69453-7

69453-7

NO. 69453-7-I

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

STATE OF WASHINGTON,

Respondent,

v.

VINAY BHARADWAJ,

Appellant.

REC'D
MAR 10 2014
King County Prosecutor
Appellate Unit

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

The Honorable Richard D. Eadie, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE TRIAL COURT ERRED WHEN IT DENIED BHARADWAJ CONFLICT-FREE COUNSEL TO REPRESENT HIM ON THE MOTION FOR NEW TRIAL.

Bharadwaj had a constitutional right to be represented by conflict-free counsel on his motion for new trial. State v. Robinson, 153 Wn.2d 689, 698 n.7, 107 P.3d 90 (2005). This right was violated if (1) his attorney had an actual conflict of interest; i.e., his attorney's interests diverged from his own on a material legal issue or course of action, and (2) the conflict had an adverse effect on counsel's performance. State v. Dhaliwal, 150 Wn.2d 559, 566, 570, 79 P.3d 432 (2003); State v. Robinson, 79 Wn. App. 386, 394, 902 P.2d 652 (1995). "Adverse effect" means some lapse in representation contrary to the defendant's interests or a likely impact on some aspect of counsel's advocacy. State v. Regan, 143 Wn. App. 419, 428, 177 P.3d 783, review denied, 165 Wn.2d 1012, 198 P.3d 512 (2008). This standard was met in Bharadwaj's case.

Browne first alerted Judge Eadie to the conflict in an e-mail prior to sentencing. 13RP 3. At sentencing, he then summarized Bharadwaj's claim, indicating it pertained to his handling of plea

negotiations with the State. 13RP 5-6. Browne was mistaken about the specifics – he believed the claim stemmed from Bharadwaj's failure to take a deal to CMIP rather than assault.[1] 13RP 5-6, 8. But it was apparent nonetheless that Bharadwaj was now accusing Browne of botching plea negotiations with the State. And Browne, as counsel in the case, was in the best position to recognize this created a disabling conflict. State v. Chavez, 162 Wn. App. 431, 439, 257 P.3d 1114 (2011).

That Browne misstated the specifics of Bharadwaj's claim is not entirely surprising. He was not arguing the claim on Bharadwaj's behalf. Quite the opposite. He indicated he could not argue this claim or any other and was simply alerting the court to the conflict. The specifics would have to be addressed later by new counsel in a substantive supplement to the motion for new trial.

Contrary to the State's argument, Judge Eadie was not faced with "a bare allegation of ineffective assistance of counsel." BOR at 15. He knew Bharadwaj had contacted immigration attorneys in California. 13RP 8. He knew Bharadwaj had already sought and enlisted the assistance of another attorney, David

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1 This may be attributable to Browne's erroneous belief at the time that a conviction for CMIP would not lead to deportation. See CP 1245.

Zuckerman, who made a point of being present for the hearing. 13RP 5. And Browne made it clear the only reason there was no substantive written pleading was timing; Zuckerman had not yet had an opportunity to prepare one, but it was coming. 13RP 10. Even Mr. Barber agreed that such a pleading would be filed. 13RP 23 ("there's no formal claim of conflict . . . I believe it will follow").

Still, the State maintains that there was no need for new counsel and a continuance, in particular, because "the allegation of ineffective assistance of counsel did not concern the pending motion for a new trial or the sentencing." BOR, at 16; see also BOR, at 19 (same claim). This is simply not so. Bharadwaj clearly was not happy with the content of his motion for new trial, which is why he contacted Zuckerman in the first place. He sought to supplement the motion with his claim that Browne was ineffective because he had mishandled the plea negotiations. CP 1180; 13RP 14. He also wished to raise other claims, including additional claims of ineffectiveness assistance of counsel and claims involving additional material evidence from new witnesses, assuring the court these individuals were coming forward. 13RP 14-15 ("I know for sure they are coming in".).

With Browne's inability (and unwillingness) to address the claims already made in the new trial motion, and inability to address claims of his deficient performance, Bharadwaj was adversely effected because he was left to fend for himself. In this respect, he was no different than the defendant in State v. Harell, 80 Wn. App. 802, 803-805, 911 P.2d 1034 (1996) (defendant denied right to counsel where counsel declined to assist defendant at hearing on claim counsel was ineffective in handling of defendant's plea; remanded for new hearing on claims with new counsel).

The State also argues that because the trial court ultimately denied the preliminary motion for new trial filed by Browne, there is no issue regarding Bharadwaj's lack of representation. BOR, at 16, 20-22. This position fails for at least two reasons.

First, since Browne had a conflict of interest that adversely affected his performance, the remedy is reversal, the appointment of new counsel, and a rehearing on all of Bharadwaj's claims. A defendant is not *also* required to show the ultimate result of the hearing would have been different. Mickens v. Taylor, 535 U.S. 162, 166, 174, 122 S. Ct. 1237, 152 L. Ed. 2d 291 (2002); Dhaliwal, 150 Wn.2d at 570 n.7; Harell, 80 Wn. App. at 805. The State cites no authority for its contrary position.

Second, even if reversal did turn on the probable impact on the ultimate outcome, the State's position simply ignores the possibility the outcome might have differed had a non-conflicted attorney advocated on Bharadwaj's behalf concerning the claims already made in the motion and raised the new claims Bharadwaj wished to add.

Regarding Browne's refusal to argue on Bharadwaj's behalf, the State cites State v. Bandura, 85 Wn. App. 87, 931 P.2d 174, review denied, 132 Wn.2d 1004, 939 P.2d 215 (1997), for the proposition that trial courts are not required to hear oral argument on motions for new trial.[2] See BOR, at 20. Bandura indicates that oral argument is discretionary so long as the defendant is provided an opportunity to argue his claims in writing. Bandura, 85 Wn. App.

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[2] The State also asserts, "both trial counsel and the prosecutor agreed that oral argument was not required." BOR, at 5. To be clear, "required" in this context means "as of right." The State's characterization should not be misconstrued to mean Browne felt there was no reason for oral argument. He clearly felt there was. See 13RP 20 ("I came anticipating, before all this happened I came today anticipating I'd argue"). This is not surprising given that his written motion was identified as "preliminary" and discussed fewer than half of the substantive attachments. See Brief of Appellant, at 26. Moreover, Browne had not bothered to file a reply to the State's written response to his preliminary motion. See CP 1367-1373. The written materials obviously were not Browne's best effort.

at 93. This is true. However, a court's general discretion is irrelevant where, as here, the court exercised that discretion, but conflicted counsel declined to present argument based on a conflict. See 13RP 20; Harell, 80 Wn. App. at 804 ("Implicit in the trial court's decision to hold a hearing is a finding that sufficient facts were alleged to warrant a hearing."). Moreover, unlike Bandura, Bharadwaj had not been presented an opportunity to argue all of his claims in writing. Not only did Browne's preliminary written motion fail to address most of its attachments, it addressed none of Bharadwaj's additional claims – including the claims of ineffective assistance of counsel against Browne.

Finally, the State argues that, should this case be remanded for a new hearing on the motion for new trial, Judge Eadie should not be replaced with another judge. BOR, at 23-24. The State points out that, as fact-finder in this case, Judge Eadie was in a unique position to assess the impact of Bharadwaj's new evidence. BOR, at 23. Unique or not, Judge Eadie forfeited the opportunity to consider Bharadwaj's claims on remand when he prejudged the incomplete motion in violation of Bharadwaj's right to representation. Assigning a new judge to the case would not be novel. See Brief of Appellant, at 27-29.

2. THE COURT ERRED WHEN IT DENIED BHARADWAJ'S CrR 7.8 MOTION

The issue is prejudice: whether there is a reasonable probability that, but for defense counsels' serious mistakes in conducting plea negotiations with the State, and failure to adequately assist Bharadawaj in making an informed decision, a plea deal would have been agreed upon and accepted that would have been less severe than the 57-month sentence Bharadwaj received for convictions that result in his automatic deportation. See Lafler v. Cooper, ___ U.S. ___, 132 S. Ct. 1376, 1385, 182 L. Ed. 2d 398 (2012).

Prejudice has been established. It is beyond dispute that Bharadwaj desperately wished to avoid deportation, which had devastating consequences for him personally and professionally. CP 1211-1212. It is beyond dispute that the King County Prosecutor's Office was not seeking his deportation and confirmed its willingness to allow Bharadwaj to plead guilty to Assault in the Third Degree with Sexual Motivation or another offense avoiding that consequence. CP 1232, 1241-1242. And, it is beyond dispute that – had he been adequately advised – Bharadwaj would have

pled guilty to Assault rather than risk a far longer sentence and automatic deportation by rolling the dice at trial. CP 1216.

In response, the State merely maintains its stance below (a stance adopted by Judge Eadie), arguing it "would not have offered a plea bargain that would have included redacting the victim's age from the guilty plea and sentencing documents[.]" BOR, at 30. Even if true, this is not the deal killer the State still seems to think it is.

As was made clear in the CrR 7.8 motion, limiting use of S.M.'s age in the plea and sentencing documents was simply an *advisable* and *cautionary* measure recommended by immigration experts. See 14RP 10-11 (asserting that all immigration lawyers "advise against admitting to unnecessary elements" and "inadvisable" to attach certification of probable cause containing extraneous information); 14RP 14 (it is "simply advisable" to keep victim's age out of documents and "probably best" age not be included on judgment); 14RP 15 (indicating State is under misimpression "this has to be completely sanitized"); CP 1334 ("immigration attorneys caution that the amended information contain no references to the age of the victim and that the defendant should not agree that the certification for determination

of probable cause be considered part of the factual basis for the plea.").

While crafting a plea record to Assault 3 that did not include evidence of the victim's minor status would have been the safest way to ensure Bharadwaj's conviction did not trigger federal scrutiny, it simply was not necessary to avoid deportation.

Critically, even if the prosecution had refused to make *any* accommodations regarding S.M.'s age, Bharadwaj would not have been deported. As discussed in Bharadwaj's opening brief, in Sanchez-Avalos v. Holder, 693 F.3d 1011 (9th Cir. 2012), the Ninth Circuit Court of Appeals recognized that, when classifying convictions under federal immigration law, only the elements of the conviction are examined, not the facts. This is referred to as the "categorical approach."[3] Sanchez-Avalos, 693 F.3d at 1014. Under this approach, even where the plea documents and probation conditions make it clear that a child was involved in a sex crime (in other words, an un-sanitized record), unless the victim's

[3] The categorical approach is not limited to determining whether a prior crime is a deportable offense under federal law. The approach also is used to determine whether prior crimes can be used to enhance federal sentences. Indeed, it originated in that context. See Taylor v. United States, 495 U.S. 575, 110 S. Ct. 2143, 109 L. Ed. 2d 607 (1990).

age was an *element* of the conviction, it will not trigger deportation grounds related to crimes involving minors.[4] Sanchez-Avalos, 693 F.3d at 1014-1016, 1019. None of the crimes set forth in RCW 9A.36.031 have the victim's minor status as an element of the offense.

Thus, even if an un-sanitized record had triggered federal scrutiny, it is apparent Bharadwaj would not have been deported under the categorical approach, which is based on well-established United States Supreme Court precedent. See Descamps v. United States, ___ U.S. ___, 133 S. Ct. 2276, 2281-2286, 186 L. Ed. 2d 438 (2013); Moncrieffe v. Holder, ___ U.S. ___ 133 S. Ct. 1678, 1684, 185 L. Ed. 2d 727 (2013) (citing Nijhawan v. Holder, 557 U.S. 29, 33-38, 129 S. Ct. 2294, 174 L. Ed. 2d 22 (2009); Gonzales v. Duenas-Alvarez, 549 U.S. 183, 185-187, 127 S. Ct. 815, 166 L. Ed. 2d 683 (2007); Taylor, 495 U.S. at 599-600); see also Shepard v. United States, 544 U.S. 13, 19, 125 S. Ct. 1254, 161 L. Ed. 2d 205 (2005) (categorical approach applies not just to jury verdicts, but also to plea agreements).

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[4] See 8 U.S.C. § 1227(a)(2)(A)(iii) (deportation for crimes classified as aggravated felonies under 8 U.S.C. § 1101(a)(43), one of which – § 1101(a)(43)(A) – is "sexual abuse of a minor"); see also 8 U.S.C. § 1227(a)(2)(E)(i) (deportation for "a crime of child abuse").

Bharadwaj missed out on a guilty plea that would have been acceptable to everyone, would have required just over a year in prison, and would have allowed him to stay in the United States. CP 1241. Instead, he was convicted on the most serious charges that could be filed, he is serving a 57-month sentence, and he is subject to automatic deportation. He has demonstrated prejudice.

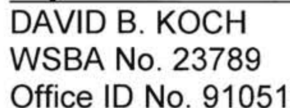
B. CONCLUSION

Bharadwaj was denied his right to competent counsel in handling plea negotiations. His convictions should be reversed and he should be offered a plea deal that avoids deportation. Alternatively, his case should be remanded and conflict-free counsel appointed to handle, supplement, and argue his motion for new trial before a different judge.

DATED this 10th day of March, 2014.

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. VINAY BHARADWAJ, Appellant.	)))))))))	COA NO. 69453-7-I

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 10TH DAY OF MARCH 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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SIGNED IN SEATTLE WASHINGTON, THIS 10TH DAY OF MARCH 2014.

x Patrick Mayovsky