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SUPREME COURT
STATE OF WASHINGTON
Oct 23, 2013, 3:36 pm
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IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,)	
)	
Respondent,)	No. 89125-7
)	
vs.)	ANSWER OF PETITIONER'S
)	COUNSEL TO PETITIONER'S
GARY McCABE,)	MOTION FOR ORDER
)	APPOINTING INDEPENDENT
Petitioner.)	APPELLATE COUNSEL

I. IDENTITY OF ANSWERING PARTY

Nielsen, Broman & Koch, counsel for petitioner Gary McCabe, requests the relief stated in part II.

II. STATEMENT OF RELIEF SOUGHT

Counsel for petitioner supports petitioner's pro se motion for the appointment of independent and conflict-free counsel. As an alternative, this Court should grant review and reverse petitioner's conviction in a per curiam decision.

III. FACTS RELEVANT TO ANSWER AND GROUNDS FOR RELIEF

The facts relating to the motion and answer are stated in the petition for review. In short, appellate counsel was appointed to handle

the appeal in cause number 29785-3-III, from petitioner's convictions for burglary and possession of methamphetamine. On petitioner's behalf, counsel argued, inter alia, the trial court erred in failing to instruct the jury on the lesser included offense of first degree criminal trespass, because the evidence allowed the jury to conclude petitioner had only remained in a "fenced area." BOA at 15-21.

Division Three rejected the argument, concluding that a person cannot be guilty of first degree trespass if the record showed the person only remained in a "fenced area." State v. McCabe, No. 29785-3-III, slip op. at 5 (citing State v. Brown, 50 Wn. App. 873, 878, 751 P.2d 331 (1988), abrogated on other grounds by In re Restraint of Heidari, 174 Wn.2d 288, 274 P.3d 366 (2012)). According to Brown, entry into a fenced area can only support a conviction for second degree trespass. Brown reached this conclusion as a matter of law. Brown had not been cited in either the state's or the appellant's briefs.

Division Three's disposition of McCabe's claim raised another claim. Even if Division Three and Brown were correct, the trial court still erred in failing to instruct the jury on the lesser included offense of second degree trespass. M2R at 4-9.

McCabe therefore moved to reconsider. He asked Division Three to address the second degree trespass claim in the interest of justice. In

the alternative, McCabe was denied effective assistance of appellate counsel, because appellate counsel's brief did not argue the trial court erred in refusing instructions on second degree trespass. Counsel had no legitimate tactical reason for this failure. M2R at 10. The motion for reconsideration requested this relief:

McCabe asks this Court to reverse his burglary conviction because the trial court erred in failing to instruct the jury on the lesser-included offense of second degree criminal trespass. In the alternative, this Court should appoint new appellate counsel to assist McCabe in raising that claim, and in arguing that he has been denied effective assistance of appellate counsel.

The motion concluded:

This Court should address the claim that the trial court erred in failing to instruct the jury on second degree trespass. In the alternative, this Court should appoint new counsel to assist McCabe in arguing that current counsel has provided ineffective assistance.

M2R at 11.

Division Three denied the motion without further comment.

McCabe then petitioned for review in this Court, raising the same basic arguments. The petition raised this third issue:

Was McCabe denied effective assistance of appellate counsel, and should this Court grant review, to remedy that denial and to provide guidance on how appellate courts should address such claims when raised in a timely motion for reconsideration? RAP 13.4(b)(3), (4).

P4R at 2. The petition also offered three main reasons why this Court should grant review. Pertinent to this answer is the third:

the remedy for the denial of effective assistance of appellate counsel is to reinstate the appeal and start over. The court therefore should appoint new counsel to argue that McCabe was denied effective assistance of appellate counsel. Current counsel has a conflict of interest that precludes counsel from arguing his own ineffectiveness. RPC 1.7(a)(2); United States v. Del Muro, 87 F.3d 1078, 1080-81 (9th Cir.1996) (counsel should not be forced to argue counsel's own ineffectiveness; In re Frampton, 45 Wn. App. 554, 559-60, 726 P.2d 486 (1986) (where effective assistance of appellate counsel is denied, the appropriate remedy is reinstatement of the appeal).

Petition, at 12.

Citing Del Muro, McCabe has now filed a pro se motion seeking the appointment of independent and conflict-free counsel. The motion should be granted.

The Washington Constitution guarantees the right to appeal, and the state and federal constitutions guarantee the right to effective assistance of appellate counsel. An appellant is denied effective assistance if (1) the legal issue appellate counsel failed to raise had merit, and (2) the appellant was prejudiced by the failure to raise or adequately raise the issue. U.S. Const. Amend. 6; Const. art. 1, § 22; Evitts v. Lucey, 469 U.S. 387, 396-99, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985); In re Restraint of Netherton, 177 Wn.2d 798, 801-02, 306 P.3d 918 (2013); In

re Restraint of Morris, 176 Wn.2d 157, 166-68, 288 P.3d 1140 (2012); In re Restraint of Orange, 152 Wn.2d 795, 814, 100 P.3d 291 (2004). As set forth in the motion for reconsideration and petition for review, the refusal to instruct the jury on second degree trespass is an issue with merit. Had it been timely raised, the Court of Appeals should have addressed the issue. There is a reasonable probability of a different outcome than the affirmance of McCabe's conviction.¹

The right to effective assistance includes the right to conflict-free trial counsel. State v. Dhaliwal, 150 Wn.2d 559, 79 P.3d 432 (2003). Other jurisdictions also have recognized the right to conflict-free appellate counsel. See generally, Williams v. Moody, 287 Ga. 665, 667, 697 S.E.2d 199 (2010) ("a convicted defendant is entitled to appellate representation by conflict-free counsel as a matter of constitutional law"); Garland v. State, 283 Ga. 201, 657 S.E.2d 842 (2008) (appellate counsel appropriately raised the claim of counsel's own ineffective assistance and then sought appointment of new counsel to argue the claim); Commonwealth v. McBee, 513 Pa. 255, 261, 520 A.2d 10 (1986) ("When appellate counsel asserts a claim of his or her own ineffective assistance

¹ As stated in the brief and petition for review, second degree criminal trespass meets the legal prong of Workman. The Court of Appeals implicitly agreed the evidence meets the factual prong. P4R at 11; BOA at 15-21; COA slip op. at 5.

of counsel on direct appeal, the case should be remanded for the appointment of new counsel *except* (1) where, it is clear from the record that counsel was ineffective or (2) where it is clear from the record that the ineffectiveness claim is meritless," court's emphasis); State v. Lentz, 70 Ohio St.3d 527, 531, 639 N.E.2d 784 (1994) ("it should not be necessary to instruct public defenders if an actual conflict does exist at the appellate level that they should either procure a waiver of the conflict from the defendant or cease representation in the case. Any lawyer who does not do so is violating his ethical obligation to avoid conflicting representation, and also creates a viable claim for ineffective assistance of appellate counsel"); Murphy v. People, 863 P.2d 301, 304 (Colo.1993) (trial court erred by appointing the same attorney for post-conviction review who had represented the petitioner at trial, "causing an impermissible conflict of interest" that "[n]ot only ... harm[s] the interests of the client, who is entitled to the assistance of a zealous advocate, but [draws] the integrity of the entire judicial process ... into question"); Roberts v. State, ___ So.3d ___, 2013 WL 5506645, *1-4 (Ala.Crim.App.,2013) (conflict of interest precludes court from appointing post-conviction counsel to argue her own ineffectiveness); Osterkamp v. Browning, 226 Ariz. 485, 491, 250 P.3d 551 (Ariz.App. 2011) (post-conviction counsel cannot be expected to argue his own ineffectiveness).

When an indigent litigant presents specific, legitimate, and arguably meritorious reasons for his dissatisfaction with appointed counsel, substitution of new counsel is appropriate. State v. DeWeese, 117 Wn.2d 369, 376, 816 P.2d 1 (1991); State v. Sinclair, 46 Wn. App. 433, 730 P.2d 742 (1986), rev. denied, 108 Wn.2d 1006 (1987). Substitution of counsel is warranted by a showing of good cause, "such as a conflict of interest." State v. Varga, 151 Wn.2d 179, 200, 86 P.3d 139 (2004) (quoting State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997)).

As set forth supra, appellate counsel has identified the ineffective assistance claim. Because counsel cannot ethically argue the claim further, counsel requested the Court of Appeals and this Court to appoint conflict-free appellate counsel. Petitioner has now filed a pro se motion asking this Court to appoint independent counsel. The motion should be granted for the reasons stated in (1) the motion to reconsider and petition for review, (2) petitioner's pro se motion, and (3) this answer.

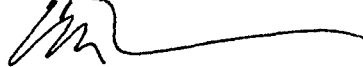
An alternative to granting the motion would be to grant review and reverse McCabe's burglary conviction in a per curiam decision. The trial court and Court of Appeals erred for the reasons set forth in the petition for review.

IV. CONCLUSION

Counsel respectfully requests that this Court grant the motion and appoint new conflict-free counsel. In the alternative this Court should grant review and reverse petitioner's burglary conviction.

DATED this 23rd day of October, 2013.

Respectfully submitted,
NIELSEN, BROMAN & KOCH



ERIC BROMAN, WSBA 18487
Office ID No. 91051
Attorneys for Petitioner

OFFICE RECEPTIONIST, CLERK

To: Eric Broman
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Dear Supreme Court Clerk:

Attached for filing is petitioner's counsel's answer to the motion to appoint independent counsel.

Thank you for your assistance and consideration.

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Eric Broman, WSBA 18487
Nielsen, Broman & Koch, PLLC
1908 E. Madison
Seattle, WA 98122
206-623-2373 ph
206-623-2488 fax