COURT OF APPEALS NO. 67513-3-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON

V.

SERGIO PERALTA,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Barbara A. Mack, Judge

MOTION TO WITHDRAW AND BRIEF REFERRING TO MATTERS IN THE RECORD WHICH MIGHT ARGUABLY SUPPORT REVIEW

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RULES, STATUTES AND OTHERS (CONT.)

I. IDENTITY OF MOVING PARTY

Nielsen, Broman & Koch, PLLC, appointed counsel for appellant, respectfully requests the relief designated in Part II of this motion.

II. STATEMENT OF RELIEF SOUGHT

Appointed counsel for appellant requests permission to withdraw pursuant to RAP 15.2(i).

III. FACTS RELEVANT TO MOTION

By order dated October 27, 2011, this Court appointed Nielsen, Broman & Koch (NBK) to represent appellant Sergio Peralta on this appeal for the purpose of filing a motion to extend the time to file the notice of appeal of an amended judgment and sentence entered July 2, 2009. This Court subsequently granted the motion to enlarge time.

In reviewing this case for issues to raise on appeal, Dana M. Nelson, a staff attorney with NBK, did the following:

(a) read and reviewed the verbatim report of proceedings for the resentencing hearing on February 18, 2009, following remand from this Court in Mr. Peralta's first appeal;

(b) read and reviewed all of the clerk's papers;

(c) researched all pertinent legal issues and conferred with other attorneys concerning legal and factual bases for appellate review; and,

(c) contacted appellant to explain the Anders procedure and appellant's right to file a pro se supplemental brief.

IV. GROUNDS FOR RELIEF

RAP 15.2(i) allows an attorney to withdraw on appeal where counsel can find no basis for a good faith argument on review. In accordance with the due process requirements of Anders v. California, 386 U.S 738, 18 L. Ed. 2d 493, 87 S. Ct. 1396 (1967), State v. Hairston, 133 Wn.2d 534, 537, 946 P.2d 397 (1997), State v. Theobald, 78 Wn.2d 184, 185, 470 P.2d 188 (1970), and State v. Pollard, 66 Wn. App. 779, 834 P.2d 51, rev. denied, 120 Wn.2d 1015 (1992), counsel seeks to withdraw as appellate counsel and allow Peralta to proceed pro se. Counsel submits the following brief to satisfy her obligations under Anders, Hairston, Theobald, Pollard, and RAP 15.2(i).

V. BRIEF REFERRING TO MATTERS IN THE RECORD THAT MIGHT ARGUABLY SUPPORT REVIEW.

A. POTENTIAL ASSIGNMENTS OF ERROR

1. Appellant's right to be present at all critical stages of the proceedings was violated when the court entered the amended judgment and sentence in appellant's absence.

2. Appellant's right to counsel of his choice was violated when the court entered the amended judgment and sentence upon former private defense counsel's agreement, despite the fact appellant had fired him.

Issues Pertaining to Potential Assignments of Error

1. Whether the trial court's entry of the amended judgment and

sentence in appellant's absence violated his right to be present at all critical stages of the proceedings.

2. Whether the trial court's entry of the amended judgment and sentence violated appellant's right to counsel of his choosing, where the court entered the amended sentence upon former defense counsel's agreement, yet appellant had written counsel previously and released him from all further responsibility in the case?

B. STATEMENT OF THE CASE

In 2007, Peralta was convicted of several counts, including first degree kidnapping and first degree rape of H.H. At sentencing, the court and parties agreed the kidnapping and rape of H.H. merged. The court crossed out the kidnapping count and dismissed it. CP 16.

On appeal, Peralta argued the convictions for kidnapping and raping H.H. should be reversed because the kidnapping was merely incidental to the rape; therefore, there was insufficient evidence to convict him of either kidnapping or a rape elevated by kidnapping. CP 18. Although the trial court merged and dismissed the kidnapping conviction, this Court nevertheless addressed the sufficiency of the evidence of kidnapping "to determine which charges may be pursued on remand," as this Court reversed the rape conviction based on Peralta's alternate argument that the jury instructions allowed Peralta to be convicted of an uncharged alternate means of committing first degree rape. CP 18, 20.

This Court concluded the kidnapping was not "merely incidental" and sufficient evidence supported the conviction. CP 18-19. Although Peralta argued the conviction was dismissed and could not be "revived" on remand, this Court declined to reach the issue on grounds it was not ripe:

> This issue is not ripe because the State has identified several options it may pursue on remand, i.e. a sentence for the lesser included offense of second degree rape, a revival of, and sentence for, the kidnapping conviction, or a retrial for first degree rape.

CP 21. For similar reasons, this Court also declined to consider whether two of Peralta's other current offenses constituted the same criminal conduct. CP 21.

On remand, Peralta hired private attorney, Theodore Rogge. CP 116. On February 18, 2009, Rogge, the prosecutor and court executed the following Agreed Order:

> The parties agree that, regardless of the alternative means issue on the charge of Rape in the First Degree, the jury necessarily found the defendant guilty of the lesser included offense of Rape in the Second Degree. They are, therefore, in agreement with the court entering the judgment on that finding of guilty on one count of Rape in the Second Degree. The parties further agree that Count IV, the count of Kidnapping in the First Degree that was merged due to the conviction on the reversed count of Rape in the First Degree, will not be "revived" and the defendant will not be sentenced on this charge nor will it be used to determine his offender score on any of the other charges.
>
> The defendant has been fully advised of his rights at this stage of the proceedings and is in agreement with this order. He is aware that he will need to be resentenced on this

> case. He is further aware that his minimum indeterminate standard range is now 210-280 months and his maximum is life in prison. The defendant knowingly, intelligently, and voluntarily waives his right to appeal or collaterally attack the judgment and sentence based on a conviction for Rape in the Second Degree. This agreement is intended to bring finality to this litigation for all parties.
>
> IT IS HEREBY ORDERED, ADJUDGED and DECREED that the defendant is not guilty of the crime of Rape in the First Degree but is guilty of the lesser included offense of Rape in the Second Degree. He shall be resentenced in accordance with this order. The charge of Kidnapping in the First Degree that was merged with the charge of Rape in the First Degree at his previous sentencing hearing shall not be revived and will not be scored in determining his new sentence. The defendant's waiver of the right to appeal or collaterally attack this order and his subsequent resentencing is knowing, intelligent, and voluntary.

CP 119.

Peralta did not sign the Agreed Order, but the Court signed off on it, after hearing from the prosecutor and defense counsel. RP 5. After the court pronounced its sentence and the parties were discussing credit, however, this colloquy occurred:

> THE COURT: And I – I know, Mr. Rogge, that did you go over this order at length with your client?
>
> MR. ROGGE: Yes, we discussed that as [sic] length. And he understands that there's –
>
> THE COURT: You can't – you don't have the right to appeal this?
>
> THE DEFENDANT: Yeah.

RP 15.

On April 16, 2009, Peralta wrote a letter to Rogge, suggesting he was considering seeking collateral relief regarding the Agreed Order and included the following direction:

> I hereby terminate your services. I will no longer need your assistance. Please send me my entire file what ever you have on hand of mine. If you are going to credit me any money back from the deposit you received, please send it to my sister . . . Thank you.

CP 125.

On April 22, 2009, Mr. Rogge wrote back regarding the Agreed order but also advised:

> If you still wish all your papers returned please advise me. I have spent more hours on your case than the monies I received, but have advised your sister I would call it even due to a lot of travel time being necessary. Further, I explained that I would give you a thousand dollar credit if you decided to pursue more relief by way of personal restraint petition.

CP 128.

Meanwhile, on May 12, 2009, the department of corrections wrote the following letter to the sentencing court and parties seeking the following correction to the judgment and sentence:

> The Washington State Department of Corrections respectfully requests that the Court amend the attached judgment and sentence by providing an order [of] a term of confinement within the standard range as well as 36-48 months of community custody following release on Count I.

> On 2/18/09, the Court sentenced Sergio R. Peralta to 180 months to Life for count 1 – Kidnapping 1 on 11/12/2005, 180 months to Life for count 2 – Indecent Liberties (with Forcible Compulsion) on 11/12/2005, and 250 months to Life for count 5 – Rape 2 with force.
>
> Pursuant to RCW 9.94A.712, Count I only is ineligible for a minimum and maximum term of confinement and the community custody ordered, as the finding of "sexual motivation" was removed. If the intent of the Court is to sentence Mr. Peralta under RCW 9.94A.712, please amend by re-imposing the sexual motivation finding.

CP 130.

The prosecutor, Rogge and the court thereafter entered an agreed order amending the judgment and sentence as follows:

> IT IS HEREBY ORDERED, ADJUDGED and DECREED that the Judgment and Sentence shall be amended to reflect that Count I, Kidnapping in the First Degree, was found to have been committed with a sexual motivation. The Judgment and Sentence entered on February 18, 2009 is otherwise accurate.[1]

CP 53-54, 133. The order was entered July 1, 2009. Id.

On September 21, 2009, Rogge filed a Notice of Withdrawal from the case directing that future pleadings be sent to Peralta at the DOC facility where he was incarcerated (at the time, Stafford Creek). Supp. CP __ (sub. no. 160, Notice of Withdrawal, 9/21/09).

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[1] The original judgment and sentence indicates count I was found to have been committed with sexual motivation. CP 92.

In June 2011, Peralta filed a motion to vacate the amended judgment and sentence under CrR 7.8, on grounds it was entered without notice to him, and in violation of his right to be present at all critical stages of the proceeding. CP 82, 84-85. Peralta argued his motion should not be considered time-barred, as he was never provided notice of the amended judgment and sentence. CP 86. Peralta also filed a notice of appeal from the amended judgment and sentence. CP 136-38.

The state thereafter moved to have the motion transferred to the Court of Appeals for consideration as a personal restraint petition, on grounds Peralta had a personal restraint petition then-pending before the Court, potentially divesting the trial court of jurisdiction to act on the motion. CP 139-44. The state's affidavit of service alleged it mailed Peralta a copy of the motion to transfer on August 3, 2011. CP 142.

Peralta moved to strike the state's motion on grounds that the state and local rules required motions to be noted for a hearing. Moreover, because Peralta never received "a calendar notice or other noting instrument from the plaintiff with regard to their motion to [transfer]" his motion, he did not know when his response was due. Supp. CP __ (sub. no. 178, Motion to Strike, 8/15/11). Peralta's motion to strike was dated August 10 and stamped as filed on August 15, 2011. Id.

Although Peralta requested his motion to strike be set for a hearing,[2] the court granted the state's motion and transferred Peralta's motion to vacate the judgment and sentence to this Court. CP 145-46.

Meanwhile, however, this Court granted Peralta's motion to enlarge time to file his notice of appeal of the amended judgment and sentence.[3] See Order Granting Motion to Enlarge Time to File Notice of Appeal, entered January 23, 2012. Accordingly, this is a direct appeal of the amended judgment and sentence.

C. ISSUES THAT MIGHT ARGUABLY SUPPORT REVIEW

PERALTA COULD ARGUE HE WAS DENIED HIS RIGHT TO BE PRESENT AT ALL CRITICAL STAGES OF THE PROCEEDINGS AS WELL AS HIS RIGHT TO COUNSEL OF CHOICE.

A person accused of a crime has a right to be present for all critical stages of the prosecution, including sentencing. U.S. Const. amends. 5, 6, 14; Const. art. 1, §§ 3, 22; Kentucky v. Stincer, 482 U.S. 730, 745, 107 S. Ct. 2658, 96 L. Ed. 2d 631 (1987); United States v. Gagnon, 470 U.S. 522, 526, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985); Illinois v. Allen, 397 U.S. 337, 338, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970). The Washington

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[2] Supp. CP __ (sub. no. 181, Clerk's Action Required Set Motion to Docket, 8/15/11).

[3] This Court stayed the personal restraint petition pending resolution of the motion to enlarge time. See Notation Ruling dated October 27, 2011; ER 201 K. Tegland, 5 Wash. Pract. Evidence §§ 46-47 (3d ed. 1989) (this Court may take judicial notice of its own files).

Constitution specifically provides for the right to "appear and defend in person." Const. art. 1, § 22.

Here, the record indicates parties and the court entered an agreed order amending the judgment and sentence without notice to Peralta and without providing him the opportunity to be present at the hearing. Peralta could argue the trial court's failure to provide Peralta his right to be present at a hearing regarding entry of the order violated his due process rights.

Moreover, Peralta could argue that entry of the amended order upon his former counsel's agreement violated his right to counsel of his choice, as he had terminated counsel's services by the time the amended order was entered.

The Sixth Amendment provides that, "[I]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." An element of this right is the right of a defendant who does not require appointed counsel to choose who will represent him. United States v. Gonzales-Lopez, 548 U.S. 140, 126 S. Ct. 2557, 2561, 165 L. Ed. 2d 409 (2006); Wheat v. United States, 486 U.S. 153, 159, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988); Powell v. Alabama, 287 U.S. 45, 53, 53 S. Ct. 55, 77 L. Ed. 158 (1932). As a general rule, defendants are free to employ counsel of their own choice, and the courts are afforded little leeway in interfering with that choice. United States v. Gonzales-Lopez, 399 F.3d 924

(8th Cir. 2004), affirmed, 126 S. Ct. 2557 (2006); United States v. Lewis, 759 F.2d 1316, 1326 (8th Cir. 1985). Lawyers are not fungible, and often the most important decision a defendant makes in shaping his defense is his selection of an attorney. United States v. Mendoza-Salgado, 964 F.2d 993, 1014 (10th Cir. 1992) (citations omitted).

Peralta had fired private attorney Rogge by the time Rogge agreed to entry of the amended order. This is evident from the letters exchanged between Rogge and Peralta in advance of the hearing. Because Peralta was not given notice of the hearing to enter the agreed order, he could argue he was not only deprived of his right to be present but his right to counsel of his choice.

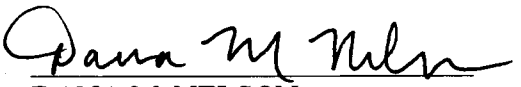
D. CONCLUSION

Counsel respectfully moves this Court for permission to withdraw as attorney of record.

DATED this 30th day of April, 2012.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC,



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 67513-3-I
	)	
SERGIO PERALTA,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 30TH DAY OF APRIL 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] SERGIO PERALTA
DOC NO. 899693
STAFFORD CREEK CORRECTIONS CENTER
191 CONSTANTINE WAY
ABERDEEN, WA 98520

SIGNED IN SEATTLE WASHINGTON, THIS 30TH DAY OF APRIL 2012.

x Patrick Mayovsky