addition to the case law cited in her original brief, Doug Mulder was Appellant's lead counsel as well as the lawyer who called Darin to the witness stand and questioned him. RR.42: 4236. These facts, coupled with the absence of any information that the other attorneys affirmatively protected Appellant from Mulder's conflict, prevents the State's argument from prevailing.

Lastly, as its fourth and final argument, the State attributes to defense counsel the power to be the final arbiter of whether he had a conflict. Aside from this not being the law, the State's Brief is totally wrong in its factual support.

The State asserts that Appellant's counsel stated to the trial court there was no conflict. (State's Brief, pp. 30; 31). In truth, Appellant's counsel never said there was no conflict as to Mulder representing Appellant in relation to having represented Darin. There is a fundamental and critical difference between the existence of a conflict and a waiver.

There is no showing in this record that Appellant knowingly and intelligently waived any conflict. Although the State urges that Appellant herself should have asked for a hearing if she thought there was a need for one, such is not the law either. United States v. Alvarez, 580 F.2d 1251, 1260 (5th Cir. 1978)(laymen do not have sufficient knowledge to decide conflict issues on their own).

The State's reliance on Levy v. United States, 25 F.3d 146, 154 (2d Cir. 1994) is also misplaced for the reason that there the trial court made extensive inquiries as to the existence of a conflict, not, as what actually happened here, whether there was a waiver of the conflict.

It should be reiterated that an "adverse effect" requiring reversal in this case does not require a showing that the jury verdict would have been different with conflict-free counsel. Rather, all is required is a showing of a plausible alternative strategy or tactic which is reasonable under the facts but which was inherently in conflict with the attorney's other loyalties or interests. Perillo, supra, at 860.

As its last option, the State suggests a remand for a conflict hearing. Not only is Appellant entitled to a reversal under the law and the facts, but a remand hearing will serve no purpose. The central issue to be addressed would be Mulder's duties of confidentiality and loyalty to

Darin which, without the unlikely event of a waiver by him, Mulder could not discuss. Cf., Ramirez v. State, 13 S.W.3d 482, 489-90 (Tex.App. - Corpus Christi 2000) pet. dism'd, improvidently granted, 67 S.W.3d 177 (Tex.Crim. App. 2001).

POINT OF ERROR NUMBER TWO
(Restated)

APPELLANT'S CONVICTION MUST BE REVERSED BECAUSE A SIGNIFICANT PART OF THE REPORTER'S RECORD NECESSARY TO THE APPEAL WAS LOST OR DESTROYED THROUGH NO FAULT OF HER OWN.

ARGUMENT AND AUTHORITIES

Appellant has argued that the uncertified 54 pages found in volume 10 cannot be considered part of this appellate record and thus such constitutes a "lost or destroyed" portion of the record under TEX.R.APP.P. 34.6(f).

The State contends that while this portion of the record wasn't certified as accurate, the court reporter could have certified it and thus this Court should treat it as if it were.

It should first be noted that the State has not sought any extraordinary relief from this Court to require Susan Simmons to certify these 54 pages nor did it ask the trial court for any such relief.

The State asserts that Simmons did not say these 54 pages "were not certifiable." (State's Brief, p. 33). While strictly accurate, the State utterly fails to cite that Simmons would not certify this portion based on her full review of the Halsey work product. This was the conclusion reached by the trial court in its order dated January 28, 2000, as to Simmons' testimony. SCR.2: 567. As found by the trial court, Simmons' not feeling "comfortable" meant that she would not certify those pages because she didn't trust the accuracy of Halsey's steno notes.

This position is not "at odds" with Simmons' testimony about the rest of the record because it is clear from all her testimony that she created her record by using the audiotapes virtually exclusively because she didn't trust Halsey's notes.

Appellant's Brief set forth numerous case authorities for the proposition that undisputed statements by trial participants are accepted as proof of the events. Appellant's Brief, pp. 45-6. Other authorities cited established the legal significance of docket entries as proof of what occurred in court. Appellant's Brief, pp. 47-8. The State has taken no issue in its brief with these authorities. Yet, in continuing its misconstruction of Point Of Error Number One, the State insists once more that there was no hearing on its own conflict motion because "the defense assured everyone that Mulder has no such conflict." (State's Brief, p. 37, 39). Once again, Appellant would point out that no one ever asserted Mulder didn't have a conflict in relation to Darin's representation, but only that any conflict was waived.

On the issue of the significance of the lost or destroyed portion of this record, the State's argument is based on the conclusion that, regardless of anything present or absent in the uncertified pages, this Court can decide the conflict issue against Appellant. However, the State fails to acknowledge that the issues of whether there was a conflict, the nature and

extent of any conflict and the sufficiency of any waiver thereof are the essential facts needed by any court to decide a conflict issue. Simply stated, a lost or destroyed record containing any such information necessarily would be deemed "significant."

Finally, the State claims "Appellant had years to adduce evidence supporting her claim of a lost or destroyed record" is disingenuous given Appellant's extensive requests for a hearing to do just that which were ultimately denied by the trial court. See Point Of Error Numbers Four and Five, Appellant's Brief, pp. 84-87.

POINT OF ERROR NUMBER THREE
(Restated)

APPELLANT IS ENTITLED TO A NEW TRIAL BECAUSE THE REPORTER'S RECORD DOES NOT CONFORM TO THE REQUIREMENTS OF TEX.R.APP.P. 34.6(A)(1) AND THE DEFECT CANNOT BE CORRECTED.

POINT OF ERROR NUMBER FOUR
(Restated)

APPELLANT IS ENTITLED TO A HEARING WHICH COMPORTS WITH DUE PROCESS ON HER OBJECTIONS TO THE COMPLETENESS AND ACCURACY OF THE REPORTER'S RECORD BEFORE IT CAN BE USED TO DECIDE HER APPEAL.

POINT OF ERROR FIVE
(Restated)

APPELLANT IS ENTITLED TO A RULE 34.6(E)(2) HEARING TO SETTLE THE DISPUTES ABOUT THE REPORTER'S RECORD BEFORE IT CAN BE USED TO DECIDE HER APPEAL.

ARGUMENT AND AUTHORITIES

In the interest of brevity, Point Of Error Numbers Three, Four, and Five will be argued together.

Susan Simmons testified at length to the standard procedure in creating an appellate record. As the court reporter types on her machine, the keystrokes are recorded on both paper steno notes as well as a computer disk or hard drive, each containing the specialized letters/symbols peculiar to the world of court reporters. That disk/hard drive full of symbols is then translated by computer into English, usually with the aid of a "personal dictionary" of the reporter which will translate certain symbols which may have a unique meaning to that court reporter. This initial translation is then "edited" by the use of audiotape backups of the courtroom proceeding. This editing entails reading the initial translation while listening to the audiotapes and making corrections of any keystroke or translation errors. A printed paper version of this edited translation of the steno notes then becomes the appellate record. SRR.13: 10-17.

The Halsey transcript has been stricken as the record of this appeal for being inaccurate and the appellate record created here by Susan Simmons was not produced in accordance with Simmons self-described normal procedure.

The State does not dispute that Simmons did not start her process by transcribing Halsey's notes. While Appellant contends that Simmons thus violated the rules which require a transcription of a reporter's steno notes, the State claims all Simmons did was provide the editing necessary to make Halsey's transcription of her notes accurate as to what occurred at trial.

Appellant concedes that audiotapes may be used to edit an initial transcription of a court reporter's notes. However, the use of tapes cannot totally supplant the official record of a trial, i.e., the steno notes. The issue then is whether the audiotapes or Halsey's steno notes were the basis for this appellate record.

It should be conceded that it is only a matter of degree when determining the extent a final record is based on notes or tapes. That is, obviously if only one word is changed in the steno transcript due to what was heard on the audiotapes, then there would be no valid claim the record was actually an audiotape record. In contrast, if only one word of the record was based on the reporter's steno notes and the balance was based on the audiotape, then there would be no dispute that the record would be characterized as being based on a transcription of the audiotapes rather than the steno notes.

Somewhere between these extremes is a line at which a reporter's record becomes outside the rules for not being truly a transcription of the court reporter's notes. Wherever that line may be in any other case, in the case at bar it was clearly crossed.

This is because Simmons testified that despite having in her possession Halsey's steno notes, Halsey's edit disks, the audiotapes and Halsey's printed transcript, Simmons only rarely referred to the steno notes. SRR.13: 24, 36. Instead, she simply strapped on the headphones, pulled out the Halsey transcript, and wrote corrections in red ink based almost exclusively on the content of the audiotapes. SRR.13: 23. She then provided the marked-up Halsey transcript and Halsey's edit disks to an assistant. This assistant would then change the edit disk to reflect Simmons' handwritten revisions, SRR.13: 25-28, and the new record was printed out.

If the record in this cause does not establish to the satisfaction of the Court that the Simmons record crossed the line between having a foundation on the notes versus the audiotapes, then Appellant is entitled to a hearing in the trial court on this issue alone.

Appellant is also entitled to a hearing which comports with due process of her multiple objections filed pursuant to the trial court's directives together with the written questions of facts which need to be resolved to determine the accuracy of the new record. In its response, the State cited no authority for denying Appellant a hearing on these pleadings.

The State now claims Appellant "did not identify specific factual disputes that the trial court needed to resolve..." (State's Brief, p. 49). The irony of this contention is not lost on Appellant.

Her number one objection to the Simmons record in the trial court was based on the lost or destroyed conflict hearing which all parties said took place but which is nowhere to be found in the record. SCR.2: 490. In conjunction to these objections, Appellant set forth specific questions which needed to be addressed at a hearing to resolve this issue. SCR.2: 480. The State opposed any hearing on these and the other issues raised by Appellant. SCR.2: 293.

The State now duplicitously argues in this Court that Appellant has not shown there was a conflict hearing or that it was stenographically recorded. Yet these are the very questions submitted to the trial court in support of Appellant's request for a hearing. SCR.2: 480-1, 490-500. Even a casual review of the remainder of Appellant's objections and fact questions submitted to the trial court will demonstrate their relevance to the issues raised on this appeal. SCR.2: 480-89; 490-559. Appellant identified literally hundreds of problems to be resolved in a hearing and had subpoenaed multiple witnesses and produced multiple documents in support of her claims.

If the condition of this record does not warrant a reversal as it is, due process requires Appellant have her day in court to attempt to prove her complaints.

PRAYER

For the reasons stated, Appellant prays that the judgment of conviction be reversed and the cause remanded for a new trial and, as appropriate, that this Court order further hearings in the trial court as requested herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the fore- going document was served upon (1) Bill Hill, District Attorney, 133 N. Industrial Blvd., Dallas, Texas 75207; and (2) Matthew Paul, State's Prosecuting Attorney, P.O. Box 12405, Austin, Texas 78711, by depositing a copy of the same in the U.S. Mail, postage paid, on this the _____ day of March, 2002.

J. STEPHEN COOPER