UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 75

September Term, 2015

HAROLD BRIAN CLARK

v.

STATE OF MARYLAND

Berger,
Nazarian,
Beachley,

JJ.

Opinion by Berger, J.
Dissenting opinion by Nazarian, J.

Filed: February 22, 2017

* This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Harold Clark was charged by indictment with attempted first-degree murder, attempted second-degree murder, robbery, and numerous other related offenses in the Circuit Court for Baltimore County. In August 2014, Mr. Clark filed an Attorney Grievance Commission ("AGC") complaint against his public defender. On December 15, 2014, the day before Mr. Clark's trial was scheduled to begin, his public defender requested a postponement explaining that he was not prepared for trial because he had been unable to confer with Mr. Clark while the grievance was pending. The court recognized that the AGC complaint had prevented Mr. Clark's public defender from conferring with him and preparing for trial, and found good cause to postpone the case. The court set the new trial date for March 9, 2015, and the grievance was resolved before the three-day jury trial, which began on March 10, 2015. At the conclusion of the trial, Mr. Clark was convicted of attempted first-degree murder, robbery, and other lesser-included offenses.

On appeal, Mr. Clark asserts that the trial court erred by failing to conduct the proper inquiry under Maryland Rule 4-215(e) when he indicated that he wanted to discharge his counsel, by failing to take curative action in connection with counsel's conflict of interest, and by in admitting certain evidence. We hold that the trial court did not violate Maryland Rule 4-215(e) because Mr. Clark never requested that the court discharge his counsel. We further hold that any conflict of interest between Mr. Clark and his counsel was waived by Mr. Clark or resolved prior to trial. Lastly, we conclude that the trial court did not abuse its discretion in admitting certain evidence. We, therefore, affirm the judgments of conviction.

BACKGROUND

On June 20, 2014, around 10:00 a.m., Brian Thompson, LaToya Watson, and her two children were at their apartment in Baltimore County when Ms. Watson heard a knock on the door. She opened it, and an African-American man, who was about 5′7″ and wearing a baseball hat, stepped inside the apartment, pulled out a gun, and pointed it at her face. She said, "Please don't shoot me," and the man replied, "Don't move. If you move, I'm gone [sic] shoot. If you try anything funny, I'm gone [sic] shoot you." The man asked if she was alone, demanded any money or jewelry she had, then signaled to an African-American man with dreadlocks that he should come inside and go to the back of the apartment. The men rifled through dresser drawers and closets looking for money and jewelry, and when they didn't find anything, the man wearing the baseball hat hit Ms. Watson in the head with the gun.

Mr. Thompson was in the bathroom, getting ready to leave the apartment, when he heard Ms. Watson say, "Please don't shoot me," and then heard a man say, "Give me the money and the jewelry." Mr. Thompson called 911 to report the robbery, and that alerted the robbers to his presence. The man with the gun pushed the door open, and as Mr. Thompson tried to step out of the bathroom, the man shot Mr. Thompson in the leg. A struggle ensued, during which Mr. Thompson hit the man over the head with a hair brush and the gun fell to the floor. The man with the dreadlocks jumped on Mr. Thompson from behind and the struggle continued. The man who had fired the first gunshot ultimately recovered the gun and shot Mr. Thompson in the head. Both men fled on foot.

Officer Keon Marshall responded to the 911 call. When he arrived, at approximately 10:09 a.m., he observed an African-American man with dreadlocks and wearing a black-and-white shirt and dark-colored shorts (later identified as Ricky Reid) running out of the apartment complex. Officer Marshall chased Mr. Reid to the back of the building where he and other officers detained him. Officer Marshall searched Mr. Reid and recovered money, jewelry, and two cell phones.

Officer Nicholas Hartwig also responded to the 911 call. When he arrived he noticed an African-American man wearing a white tee-shirt and red track pants (later identified as Mr. Clark) "jogging" from the location. After being notified that the man fit the description of a robbery suspect, Officer Hartwig stopped and detained him. When stopped, Mr. Clark stated, "We didn't go there to rob nobody. We went there to talk. I had to do what I needed to protect myself . . . because the guy in the house punched me in the eye." Officer Hartwig searched Mr. Clark and recovered money and jewelry. Another officer retrieved a handgun from a storm drain behind the apartment complex during a search of the area.

Mr. Clark was arrested and charged with attempted first-degree murder, robbery with a dangerous or deadly weapon, and other related offenses. In August 2014, while awaiting trial, Mr. Clark filed an AGC complaint. The complaint itself is not in the record, but there is no contention that the complaint was frivolous or tactical.

On December 15, 2014, the day before the initial trial date, the court held a hearing to address the defense's motion for a postponement. Counsel explained that he was not

prepared for trial because the pending AGC complaint had prevented him from conferring with Mr. Clark. Due to a scheduling conflict, the next available trial date was March 9, 2015, which was beyond the 180-day speedy trial deadline recognized in *State v. Hicks*, 285 Md. 310 (1979). Mr. Clark declined to waive his rights under *Hicks* and argued that his counsel had not met with him to prepare for trial and, therefore, was not representing him adequately. The court ultimately found good cause to continue the case, and Mr. Clark's refusal to waive *Hicks*, and rescheduled the trial for March.

On January 10, 2015, Mr. Clark wrote a letter to the court in which he indicated that he wanted to discharge his public defender, and the court held a Rule 4-215(e) hearing on February 11, 2015. In the course of the hearing, Mr. Clark withdrew his request, arguing that he did not want to proceed without counsel, but that he wanted counsel who would represent him, and his public defender still had not talked to him about his case. The court acknowledged that the pending AGG complaint prevented the public defender from conferring with Mr. Clark to prepare for trial, but because Mr. Clark had withdrawn his request to discharge his counsel, the court retained the March 9 trial date.

On March 9, 2015, during pre-trial motions, Mr. Clark filed and argued a motion to dismiss the case based *first* on a violation of his speedy trial rights, because his case was postponed even though he had refused to waive *Hicks*, and *second* on ineffective assistance of counsel, because of his counsel's failure to consult with him while the AGC complaint was pending (it had been resolved sometime between the February motions hearing and the March 9 pre-trial motions hearing). The trial court denied the motion, and trial began

the next day. At the conclusion of the trial, the jury found Mr. Clark guilty of attempted first-degree murder, robbery with a dangerous or deadly weapon, robbery, two counts of use of a handgun during the commission of a felony or crime of violence and first-degree burglary. The court sentenced Mr. Clark to life in prison, the first twenty-five years without of the possibility of parole, for the attempted first-degree murder and numerous other sentences for the other convictions, all to run concurrently to his life sentence. This timely appeal followed.

DISCUSSION

Mr. Clark raises three issues on appeal.[1] *First*, he contends that the trial court violated Rule 4-215(e) when it failed to inquire into his request to discharge his public defender. *Second*, he argues that the court erred when it failed to conduct the necessary inquiry and to take curative action to address the conflict of interest between him and his attorney. *Third*, he claims that the trial court abused its discretion by admitting jewelry into evidence without the proper foundation.

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[1] Mr. Clark phrases the Questions Presented as follows:

> I. Did the trial court err in (A) failing to conduct the proper inquiry under Maryland Rule 4-215(e) when Appellant indicated his desire to discharge his counsel, and (B) failing to conduct the necessary inquiry and to take any curative action to prevent a conflict of interest when a conflict was brought to the trial court's attention prior to trial?
>
> II. Did the trial court err in admitting jewelry belonging to one of the victims when the State failed to establish a proper foundation that it was seized from Appellant?

The State counters that Rule 4-215(e) was never implicated, but that even if it was, the court conducted the appropriate inquiry when it permitted Mr. Clark to explain why he wanted to discharge his counsel. The State also argues that the court was not required to take curative action with regard to counsel's potential conflict of interest because the conflict was resolved before the trial began, and that the court properly exercised its discretion when it admitted the jewelry into evidence. We agree with the State that Rule 4-215(e) was not violated, and further conclude that conflict of interest between Mr. Clark and his counsel was waived by Mr. Clark or otherwise was resolved prior to the March 9, 2015 trial. Lastly, we hold that the trial court properly admitted the jewelry seized by Officer Hartwig into evidence. We, therefore, affirm the judgments of conviction.

I. The Trial Court Did Not Violate Maryland Rule 4-215(e).

"The purpose of [Md.] Rule 4-215 is to protect that most important fundamental right to the effective assistance of counsel, which is basic to our adversary system of criminal justice." *Williams v. State*, 435 Md. 474, 485 (2013) (internal citations and quotations omitted). Maryland Rule 4-215(e) sets forth the procedure that applies when a defendant seeks permission to discharge his counsel:

> **(e) Discharge of Counsel – Waiver.** If a defendant requests *permission to discharge an attorney* whose appearance has been entered, the court shall permit the defendant to explain the reasons for the request. If the court finds that there is a meritorious reason for the defendant's request, the court shall permit the discharge of counsel; continue the action if necessary; and advise the defendant that if new counsel does not enter an appearance by the next scheduled trial date, the action will proceed to trial with the defendant unrepresented by counsel. If the court finds no

> meritorious reason for the defendant's request, the court may not permit the discharge of counsel without first informing the defendant that the trial will proceed as scheduled with the defendant unrepresented by counsel if the defendant discharges counsel and does not have new counsel. If the court permits the defendant to discharge counsel, it shall comply with subsections (a)(1)–(4) of this Rule if the docket or file does not reflect prior compliance.

(Emphasis added).

At the threshold, the defendant must actually request permission to discharge counsel, and the Rule doesn't apply until he does. "A request for permission to discharge counsel triggering the process mandated by Md. Rule 4-215(e) is any statement from which a court could conclude reasonably that the defendant may be inclined to discharge counsel." *State v. Graves*, 447 Md. 230, 241–42 (2016) (internal citations and quotations omitted). The Rule 4-215(e) inquiry "begins with a trial judge inquiring about the reasons underlying a defendant's request to discharge the services of his trial counsel and providing the defendant an opportunity to explain those reasons." *Id.* at 242 (internal citations and quotations omitted). When the court is uncertain about whether the defendant is dissatisfied with his or her counsel, the court should clear up any ambiguity by questioning the defendant itself. *State v. Davis*, 415 Md. 22, 35 (2010). We review adherence to Md. Rule 4-215 *de novo*, and strict compliance is required. *Webb v. State*, 144 Md. App. 729, 741 (2002).

We disagree that the trial court failed to conduct the necessary inquiry at the December 15, 2015 hearing. Again, the request does "not need to be a talismanic phrase or artfully worded . . . request." *State v. Campbell*, 385 Md. 616, 632 (2005). But still, "a

defendant must provide a statement from which the court could reasonably conclude that the defendant desires to discharge his or her attorney, and proceed with new counsel or self-representation." *State v. Taylor*, 431 Md. 615, 632 (2013) (internal citations and quotations omitted).

Critically, Mr. Clark made no such request to discharge his counsel. As we discuss herein, Mr. Clark's statements focused on the alleged conflict of interest that, he contended, prevented his assigned public defender from conferring with him and preparing for trial, not on his desire to discharge his public defender and hire new counsel or proceed *pro se*. *Cf. Graves*, 447 Md. at 235 (holding that Rule 4-215(e) was triggered when the public defender informed the court that the defendant told him that he would prefer to have private counsel represent him rather than the public defender); *Gambrill v. State*, 437 Md. 292, 301 (2014) (holding that Rule 4-215(e) was implicated and that the trial court was required to permit the defendant to explain his reasons for requesting discharge of counsel when the public defender requested a postponement and indicated that the defendant would like to hire private counsel); *Williams*, 435 Md. at 485 (holding that the defendant's "unambiguous and to-the-point letter" in which he expressed dissatisfaction with his counsel and asked that the lawyer be removed from the case was sufficient to constitute a request to discharge counsel under Rule 4-215(e), even though he did not express his intent in open court); *Davis*, 415 Md. at 31 (holding that defense counsel's statement to the trial court that the defendant wanted a jury trial and new counsel served as an adequate request to discharge counsel pursuant Rule 4-215(e)).

Notably, Mr. Clark never asked the court to discharge his counsel, and when asked by the postponement judge on December 15, 2014 if that's what he wanted, he demurred. Further, on February 11, 2015, approximately one month before the scheduled trial date, Mr. Clark again appeared before the same judge and was represented by the same attorney who represented him before the postponement judge. The court indicated that it brought Mr. Clark into court because it received a letter from Mr. Clark and, as a result, "the Court has to undertake certain inquiries."

As the February 11, 2015 hearing, the following colloquy occurred:

> [COURT]: The sole purpose of your being brought here today pursuant to Maryland case law was to give you an opportunity to express your thoughts concerning you're [sic] most recent request wherein I think most of the current appellate courts would agree that you say wanting a new lawyer requires the Court to make some inquiry. That's what I'm giving you a chance to do.
>
> [MR. CLARK]: I don't want that.
>
> * * *
>
> [COURT]: Here's the question – we've got to stay focused. Okay? This isn't your trial date. This is the day that according to Maryland cases that I'm familiar with put a responsibility on the court, rightfully so, to inquire of an individual if they want to discharge counsel and their reasons for it. That's really why we're here.
>
> [MR. CLARK]: Well, I'm not –
>
> [COURT]: Because of what you wrote in your letter –
>
> [MR. CLARK]: I'm not requesting to discharge counsel.

Under these circumstances, we conclude that Maryland Rule 4-215(e) was never triggered at any time in these proceedings.

II. The Conflict Of Interest Between Mr. Clark And His Trial Counsel Was Waived By Mr. Clark Or Otherwise Resolved Prior To Trial.

"The Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of Rights, as a safeguard necessary to ensure fundamental human rights of life and liberty, guarantee to any criminal defendant the right to have the assistance of counsel." *Duvall v. State*, 399 Md. 210, 220-21 (2007) (internal citations omitted). The right to counsel means that the defendant has the right to effective assistance of counsel, and that "[t]he constitutional right to counsel, under the Sixth Amendment and Article 21 of the Maryland Declaration of Rights, includes the right to have counsel's representation free from conflicts of interest." *Id*. (internal citations omitted). The Maryland Attorneys' Rules of Professional Conduct also prohibit attorneys from representing a client when there is a conflict of interest. *See* Maryland Attorneys' Rules of Professional Conduct (MARPC) 1.7 (Md. Rule 19-301.7). Further, when an actual conflict of interest exists, the defendant is entitled to reversal without a showing of prejudice or adverse effect upon representation. *Duvall*, 399 Md. at 234.

Mr. Clark maintains that his counsel had a conflict of interest because he filed an AGC Complaint (which Mr. Clark had filed in August, 2014), in which he contended that counsel had not come to meet him to prepare his case. The conflict was raised during a hearing on Mr. Clark's motion for continuance on December 15, 2014. At that hearing,

the court found good cause to postpone the case, and rescheduled the trial date for March 9, 2015.

Thereafter, on January 10, 2015, Mr. Clark wrote to the court and indicated that he wanted to discharge his public defender. On February 11, 2015, approximately one month before the scheduled trial date, Mr. Clark again appeared before the same judge who entertained his previous request for postponement on December 15, 2014. The purpose of that proceeding, as set forth in the previous section, was for the trial judge to determine if Clark wanted to discharge his counsel pursuant to Maryland Rule 2-415(e).

At the February 11, 2015 proceeding, Mr. Clark ultimately withdrew his request to discharge his counsel, but reiterated that his public defender still had not talked to him about his case, even though his trial was less than a month away. After ensuring that Mr. Clark did not want to discharge his counsel, the court retained the March 9 trial date.

The AGC Complaint ultimately was resolved between the February 11, 2015 hearing and the March 9, 2015 trial. Indeed, at the motions hearing before trial began on March 9, 2015, Mr. Clark informed the court that his attorney came to see him at the jail on February 14, 2015, and that they had discussed the case.

Mr. Clark now contends that he was prejudiced by "the trial court's failure to resolve" a potential conflict of interest that was generated by the complaint he filed with the AGC against his attorney. In our view, any conflict was either waived or resolved sufficiently before the trial date.

In *Duvall v. State*, 399 Md. 210 (2007), the Court of Appeals addressed the circumstances when a conflict of interest results in prejudice to an accused:

> We adopt the interpretation of the courts that have interpreted the Supreme Court's holdings to mean that when the trial court is notified of a potential conflict and fails to take adequate steps to investigate the potential for conflict or requires conflicted representation, despite the conflict, reversal is automatic, without a showing of prejudice of adverse effect upon representation.

Duvall, *supra*, 399 Md. at 234.

Accordingly, *Duvall* requires the trial court to take "adequate steps" to ascertain whether the conflict warrants appointment of separate counsel. The *Duvall* court further noted that, under the circumstances in that case, "the only possible cure would have been a waiver of the conflict by the defendant or replacement of defendant's attorney." *Duvall*, *supra*, 399 Md. at 235. The Court held that the administrative judge in *Duvall* "failed to determine whether the defendant wanted to waive the conflict." *Id.* at 235-36.

In the instant case, the circuit court addressed the potential conflict of interest with Clark and his attorney at both the December 15, 2014 postponement hearing and the February 11, 2015 hearing. At the February 11, 2015 proceeding, Clark's attorney represented to the court that he was "prepared to go forward" with the trial on March 9, 2015 and described the amount of time he put into his preparation for trial:

> I am prepared to go forward for [sic] trial. I have spent hours going over the discovery. I've spent a lot of time talking to [co-defendant's counsel] who represents a co-defendant to this case. I've done hours of research. I've spoken to our forensic division about some of the forensic type of evidence in this case, the gunshot residue as well as some other DNA forensics.

> I'm ready to go forward on that trial date if Mr. Clark gives me an opportunity to talk to him at the jail.

At the February 11, 2015 proceeding, Mr. Clark unequivocally and repeatedly informed the trial judge that he did not want a postponement and he did not want to discharge his defense counsel. The following colloquy occurred at the February 11, 2015 proceeding between the judge and Mr. Clark:

> [COURT]: . . . . Do you or do you not wish to discharge [defense counsel]?
>
> [MR. CLARK]: No, sir.
>
> [COURT]: You want him to represent you?
>
> [MR. CLARK]: He's got to go forward, it's 26 days and I'm not allowing another continuance. I'm not gonna consent to another continuance.

Mr. Clark clearly knew of the potential conflict since he was the person who initiated the alleged conflict when he filed his complaint with the AGC. Nevertheless, he voluntarily decided to waive any conflict and clearly indicated his desire to proceed to trial in March, 2015. Moreover, any potential conflict was nonexistent by the time trial began on March 9, 2015 because the grievance had been resolved shortly after the February 11, 2015 proceeding.

Just prior to the commencement of trial, the trial court conducted a motions hearing on March 9, 2015. Critically, at that hearing, Clark told the court that his attorney visited him at the jail on February 14, 2015 and that they spoke about the case. At the March 9, 2015 hearing, Mr. Clark's counsel made clear to the trial court that "there was no violation

of the attorney-client rules of professional conduct." Clearly, at this point, any potential conflict of interest that may have existed prior to the trial was no longer an issue.

Notwithstanding the lack of any conflict of interest before the trial, Clark contends that "[t]he conflict . . . left counsel without enough time prior to trial to investigate the case and collect materials [he] asked him to collect including telephone records and witnesses, forced [him] to prepare and argue his own motion before trial with counsel present and silent, and undermined any ability to work out a plea agreement with the State." We are unpersuaded.

Mr. Clark's counsel described the extensive preparation he put into the case at the February 11, 2015 proceeding, which was just short of a month prior to the commencement of the trial. Further, he indicated to the court that he had issued subpoenas to obtain phone records and that the records were due to be received at his office prior to the start of the trial.

Mr. Clark further contends now that he was forced to prepare and argue his own motions on March 9, 2015 before trial began. The motions argued by Clark concerned (1) a speedy trial motion; and (2) an argument that he was not provided effective assistance of counsel. The speedy trial motion was completely without merit. Indeed, Mr. Clark had been arrested less than ten months prior to his trial date and good cause was found by the court to extend the case beyond the *Hicks* date. The argument concerning ineffective assistance of counsel was clearly premature as he had not even gone to trial at this point in the proceedings.

Finally, at the March 9, 2015 motions hearing, Mr. Clark's attorney placed the plea discussions he had with the State on the record, including a counteroffer that Mr. Clark made that his counsel provided to the prosecutor. Accordingly, any claim that an earlier conflict of interest restricted his ability to negotiate a plea agreement with the prosecutor is belied by the record. We, therefore, conclude that any conflict of interest was either waived or, at a bare minimum, removed or resolved sufficiently in advance of the March 9, 2015 trial.

III. The Trial Court Did Not Abuse Its Discretion By Admitting Jewelry Recovered From Mr. Clark.

Officer Hartwig, who stopped and detained Mr. Clark in the general vicinity of the incident, testified that he seized jewelry from Mr. Clark when he was apprehended. Over defense counsel's objection, the jewelry was admitted into evidence as State's Exhibit 16. On appeal, Mr. Clark argues that: (1) the evidence was inadmissible because it was irrelevant; (2) Detective McDonnell Jones, who testified that he received two bags of property from the arresting officers, had no personal knowledge of the property; and (3) no foundation was established to introduce the jewelry into evidence.[2]

We have explained the standard of review of a trial court's decision regarding the admission of evidence:

[2] The record reflects that Mr. Clark's counsel objected to the admission of the jewelry into evidence because Officer Hartwig could not remember the jewelry taken from Mr. Clark. To the extent that Mr. Clark contends that the evidence was inadmissible because it was irrelevant (*see* Md. Rule 5-402) or that Detective Jones had no personal knowledge of it (*see* Md. Rule 5-602), those issues are not raised below and are not preserved for our review. *See* Md. Rule 8-131(a).

> "Determinations regarding the admissibility of evidence are generally left to the sound discretion of the trial court. *Hajireen v. State*, 203 Md. App. 537, 552, *cert. denied*, 429 Md. 306 (2012). This Court reviews a trial court's evidentiary rulings for abuse of discretion. *State v. Simms*, 420 Md. 705, 724-25 (2011). A trial court abuses its discretion only when 'no reasonable person would take the view adopted by the [trial] court,' or when the court acts 'without reference to any guiding rules or principles.' *King v. State*, 407 Md. 682, 697, 967 A.2d 790 (2009) (quoting *North v. North*, 102 Md. App. 1, 13, 648 A.2d 1025 (1994))."

Baker v. State, 223 Md. App. 750, 750 (2015) (quoting *Donati v. State*, 215 Md. App. 686, 708-09 (2014).

In order to admit physical evidence into evidence, the item(s) must be in "substantially the same condition that it was in at the time of the crime." *Best v. State*, 79 Md. App. 241, 250 (1989) (quoting *Amos v. State*, 42 Md. App. 365, 370 (1979). Further, in order to make certain that an item of evidence is in "substantially the same condition that it was in at the time of the crime," the offering party must "establish the 'chain of custody,' i.e., account for its handling from the time it was seized until it is offered in evidence." *Lerter v. State*, 82 Md. App. 391, 394 (1990).

The circumstances of the custody of an item of property need only be established by a reasonable probability that the item is in substantially the same condition as at the time of the alleged crime. *Breeding v. State*, 220 Md. 193, 199 (1959); *Best v. State*, 79 Md. App. at 250; *Hawkins v. State*, 77 Md. App. 338, 347 (1988). The evidence presented at trial reflects that Officer Hartwig initially responded to the location of the incident as back-up. Thereafter, he noticed an individual jogging from the area. A description of one

of the two suspects was broadcast and Officer Hartwig testified that the person he previously saw jogging matched that description.

Thereafter, Officer Hartwig searched Mr. Clark and recovered money and jewelry from him. Although he testified that he could not recognize the jewelry he recovered from Clark, he testified that he would have "placed each in an individual envelope, and . . . would have given the same to the detective units."

The testimony of Detective McDonnell regarding the property recovered by Mr. Clark reflects the following colloquy:

> [PROSECUTOR]: Thank you. Detective, I'm showing you what has been marked State's Exhibit 16 for identification purposes. Would you look at the packaging and contents of Exhibit 16 and tell us what that is?
>
> [WITNESS]: Again, it's jewelry. This jewelry was taken off of [Clark], and it was handed to me by Officer Hartwig.
>
> [PROSECUTOR]: Okay. Once it was handed to you, what did you do with it?
>
> [WITNESS]: I then packaged it as evidence.
>
> [PROSECUTOR]: Okay. Thank you. Is this in the same condition as it was when you retrieved it?
>
> [WITNESS]: Yes, it is.

Additional testimony of Detective Jones on cross-examination further establishes the requisite foundation for admitting the jewelry into evidence:

> [DEFENSE COUNSEL]: The jewelry that you were showed [sic] in Exhibit Number 16, the jewelry that was presumably taken off the person of Mr. Clark, you didn't observe that jewelry being taken off Mr. Clark, did you?

> [WITNESS]: It was removed from him when I arrived.
>
> [DEFENSE COUNSEL]: Did you observe that yourself?
>
> [WITNESS]: I did not.
>
> [DEFENSE COUNSEL]: In fact, you obtained that jewelry from Officer Hartwig, is that correct?
>
> [WITNESS]: That's correct.
>
> [DEFENSE COUNSEL]: So, presumably [Officer] Hartwig was the person who removed that jewelry?
>
> [WITNESS]: Yes.
>
> [DEFENSE COUNSEL]: You never saw Officer Hartwig remove the jewelry from Mr. Clark?
>
> [WITNESS]: When I arrived, Officer Hartwig had Mr. Clark in custody, and he had the bag of property in his vehicle.
>
> [DEFENSE COUNSEL]: The bag of property was in his vehicle?
>
> [WITNESS]: The jewelry, he had already collected the property off of his person.
>
> [DEFENSE COUNSEL]: The bag of jewelry you said was in his person, you mean Officer Hartwig's police car?
>
> [WITNESS]: Yes.

Based on the testimony of Detective Jones, we conclude that the requisite foundation was established to introduce the jewelry into evidence. As such, the trial judge

did not abuse its discretion in admitting the jewelry recovered from Mr. Clark into evidence.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

UNREPORTED

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Dissenting Opinion by Nazarian, J.

Filed: February 22, 2017

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I agree with the majority that Mr. Clark never asked to discharge his counsel, and although I wouldn't reach the issue for reasons that will become apparent, I agree as well that the circuit court didn't err when it admitted as evidence the jewelry found on Mr. Clark's person. We part company, though, with regard to the court's handling of the conflict of interest between Mr. Clark and his counsel. In my view, the court was required by *Duvall v. State*, 399 Md. 210 (2007), to take steps to address the conflict when the conflict came to the court's attention at the December 15, 2014 motions hearing. The majority finds no error because, and it's true, counsel told the court in February that he was prepared to try the case (a representation with which Mr. Clark disagreed) and because the conflict resolved itself by the trial date. But as I read *Duvall*, the emergence of the conflict required the court to address the conflict in *December*, and continuing the case for scheduling reasons did not fulfill that obligation. And because Mr. Clark is not required to prove prejudice, *Duvall*, 399 Md. at 234, his convictions should be reversed and the case remanded for further proceedings.

Mr. Clark argues here, as he did in the circuit court, that his assigned public defender labored under a conflict of interest because of an Attorney Grievance Commission complaint that Mr. Clark had filed in September 2014 after, he contended, counsel had failed for weeks to meet with him to prepare a defense. The conflict was revealed to the circuit court on December 15, 2014, during a hearing on the defense's motion for continuance. Mr. Clark's public defender had requested a continuance because he was not

prepared for trial, which was scheduled for the next day, and he cited the AGC complaint as the reason why he hadn't been able to prepare:

> [DEFENSE COUNSEL]: Your Honor, this is a Defense request for postponement. Mr. Clark has actually filed an attorney grievance against me. The basis of the grievance is that his arraignment was vacated once my appearance was entered.
>
> I have responded to the Attorney Grievance Commission as required by my duties and my job. However, I still haven't received a response from them. I don't know that I could ethically go forward and represent Mr. Clark as long as that attorney grievance is out there. This case is set for trial for tomorrow.

Counsel then asked for a new trial date that, due to scheduling constraints, went beyond the *Hicks* deadline:

> THE COURT: I'm not sure I'm gonna [sic] postpone it. If we start to postpone it, all we're gonna [sic] have is Defendants writing to Attorney Grievance Commission saying I don't like my lawyer. So, what I want to know from you, [Defense Counsel], is are you prepared for trial?
>
> [DEFENSE COUNSEL]: I'm not at this point.
>
> THE COURT: All right. So, what's the day you want to re schedule it for that week that [] works for everybody and [the State]?
>
> [THE STATE]: March 9th.
>
> THE COURT: Advise your client in terms of Hicks waiver.
>
> [DEFENSE COUNSEL]: Mr. Clark, I've indicated that I'm asking the Court for a postponement based on the fact that you filed this attorney grievance, and the date that's available for both the state's attorney and my calendar is a date that's beyond Hicks right?

You have a right to be tried within 180 days from arraignment or my entry of appearance, which ever came first. The date of March 9th is apparently beyond Hicks, and therefore the Court is asking if you are willing to waive your Hicks right?

[MR. CLARK]: (No audible response)

[DEFENSE COUNSEL]: Your Honor, Mr. Clark is indicating no.

THE COURT: I didn't hear him.

[MR. CLARK]: No. I don't want him representing me neither.

THE COURT: Okay. All right. Are you prepared to go to trial tomorrow?

[MR. CLARK]: I have never seen this individual -- this lawyer.

THE COURT: Are you prepared to go to trial tomorrow and represent yourself?

[MR. CLARK]: That's what I'm saying, I have never seen this lawyer.

THE COURT: No, that's not what I'm asking you. You told me you didn't want him -- meaning [your public defender] -- to represent you.

[MR. CLARK]: I have not been prepared.

THE COURT: All right. So, my question is --

[MR. CLARK]: I'm not prepared.

THE COURT: So, you are not prepared to go to trial tomorrow?

***

[Mr. CLARK]: I have not been prepared. I have not seen this individual, I have not spoken to him, nothing --

> THE COURT: I understand.
>
> [MR. CLARK]: -- six months.
>
> THE COURT: You are not prepared to waive Hicks?
>
> [MR.CLARK]: I don't feel it's right for me to waive Hicks when I wasn't adequately prepared. I have never seen anyone. I have been sitting in the jail for six months with nobody to come see me, pointblank. That's not my fault, it's not my burden.
>
> * * *
>
> [MR. CLARK]: I wrote a letter for [my public defender] to come see me, what, 'til July? I have never seen him. This is the first time I've seen him, spoke to him, anything of that nature. From calls, written letters for request to see him, I have seen nothing. It's not about an arraignment, it's because I haven't been adequately represented.
>
> THE COURT: Okay. Are you asking to discharge [your public defender]?
>
> [MR. CLARK]: And find somebody that's going to represent me, prepare me for trial. I mean, I'm fighting for my life. It carries a life sentence. It's no reason why my trial is tomorrow and I haven't seen a lawyer in the six months I've been locked up.

The court recognized the dilemma that, "as a practical matter, if another lawyer got in, there is no way they could prepare by January for court." The court asked Mr. Clark if he wanted to be represented, and Mr. Clark stated that he did. And the court acknowledged that the AGC complaint was inhibiting the public defender from preparing for trial:

> THE COURT: Mr. [Public Defender], let me ask you this, you have no idea what the Attorney Grievance Commission is going to do, but you really can't wait for them to decide something if we postpone this case, because somebody's got to prepare this gentleman's defense if he's got one.
>
> * * *

> THE COURT: The allegation is simply because of the appearance so I don't think that's gonna [sic] be a problem--
>
> [MR. CLARK]: No, that's not it.

The court then found good cause to postpone the case, and rescheduled the trial date for March 9, 2016. But the court took no further steps at that point to address the conflict of interest between Mr. Clark and his counsel.

Not quite a month later, Mr. Clark wrote to the court and indicated that he wanted to discharge his counsel. The trial court convened a Rule 4-215(e) hearing on February 11, 2015. As the majority discusses, Mr. Clark ultimately withdrew his request in the course of that hearing. Even so, he reiterated that he wanted counsel who could represent him, and that his public defender still had not talked to him about his case even though his trial was only 26 days away. As the majority notes, counsel did represent to the court that he had spent time preparing and felt prepared to proceed, but the court acknowledged that the pending AGC complaint prevented the public defender from conferring with Mr. Clark. And again, there was no discussion about the conflict—the court focused solely on whether Mr. Clark wanted to discharge his counsel. After ensuring that Mr. Clark did not want to discharge his public defender, the court ended the hearing and retained the March 9 trial date.

The AGC Complaint ultimately was resolved sometime between the February 11 hearing and the beginning of trial on March 9. At the pre-trial motions hearing on March 9, Mr. Clark (not his public defender) asked the court to dismiss the case on the grounds that the conflict had rendered his counsel ineffective and that the postponements arising

from the conflict violated his speedy trial rights. The court denied the motion and Mr. Clark proceeded to trial with the public defender's representation. So the issue isn't whether Mr. Clark was forced to proceed to trial without counsel—he had a lawyer, and the same one all along. Rather, the question is whether the court should have allowed the case to proceed past the December hearing without taking steps to address conflict of interest between Mr. Clark and his counsel.

In *Stickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court established a two-pronged test for determining whether a criminal defendant received effective assistance of counsel, as guaranteed by the Sixth Amendment to the Constitution of the United States. To establish a violation of the constitutional right to the effective assistance of counsel, a defendant must prove *first* that his or her attorney's representation was deficient and *second* that he or she was prejudiced as a result of that deficiency. *Id.* at 687. But where the defendant's ineffective assistance claim is based on a conflict of interest, the defendant does not have to prove prejudice. *Duvall*, 399 Md. at 222 (internal citations omitted). In *Lettley v. State*, 358 Md. 26, 35 (2000), the Court of Appeals explained that the Supreme Court's cases on the subject of ineffective assistance of counsel claims based on conflict of interest have produced "two distinct lines of analysis." The first, in which the trial court is informed in a timely manner of a potential conflict, *see Glasser v. United States*, 315 U.S. 60 (1942), and *Holloway v. Arkansas*, 435 U.S. 475 (1978), prejudice is presumed when there is an actual conflict of interest. The second, in which the trial court is not informed in a timely manner of a potential conflict, *see Cuyler v. Sullivan*, 446 U.S.

335 (1980), the defendant has the burden to prove that the conflict of interest adversely affected counsel's representation.

This case falls into the first of these categories. At the postponement hearing on December 15, 2014, the court recognized on the record that the pending AGC complaint had prevented Mr. Clark's public defender from conferring with him to prepare for trial, and thus, at least while unresolved, served as an actual conflict of interest. *Taylor v. State*, 428 Md. 386, 407 (2012) (citing *Mickens v. Taylor*, 535 U.S. 162, 172 n. 5 (2002) ("An 'actual conflict' . . . is a conflict of interest that adversely affects counsel's performance.")). Indeed, the public defender stated, "I don't know that I could ethically go forward and represent Mr. Clark as long as that attorney grievance is out there." At that point, the court was required to take steps to cure the conflict:

> [W]hen the trial court is notified of a potential conflict and fails to take adequate steps to investigate the potential for conflict or requires conflicted representation, despite the conflict, reversal is automatic, without a showing of prejudice of adverse effect upon representation.

Duvall, 399 Md. at 234 (internal citations omitted). But although the court recognized the conflict, the only response was to grant a postponement, presumably in the hope that the conflict would somehow be resolved before the new trial date.

At the February 11 hearing, the conflict still had not been resolved, and the court recognized again that the conflict inhibited counsel's ability to represent Mr. Clark:

> His problem is he is concerned about conferring with you with a pending grievance. Do you understand that? . . . [I]f I were in his situation given how screwed up this state is in some of the opinions that are written, I'd be scared to death to

> talk to you, because I wouldn't want somebody saying I as a lawyer violated some ethical rule because I've now talked to you in preparation for trial while at the same time you got a grievance against me. I completely understand the dilemma that [your public defender] is in.

Id. at 7. And again, the court took the same approach: it retained the March 9 trial date and hoped that the conflict would resolve. Which it did eventually, but it left a compressed time for counsel and Mr. Clark to prepare for trial.

This case created a difficult dilemma for the trial court. On the one hand, I am mindful that the conflict arose from a pending AGC complaint, and that unscrupulous defendants could attempt to create conflicts of interest in the same fashion. In *Cousins v. State*, __ Md. App. __, No. 99, Sept. Term 2016 (filed Feb. 1, 2017), slip op. at 17–25, for example, this Court rejected a similar contention by a defendant who sought to discharge his counsel because, among other reasons, their relationship had deteriorated and, among other things, he had filed a grievance against his lawyer. Unlike this case, the lawyer in *Cousins* repeatedly advised the court that he was ready for trial and "would like to take every opportunity to continue to represent" his client. *Id*., slip op. at 20. *Cousins* observed as well that the defendant's AGC grievance was grounded in his view that counsel had breached his obligations by not pressing a meritless evidentiary argument. *Id*., slip op. at 19.

In this case, however, there was no suggestion that Mr. Clark's AGC complaint was frivolous or tactical or, as in *Cousins*, that it was grounded in unreasonable demands or positions on the part of Mr. Clark. *See id*., slip op. at 22. Counsel was not ready for trial

at the December hearing, and the court recognized that the complaint was pending and that the complaint created a conflict of interest that interfered with counsel's ability to prepare for trial. The record does not contain the complaint itself or anything on which the circuit court or this Court could judge its merits (although it wouldn't be right for the court to pre-judge the merits of the complaint while it is still pending in the AGC anyway). But we do know that the circuit court viewed the conflict between Mr. Clark and his counsel as real, that the court acknowledged that the conflict interfered with counsel's ability to prepare for trial from approximately September 2014 until at best mid-February 2015, that counsel was not prepared for trial either in December, and that the conflict caused the trial to be postponed until March (a period that pushed the case past the *Hicks* deadline). And although the conflict was resolved eventually, counsel was left with a compressed time to prepare for trial.

If this were a circumstance in which Mr. Clark was required to prove prejudice, he might have difficulty meeting that burden. But here, he doesn't have to: under *Duvall*, prejudice is presumed by the fact of the conflict, 399 Md. at 234 ("[P]rejudice is presumed when counsel becomes burdened by the existence of an actual conflict of interest because, in those situations, counsel must breach the duty of loyalty, perhaps the most basic of counsel's duties." (internal citations omitted)), which required the court to take adequate curative measures. And the only measure taken here was a postponement, the length of which was driven by scheduling constraints; had the AGC complaint not been resolved in the February-March timeframe, the conflict still would have been there, Mr. Clark would

have had the same counsel, and the problem would have remained, all while Mr. Clark remained incarcerated and his trial date stretched farther past the speedy trial deadline.

The majority focuses its attention and analysis on the February 11 hearing, and interprets Mr. Clark's refusal to consent to an additional continuance or to discharge his counsel as a waiver of the conflict. I don't view the colloquy that way—assuming, as we must for these purposes, that the conflict was real and non-frivolous, the choice between further delay or proceeding *pro se* doesn't seem to me to address the conflict at all. But to me, these questions should have been asked and answered when the conflict emerged at the December hearing, when the court could, for example, have explored the viability of substitute counsel, or, perhaps, postponed the case for a shorter period before addressing the conflict directly. At bottom, *Duvall* required the court to take measures to investigate and address the conflict at the time it became aware of the conflict, and the general postponement left the conflict unaddressed. For that reason, I dissent, respectfully.