68495-7

68495-7

No. 68495-7-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

PHILLIP SCHLOREDT,

Appellant.

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

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court violated Mr. Schloredt's constitutional right to counsel.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

The right to counsel is guaranteed under the Sixth Amendment to the United States Constitution and article I, section 22. Counsel shall be provided at every stage of the proceedings, including sentencing, appeal, and post-conviction review. A lawyer initially appointed shall continue to represent the defendant through all stages of the proceedings unless a new appointment is made by the court following withdrawal of the original lawyer. Did the trial court's decision permitting defense counsel to withdraw, requiring Mr. Schloredt to pursue post-conviction relief pro se, violate Mr. Schloredt's right to counsel?

C. STATEMENT OF THE CASE

Phillip Schloredt was arrested and charged with the commercial burglary of a tire shop in Edmonds, which occurred on April 8, 2011. CP 171-72; RP 80-95.[1]

[1] The verbatim report of proceedings from the trial consists of two non-consecutively paginated volumes. The first volume, from December 5 and 6, 2011, is referred to as "RP." The second volume, from the afternoon of December 6, 2011, is referred to as "2RP." Post-conviction proceedings are referred to by date, "1/13/12 RP __."

Before trial, Mr. Schloredt moved in limine to exclude a bag containing a syringe that had been found by officers when they searched his truck. RP 10; CP 157-58.[2] The trial court instructed the State to "carefully instruct" its witnesses on the court's ruling on this motion. RP 10.

At trial, Officer Alan Hardwick testified that Mr. Schloredt told him about "needles" in his bag, and that he had seemed unstable on his feet. RP 183-91. The officer stated that he wondered if Mr. Schloredt was using heroin, both due to his behavior and his comment about the needles. RP 189. Counsel for Mr. Schloredt did not object.

The jury convicted Mr. Schloredt of second degree burglary. CP 135; 2RP 31-34.[3]

Following his conviction, Mr. Schloredt's trial counsel withdrew, stating that Mr. Schloredt wished to pursue ineffective assistance of counsel in a motion for a new trial. CP__, sub. no. 45.

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[2] Although it was apparently agreed that the syringe in question was for animal treatment and not related to drug use, it was excluded. RP 9-10.

[3] Mr. Schloredt stipulated to the fact that he was on community custody at the time of the offense. RP 1-5.

On January 31, 2012, Mr. Schloredt appeared on a motion for a new trial with new assigned counsel from the Snohomish Public Defender's Office. 1/31/12 RP 2. Ms. Rivera, the new attorney, stated she "wouldn't be participating" in the motion for a new trial, and Mr. Schloredt argued the motion pro se, explaining that Ms. Rivera was not willing to assist him and therefore he "didn't have much choice in the matter." Id. at 2, 11. The court agreed with Mr. Schloredt that the violation of the motion in limine regarding the syringe was the most legitimate issue raised in the motion, and a "problematic circumstance." Id. at 20-21.

The court denied the motion for a new trial and continued the case for Mr. Schloredt's motion to arrest judgment and sentencing. 1/31/12 RP 23.

On February 27, 2012, Mr. Schloredt appeared with Ms. Rivera for the motion to arrest judgment under CrR 7.4 and for sentencing. 2/27/12 RP 6. After the court stated its understanding that Mr. Schloredt was appearing pro se on the CrR 7.4 motion, Mr. Schloredt responded, "I never requested to proceed pro se on these issues and since I don't have any representation, that this is a violation of my constitutional rights to knowingly and willingly forfeit my right to representation by a lawyer." Id.

After Mr. Schloredt put letters from his counsel into evidence, CP 15-16, Ms. Rivera explained to the court her reasons for withdrawing from representation. 2/27/12 RP 7-9. Ms. Rivera explained that after looking into "the merit of the arguments, research[ing] the issues," and presenting the case to her supervisor, she was informed that the Rules of Professional Conduct (RPC's) prohibited her from representing Mr. Schloredt on his CrR 7.4 motion. 2/27/12 RP 9; CP 15-16.

Mr. Schloredt pleaded with the court for a lawyer to assist him, since Ms. Rivera would not, explaining that he did not believe he was qualified to represent himself, even with access to the law library. 2/27/12 RP 13. Mr. Schloredt ultimately "opted" to represent himself on the CrR 7.4 motion, with increased access to the law library at the jail. Id. at 21-23. The case was continued for Mr. Schloredt to prepare for the hearing.

On March 14, 2012, Mr. Schloredt argued the CrR 7.4 motion pro se. 3/14/12 RP 2. The court denied the motion, although it found the strongest argument was the violation of the motion in limine regarding the syringe. Id. at 32-34. Mr. Schloredt's motions for reconsideration on the CrR 7.4 and 7.5 were also denied. Id. at 34-35.

D. ARGUMENT

1. BECAUSE THE TRIAL COURT FAILED TO OBTAIN A KNOWING, INTELLIGENT AND VOLUNTARY WAIVER OF COUNSEL, THE COURT DENIED MR. SCHLOREDT HIS RIGHT TO ASSISTANCE OF COUNSEL UNDER THE SIXTH AMENDMENT AND ARTICLE I, § 22.

Phillip Schloredt requested the assistance of counsel to help him with post-conviction motion practice and arguments. 1/31/12 RP 3, 11-12; 2/27/12 RP 6-8, 13-14. Mr. Schloredt had relied on counsel at trial, and had requested new counsel following his conviction, due to his intention to raise ineffective assistance of his trial attorney in his motion for a new trial. CP __, sub. no. 45 (Notice of Withdrawal). The new attorney assigned to the case refused to appear on the post-conviction motion, and the court did not appoint new counsel. 1/31/12 RP 2. The trial court allowed Mr. Schloredt to summarily waive his right to counsel on his post-conviction motions without any discussion of his understanding of the legal issues or the risks and dangers of self-representation. 2/27/12 RP 22-23. By permitting defense counsel to withdraw, without appointing new counsel, the court thus denied Mr. Schloredt's right to counsel -- in effect, requiring him to proceed pro se, although Mr. Schloredt had not knowingly, intelligently, and

voluntarily waived the right to counsel, as required by the state and federal constitutions.

1. Before proceeding *pro se*, a criminal defendant must make a voluntary, knowing, and intelligent waiver of his right to counsel. The state and federal constitutions guarantee criminal defendants effective representation by counsel at all critical stages of a case. Strickland v. Washington, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); State v. Mierz, 127 Wn.2d 460, 471, 901 P.2d 286 (1995); U.S. Const. amend. 6; Wash. Const. Art I, § 22. A lawyer shall be provided at every stage of the proceedings, including sentencing, appeal and post-conviction review. CrR 3.1(b)(2)(emphasis added).

> An accused's right to be represented by counsel is a fundamental component of our criminal justice system. Lawyers in criminal cases "are necessities, not luxuries." Their presence is essential because they are the means through which the other rights of the person on trial are secured. Without counsel, the right to trial itself would be "of little avail," as this Court has recognized repeatedly. "Of all the rights an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have."

United States v. Cronic, 466 U.S. 648, 653-54, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984) (footnotes omitted.).

A criminal defendant has the corollary right to represent himself. Faretta v. California, 422 U.S. 806, 807, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); State v. Madsen, 168 Wn.2d 496, 503, 229 P.3d 714 (2010); State v. Hahn, 106 Wn.2d 885, 889, 726 P.2d 25 (1986); State v. Silva, 108 Wn. App. 536, 539, 31 P.2d 729 (2001).

The trial court may not permit self-representation unless the defendant validly waives the constitutional right to counsel. Faretta, 422 U.S. at 835 (waiver must be unequivocal); State v. DeWeese, 117 Wn.2d 369, 377, 816 P.2d 1 (1991). For a waiver of counsel to be valid, the trial court must ensure it was a knowing, voluntary, and intentional relinquishment of this fundamental constitutional right. Johnson v. Zerbst, 304 U.S. 456, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). A trial court must "indulge in every real presumption against waiver." Hahn, 106 Wn.2d at 896 (citing Johnson v. Zerbst, 304 U.S. at 464).

A colloquy on the record between the court and the accused is the preferred means of ensuring a waiver of counsel is voluntary, knowing, and intelligent. Bellevue v. Acrey, 103 Wn.2d 203, 211, 691 P.2d 957 (1984). Only in rare circumstances will the record contain sufficient information to show a valid waiver of counsel absent the requisite colloquy. Acrey, 103 Wn.2d at 211 (the fact that

a defendant is well educated, can read, or has been on trial previously is not dispositive as to whether he understood the relative advantages and disadvantages of self-representation in a particular situation). An incomplete waiver is not rescued by the defendant's subsequent garnering of sufficient knowledge to represent himself; therefore, at the time the defendant waives his right to counsel, he must be in possession of the critical information. United States v. Mohawk, 20 F.3d 1480, 1484 (9th Cir. 1994).

The trial court's comprehensive inquiry must elicit sufficiently detailed responses to determine the waiver of counsel is knowing, intelligent and voluntary. State v. Chavis, 31 Wn. App. 784, 787, 644 P.2d 1202 (1982) (finding single-word responses during colloquy insufficient to assure court that the accused understood "dangers and disadvantages of self-representation"); see also State v. Dougherty, 33 Wn. App. 466, 655 P.2d 1187 (1982).

Such a colloquy "at a minimum, should consist of informing the defendant of the nature and classification of the charge, the maximum penalty upon conviction and that technical rules exist" which govern the presentation of the defense. Acrey, 103 Wn.2d at 211; see also Hahn, 106 Wn.2d at 896 n.9 (providing an example of the proper procedure for the trial court). In addition, the court must

apprise the defendant of the disadvantages of self-representation. United States v. Balough, 820 F.2d 1485, 1489 (9th Cir. 1987); DeWeese, 117 Wn.2d. at 378; Acrey, 103 Wn.2d at 211. It is the court's obligation to fully inform the defendant of these essential elements, because no voluntary and intelligent waiver will be found without some assurance on the record that the defendant is making this decision "with eyes open" as to its risks and consequences. Balough, 820 F.2d at 1489 (quoting Faretta, 422 U.S. at 835) (internal citation omitted); Silva, 108 Wn. App. at 539-40. Finally, a defendant's education, literacy, common sense, or prior experience with the criminal justice system will "in no case" be sufficient to infer an awareness of those risks and consequences. State v. Christensen, 40 Wn. App. 290, 293, 698 P.2d 1069 (1985).[4]

Our Supreme Court recently emphasized in Madsen, in fact, that the court shall indulge in " 'every reasonable presumption'

[4] The Christensen Court suggested a colloquy modeled on the federal Bench Book. 40 Wn. App. at 295. Questions to the litigant include whether he has ever studied law, whether he has represented himself before, whether he is familiar with the consequences of a guilty (or adverse) finding, whether he is aware that the judge is not able to assist him or give legal advice during trial, whether he is familiar with the Rules of Evidence, whether he is familiar with the Rules of Criminal Procedure, why he does not want an attorney to represent him, and whether any threats or promises have been made to him to induce him to waive the right to counsel. In addition to several other questions, the colloquy includes statements that the court should make to the litigant, discouraging him from making this choice, and "strongly urg[ing]" him to be represented by counsel. Id.

against a defendant's waiver of his or her right to counsel." 168 Wn.2d at 504 (quoting In re Detention of Turay, 139 Wn.2d at 396, 986 P.2d 790 (1999) (quoting Brewer v. Williams, 430 U.S. 387, 404, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977)).

2. Once counsel withdrew, the court asked no questions of Mr. Schloredt regarding his "choice" to represent himself. Once the newly assigned counsel, Ms. Rivera, appeared on Mr. Schlorendt's case, she immediately informed the court on January 31, 2012 that she was not willing to represent her client on his post-conviction motions for a new trial or to arrest judgment. 1/31/12 RP 2. Then, without any inquiry of Mr. Schloredt, the court stated, "Mr. Schloredt, you may make oral argument if you wish at this time." 1/31/12 RP 2.

A waiver of counsel must be executed knowingly and intelligently **at the time** the court rules upon a waiver, as the critical question is the defendant's state of mind at the time he waives his right to counsel. Balough, 820 F.2d at 1489; Mohawk, 20 F.3d at 1484; see also United States v. Aponte, 591 F.2d 1247, 1250 (9th Cir. 1978). The court must indulge in every presumption against the waiver of the right to counsel. Madsen, 168 Wn.2d at 504; Hahn, 106 Wn.2d at 896; see Johnson v. Zerbst, 304 U.S. at 464.

Yet the record reveals that the court made no inquiry whatsoever into whether Mr. Schloredt was knowingly and intelligently waiving his right to counsel before he undertook pro se representation. If anything, the record indicates that Mr. Schloredt repeatedly requested counsel, but was refused, pleading, "This court appointed counsel for this action but the attorney claims that her office would not allow her to participate..." 1/31/12 RP 3.

Mr. Schloredt attempted to argue his own motion for a new trial, but interrupted his own argument to inform the court that he had only filed his own motion "because I didn't have much choice in the matter because ... I wasn't getting any help to proceed by the office, by Whitney Rivera's office." 1/31/12 RP 11. He noted that his lawyer refused to represent him on the case "because some of the case law she read that might be detrimental to my case, [and] she would not be able to represent me on this, and so I had to basically go on my own from that point." Id. at 12.[5]

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[5] Mr. Schloredt appears to attempt to cite Faretta in his oral argument, stating,

> As I understand it, you have to present a Ferrier [sic] motion, or something like that, to become pro se. To do that, you have to be able to understand 17 rules of self-representing, or something like that, and that's all I know about it. And I don't believe I'm qualified to represent myself even with access to the law library. I would actually like an attorney to represent me."

2/27/12 RP 13-14 (emphasis added).

This is hardly the unequivocal request to proceed pro se envisioned by Faretta. 422 U.S. at 835. See also Madsen, 168 Wn.2d at 504. Nor was there any colloquy for this Court to assess, as required by the case law. Faretta, 422 U.S. at 835; Madsen, 168 Wn.2d at 504; Acrey, 103 Wn.2d at 211.

3. Mr. Schloredt's counsel advocated against him, functioning as a second prosecutor. Mr. Schloredt was denied counsel when his attorney refused to assist him in the preparation and argument of his motion for a new trial and his motion to arrest judgment.

Mr. Schloredt's attorney, Ms. Rivera, did more than simply ask to withdraw from her representation, however. She actually became an advocate against her client when she essentially informed the court that she believed his motions were frivolous. 1/31/12 RP 2; 2/27/12 RP 9, 19; CP 14-16 (letters to client from defense counsel). Ms. Rivera explained to the court that she had conducted legal research, and the case law she had found did not support Mr. Schloredt's motion for a new trial. 1/31/12 RP 2; 2/27/12 RP 9, 19; CP 14-16. Thus, Mr. Schloredt was not only denied counsel, but was confronted by an extra prosecutor in the

courtroom. His "choice" to represent himself was no choice at all. As he informed the court,

> I just want it on the record that I never requested to proceed pro se on these issues and since I don't have any representation, that this is a violation of my constitutional rights to knowingly and willingly forfeit my right to representation by a lawyer.

2/27/12 RP 6.

Mr. Schloredt was clearly frustrated by his attorney's decision to withdraw from representation, and had no desire to represent himself. "I believe it's pretty much unfair for me to have to represent myself here. I appreciate you letting me sit down and be able to use my hands for the rest of this..." Id. at 6.

This case is unlike those cases in which an accused seeks the right to represent himself. See, e.g., Faretta, 422 U.S. at 835; Madsen,168 Wn.2d at 504. Mr. Schloredt's case is more like State v. Chavez, where this Court found the defendant was denied counsel when his attorney filed a brief that did not support his client's position. 162 Wn. App. 431, 440, 257 P.3d 1114 (2011) (denial of counsel where attorney submitted Anders-style brief to trial court, indicating he thought case was frivolous).

Mr. Schloredt clearly did not wish to represent himself and repeatedly asked the court for counsel, reminding the court that it had assigned counsel for post-conviction motions. He never waived the right to counsel and had no interest in doing so. He wanted the assistance of counsel, but she refused, using the Rules of Professional Conduct (RPC's) as an excuse to withdraw from the representation.

Ms. Rivera cited RPC 3.3(a)(3) in a letter she wrote to Mr. Schloredt. CP 15. This RPC, entitled "Candor Toward the Tribunal," prohibits attorneys from failing to disclose legal authority "directly adverse to the position of the client and not disclosed by opposing counsel." RPC 3.3(a)(3). Ms. Rivera informed the court that her supervisor informed her that the RPC's "prohibit[ed]" her from representing Mr. Schloredt on the motion for a new trial. 2/27/12 RP 9.

Mr. Schloredt's motion for a new trial was, in part, based upon a claim of ineffective assistance of counsel against his trial counsel – a claim the trial court found raised a "legitimate issue" and a "problematic circumstance." 1/31/12 RP 20-22. And yet the court permitted Ms. Rivera to withdraw from representation on the premise that she had found legal authority adverse to her client's

position. CP 14-16. It is inconceivable that Ms. Rivera found legal authority on ineffective assistance of counsel that was so esoteric that it would not inevitably be "disclosed by opposing counsel," as the RPC requires. RPC 3.3(a)(3). It also strains credibility that she could not have simply disclosed the adverse case law and continued her representation.

In addition, RPC 3.3 is clear that in an adversarial proceeding, an attorney has "the limited responsibility of presenting one side of the matters" that the court should consider, while "the conflicting position is expected to be presented by the opposing party." RPC 3.3(a)(3), Comment 14 (distinguishing ex parte proceedings). Lastly, RPC 3.3(a)(3) notes that a lawyer complying with the duty of candor under this Rule need not withdraw from representation of a client whose interests will be adversely affected by the lawyer's disclosure of adverse case law; permission to withdraw should only be sought (or will only be permitted) if the client-lawyer relationship deteriorates as a result of the disclosure. RPC 3.3(a)(3), Comment 15 (emphasis added).

Here, Ms. Rivera easily could have represented Mr. Schloredt, disclosing adverse legal authority, as defense attorneys do on a regular basis. The record lacks any indication that Mr. Schloredt asked her not to disclose such authority, or that their discussions concerning her ethical obligations had become fraught, resulting in a conflict. See RPC 3.3(a)(3), Comment 15. On the contrary, Mr. Schloredt repeatedly asked for Ms. Rivera to return to the case, despite her letters indicating her refusal. 2/27/12 RP 6, 13-14. In short, Ms. Rivera's request to withdraw from the case effectively undermined her client, signaling to the court that Mr. Schloredt's motion for a new trial was frivolous. 2/27/12 RP 9.

The court inquired further of Ms. Rivera, asking whether any other RPC's prevented her from representing Mr. Schloredt. 2/27/12 RP 19. She responded, "No, your Honor ... there are no other Rules of Professional Conduct that I think are implicated in my representation of him." Id. The court then posited that perhaps Ms. Rivera was seeking to withdraw because she thought Mr. Schloredt's motion lacked merit.

The court opined, "I don't know that a lawyer, even if they represent somebody, has the obligation to bring an argument that they don't believe has merit ... [i]f it's more that [the defendant] has

arguments that have no merit, then there's nothing left for the lawyer to do." Id. at 20.[6] The court immediately asked Mr. Schloredt to consider going pro se on the motion for a new trial, and instead of warning him against the dangers of self-representation, the court encouraged it. Id. at 21-23.

4. Mr. Schloredt did not knowingly and intelligently waive his right to counsel, resulting in the deprivation of counsel, which is structural error. The denial of counsel during a critical stage of proceedings is presumptively prejudicial. Cronic, 466 U.S. at 659. "It is fundamental that 'deprivation of the right to counsel is so inconsistent with the right to a fair trial that it can never be treated as harmless error.'" Silva, 108 Wn. App. at 542 (quoting Frazer v. U.S., 18 F.3d 778, 782 (9th Cir.1994) (citing Chapman v. California, 386 U.S. 18, 23 n.8, 87 S.Ct. 824, 827, 17 L.Ed.2d 705 (1967)). The error may not be considered harmless even if the court imposed a standard range sentence. Silva, 108 Wn. App. at

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[6] The trial court misapprehended the duties of criminal defense counsel under the RPC's. RPC 3.1, Meritorious Claims and Contentions, prohibits lawyers from bringing or defending frivolous proceedings. However, lawyers who represent defendants in criminal proceedings may defend their clients, despite this section. RPC 3.1. In addition, a lawyer's obligations under this Rule are subordinate to the federal and state constitutional right to counsel in a criminal matter. RPC 3.1 cmt. 3; See Chavez, 162 Wn. App. at 440 ("in light of the constitutional right of a criminal defendant to assistance of counsel, he or she may assert issues that would otherwise be prohibited under professional rules of conduct").

542; see also In re Pers. Restraint of Grajeda, 20 Wn. App. 249, 250, 579 P.2d 206 (1978) (reversing where court did not provide counsel because petitioner did not request counsel, on grounds that waiver may not be presumed). Due to this structural error, reversal is required without any further discussion of the prejudice Mr. Schloredt suffered by representing himself in the post-conviction motions.

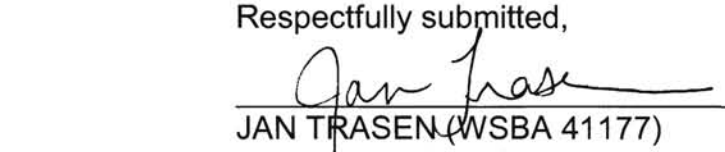
For these reasons, Mr. Schloredt's case should be remanded so that he may receive a new hearing on the motions for a new trial and for arrest of judgment, with assigned counsel.

E. CONCLUSION

For the foregoing reasons, Mr. Schloredt respectfully requests this Court remand the case so that a motion for a new trial and motion for arrest of judgment can be heard, and new counsel assigned.

DATED this 28th day of November, 2012.

Respectfully submitted,



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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 68495-7-I
	)	
	)	
PHILLIP SCHLOREDT,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 28TH DAY OF NOVEMBER, 2012, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X]	SETH FINE, DPA SNOHOMISH COUNTY PROSECUTOR'S OFFICE 3000 ROCKEFELLER EVERETT, WA 98201	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X]	PHILLIP SCHLOREDT 264049 WASHINGTON STATE PENITENTIARY 13136 N 13TH AVE WALLA WALLA, WA 99362	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON, THIS 28TH DAY OF NOVEMBER, 2012.

X_____

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