

**IN THE COURT OF APPEALS OF IOWA**

No. 2-988 / 10-1764  
Filed January 9, 2013

**STATE OF IOWA,**  
Plaintiff-Appellee,

**vs.**

**MCKINLEY DUDLEY JR.,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Cerro Gordo County, Carlynn D. Grupp, District Associate Judge.

A defendant appeals a judgment entered for operating a motor vehicle under the influence of a controlled substance, third offense. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Rachel C. Regenold, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, Carlyle D. Dalen, County Attorney, and Steven D. Tynan, Assistant County Attorney, for appellee.

Considered by Eisenhauer, C.J., and Vogel and Vaitheswaran, JJ.

**VOGEL, J.**

The defendant, McKinley Dudley, appeals from a judgment entered following a resentencing hearing ordered by this court after we found his trial counsel ineffective. Dudley claims because his second counsel was from the same office as his first counsel, a conflict of interest arose, and he was again deprived of effective assistance of counsel as guaranteed under the Iowa Constitution.

**I. Background Facts and Proceedings**

On March 12, 2009, Dudley was charged with operating while intoxicated (OWI) third offense with the habitual offender enhancement, in violation of Iowa Code section 321J.2, 902.8, and 902.9(3) (2009). He applied for, and was granted, court-appointed counsel from the Mason City Public Defender's Office. On July 27 Dudley pleaded guilty to the charge of OWI third offense. At the first sentencing hearing on October 26, Dudley was sentenced to prison for a term not to exceed five years. On appeal, we remanded the case for resentencing finding defense counsel was ineffective for failing to object to the State's breach of the plea agreement causing prejudice to Dudley. *State v. Dudley*, No. 09-1772, 2010 WL 3157757, at \*3 (Iowa Ct. App. Aug. 11, 2010). On remand, Dudley appeared without counsel and requested the court appoint counsel for him. The district court again appointed the Mason City Public Defender's Office. Dudley made no objection to this appointment. Resentencing was held on October 27, 2010, and Dudley was again sentenced to five years in prison. He again appeals.

## II. Standard of Review

Our review is de novo when a defendant alleges a conflict of interest implicating his constitutional right to counsel. *State v. Smitherman*, 733 N.W.2d 341, 345 (Iowa 2007).

## III. Conflict of Interest

Dudley claims the attorney at his resentencing hearing had a conflict of interest and was therefore incapable of providing effective assistance of counsel in violation of article I, section 10 of the Iowa Constitution. See *State v. Watson*, 620 N.W.2d 233, 237 (Iowa 2000) (holding “where the trial court knew or should have known of a particular conflict, reversal is required without a showing that the conflict adversely affected counsel’s performance, even though no objection was made at trial”); see also *Smitherman*, 733 N.W.2d at 347 (requiring a showing of “adverse effect” under the circumstances of that case, but left open the question whether Iowa—in applying its own constitution—would follow the more restrictive definition of “actual conflict” under the federal constitution in future cases involving different facts).

The parties base their arguments before us on the differing standards regarding whether there is a conflict of interest, and if so, whether we should presume prejudice. This case can be resolved on the former. In order to reach the latter question of presumption of prejudice, there must first be a conflict. A conflict of interest can arise when “an attorney is placed in a situation conducive to divided loyalties.” *Id.*; (citing *Watson*, 620 N.W.2d at 239); see also Iowa R. Prof’l Conduct 32:1.7(a)(2) (providing there is a conflict of interest if “there is significant risk that the representation of [a client] will be materially limited by the

lawyer's responsibility to . . . a third person or by a personal interest of the lawyer").

Clearly since Dudley is the only defendant involved, there is not the type of conflict involving joint representation. Dudley must therefore prove his second attorney had some type of loyalty to his first attorney which resulted in a conflict of interest. Dudley has seemingly merged the idea of "loyalty" to a client under a legal sense to the colloquial understanding of "loyalty" to, and competency of, a coworker. The record before us has not shown that any relationship the second public defender may have had with the first had any effect on her subsequent representation of Dudley. He has not alleged any facts to support his claim. We see no conflict of interest between two attorneys in the same public defender's office, absent a loyalty to a third party which would compromise the defendant's representation. *Cf. Watson*, 620 N.W.2d at 239 (finding a conflict of interest where an office represented both a defendant and a third party, a witness for the State, in the same case).

We therefore affirm the judgment and sentence.

**AFFIRMED.**