FILED
Apr 20, 2015
Court of Appeals
Division I
State of Washington

71907-6

NO. 71907-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JESSE JESUS SOTO,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE RICHARD McDERMOTT

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. A trial court has discretion to determine if a defendant has shown good cause to substitute appointed counsel, such as a conflict of interest, irreconcilable conflict, or a complete breakdown in communication. Defendant Jesse Soto moved to replace his public defender because he was unhappy that he had pleaded guilty in a prior case while represented by the same attorney, and because he believed it was taking too long for his attorney to consult with an expert witness and to return his phone calls. Did the trial court properly deny Soto's motions?

B. STATEMENT OF THE CASE

1. SUBSTANTIVE FACTS.

On the morning of January 14, 2012, officers of the Redmond Police Department were searching for a suspect wearing a particular black-and-white-checkered hoodie. 7RP 107-09, 131-32; 8RP 314-15.[1] Officer Shanks saw defendant Jesse Soto, who matched that description, walking with two other men through a park. 7RP 110-11, 133; 8RP 314-15.

[1] This brief refers to the verbatim report of proceedings as follows: 1RP – May 3, 2013; 2RP – Sep. 12, 2013; 3RP – Nov. 21, 2013; 4RP – Feb. 3, 2014; 5RP – Feb. 27, 2014; 6RP – Mar. 4, 2014; 7RP – Mar. 5, 2014; 8RP – Mar. 6, 2014; 9RP – Mar. 10, 2014; 10RP – Mar. 11, 2014; 11RP – May 6, 2014.

Officer Shanks used his loudspeaker to ask the men to approach his patrol car. 7RP 112. Instead, they took off running. 7RP 113, 133; 8RP 316.

Lieutenant Krueger saw Soto run toward a parking structure nearby, and then along a rock retaining wall. 8RP 317-18. Soto jumped off of the retaining wall and dropped momentarily out of sight. 8RP 318-20. Krueger gave chase on foot and watched as Soto ran into a pond. 8RP 320-22. Officers took positions around the pond and then took Soto into custody. 8RP 322-23.

Krueger went back to check the route that Soto had run to the pond. 8RP 324-26. At the bottom of the retaining wall, approximately where Soto would have landed, Krueger saw a footprint in the wet ground, a slide mark, and a nine-millimeter semiautomatic pistol. 7RP 203, 208; 8RP 326, 330-32.

Officers searched Soto incident to arrest and found a baggie in his pocket, containing a white crystalline substance. 7RP 143, 176. The substance tested positive for methamphetamine. 8RP 398-99.

The Washington State Patrol Crime Laboratory then tested the handgun, for deoxyribonucleic acid ("DNA"). 7RP 213; 9RP 446-48. DNA recovered from the handgun matched Soto's DNA. 9RP 478. The

chance of the DNA belonging to an unrelated individual chosen at random from the United States population was one in 530 quintillion.[2] 9RP 478.

2. PROCEDURAL FACTS.

On December 26, 2012, the State charged Soto with Unlawful Possession of a Firearm in the First Degree[3] and Violation of the Uniform Controlled Substances Act.[4] CP 1-2. The State alleged that Soto, having previously been convicted of a serious offense, knowingly possessed a firearm. CP 2. The State also alleged that Soto possessed methamphetamine. CP 2.

Mr. Scott J. Schmidt, a public defender, entered a notice of appearance on behalf of Soto on January 3, 2013. Supp. CP __ (Sub No. 4, Notice of Appearance at 1-2).

Soto was arraigned on January 7. Supp. CP __ (Sub No. 6, Initial Arraignment). On March 5, the trial court entered an order, setting an

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[2] 530 quintillion is 530,000,000,000,000,000,000. 9RP 478.

[3] RCW 9.41.040(1)(a) ("A person, whether an adult or juvenile, is guilty of the crime of unlawful possession of a firearm in the first degree, if the person owns, has in his or her possession, or has in his or her control any firearm after having previously been convicted or found not guilty by reason of insanity in this state or elsewhere of any serious offense[.]").

[4] RCW 69.50.4013(1) ("It is unlawful for any person to possess a controlled substance[.]").

omnibus hearing[5] for April 5 and scheduling trial for April 24. Supp. CP __ (Sub No. 29, Order Setting Trial Date).

Over the ensuing months, Mr. Schmidt several times moved to continue omnibus and trial, in order to accommodate further defense investigation, witness interviews, and, in particular, consultation with a potential defense expert witness. See Supp. CP __ (Sub No. 33, Order Continuing Trial), __ (Sub No. 44, Order Continuing Trial), __ (Sub No. 49, Stipulated Order to Continue Omnibus Hearing), __ (Sub No. 58, Order Continuing Trial Date).

Nine months after arraignment, at the omnibus hearing on September 6—with trial scheduled for September 18—Soto informed the court that he wished to move to discharge Mr. Schmidt. Supp. CP __ (Sub No. 58, Order Continuing Trial Date); 2RP 3. The parties appeared before the superior court on September 12 to hear Soto's motion. 2RP 3.

Soto explained that he wished to "fire" Mr. Schmidt because he was unhappy with the result of an unspecified previous case, in which Mr. Schmidt apparently had been his attorney:

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[5] An omnibus hearing is intended to be the final hearing prior to trial and generally serves to confirm the parties' readiness to proceed. See "Omnibus Hearing." King County Superior Court Criminal Department Manual at 27-28 (Mar. 2015), available online at http://www.kingcounty.gov/~/media/courts/SuperiorCourt/Docs/CriminalManual.ashx (last accessed Apr. 14, 2015). In order to promote the timely disposition of criminal matters, "it is the expectation of the court [at omnibus] that the date originally set for trial will be the trial date, absent unforeseeable circumstances." Id. at 28. The court may continue omnibus if investigation is incomplete. Id.

> **Soto**: Um, I would like to fire my attorney because that's why we're here. He's my attorney and I went—and I went to prison on similar charges and he told me to wait without telling me that I couldn't come to trial. Instead, he let me take a deal on my waive—to DOC.
>
> So I would like to fire my attorney because I have reason [sic], because he told me in a way without telling me that I could have gone to trial on similar charges, and he let me take a deal. I was on my way to DOC, so I would like to fire my attorney for that reason.

2RP 4. He added that he wanted the court to appoint him a new public defender. 2RP 4.

After hearing Soto's complaints, the trial court informed Soto that he did not have an absolute right to choose court-appointed counsel, but that he did have a right to hire private counsel if he wished. 2RP 4. The trial court also ruled that Soto had not articulated a sufficient basis to grant substitution of appointed counsel. 2RP 5.

Mr. Schmidt then asked for another continuance. 2RP 5. He explained that he had been in consultation for some time with a potential defense expert witness who could testify regarding the DNA evidence against Soto— the chief evidence for the firearm charge. 2RP 5-6. The expert had finished inspecting the Washington State Patrol Crime Laboratory, but needed additional time to finalize his report. 2RP 6. Although Soto objected to the continuance, Mr. Schmidt explained that, given the nature of the evidence against Soto, the additional time was

necessary in order to mount an effective defense. 2RP 6. The trial court granted the continuance. 2RP 7.

Omnibus and trial were continued several more times on Mr. Schmidt's motion, to accommodate further investigation and expert witness consultation. Supp. CP __ (Sub No. 68, Order Continuing Trial); Supp. CP __ (Sub No. 71, Order Continuing Trial).

On November 21, 2013, the day before omnibus, Soto made a second motion to discharge Mr. Schmidt. 3RP 3. This time, he explained that he wished to have new appointed counsel because of "conflicts," chiefly, his frustrations with attempting to get in touch of Mr. Schmidt and apparent delays in receiving unspecified discovery. He did not reiterate any concerns about a prior case:

> **Soto:** I would like to fire my attorney because I have conflicts with him. I can't get ahold of him. I call him. I leave voice mail. There's no—there's no way I—I got—I barely got ahold of him. I've been—but I've been calling him so many times, and I finally got—and he has not come up with my—I ask him for things and I haven't got a response for it.
>
> Like my discovery, I haven't gotten the rest of my discovery, or all my paperwork for my—for my courts. I haven't got all that. And also every time we go to court—
>
> **Court:** Uh-huh.
>
> **Soto:** —my trial gets keep [sic] continuing. He's through on the same subject for months, and I've been already here and—and I don't see why it's taking—it's just taking him so long to come with that information that he needs.

Court: Uh-uh.

Soto: So those are the reasons why I would want to fire my attorney, because I'm not seeing any help, any progress, anything move, that he has to go with or information.

He just barely came and see [sic] me. I even call him, leaving voicemails, and I barely got ahold of him.

3RP 4-5.

The court inquired of Soto, asking when he was calling Mr. Schmidt. 3RP 5. Soto explained that he was attempting to call Mr. Schmidt during business hours. 3RP 5. He admitted that he only was assuming that Mr. Schmidt was at his office when he called. 3RP 5-6. He also admitted that he was able recently to speak to Mr. Schmidt. 3RP 6.

The trial court gave Mr. Schmidt an opportunity to explain whether he had been slow to respond to Soto's inquiries, and if so, why. 3RP 6-7. Mr. Schmidt explained that he had been in trial for the last couple of months and was working through a backlog of client communications. 3RP 6. He acknowledged that Soto's case had been pending for some time. 3RP 6-7. However, he explained again that the delay related to the need to secure expert witness testimony regarding the State's DNA evidence. 3RP 7. He said that some "unusual issues" had arisen with the DNA evidence that had required additional time. 3RP 7. He also added that he had discussed with Soto that he currently was in recess from

another trial and was scheduled to begin yet another trial on December 2. 3RP 7.

After hearing from Soto and Mr. Schmidt, the trial court inquired of the prosecutor, asking what issues had occurred with the DNA evidence and how much more of a delay was anticipated by the State. 3RP 7.

The prosecutor explained that the delay actually was due to a mistake at the Crime Laboratory, in which an employee's DNA was accidentally mixed in with Soto's DNA on the evidence submitted for examination. 3RP 7. Because the employee's DNA had been mixed in with Soto's, the defense expert wanted the employee's DNA profile in order to aid in his independent examination of the DNA evidence. 3RP 8. That required the State and the defense to work together with the Crime Laboratory's attorney in order to draft an appropriate protection order for the use of the employee's genetic information. 3RP 8. The trial court asked the prosecutor whether it was "fair to say that that takes some time?" 3RP 8. The prosecutor confirmed, "Yes, Your Honor." 3RP 8.

Soto then stated that he understood that "they been having some issues" with the DNA testing, but opined that he "d[idn't] think it should take that long" to work through the legal and scientific issues surrounding the forensic genetic testing. 3RP 8. The trial court acknowledged that Soto was frustrated and assured him that the court understood his

frustrations. 3RP 8. However, the court explained that, if it were to grant Soto's request for substitution of counsel, with trial set so soon (on December 4), it would take a new attorney quite some time to review the case and become prepared for trial. 3RP 8-9. The trial court also reminded Soto that Mr. Schmidt had been in court, trying another case, and could only try one case at a time. 3RP 9. Finally, the trial court reiterated to Soto that he did not have a right to select court appointed counsel, but that he could hire a private attorney if he wished. 3RP 9. Based on all of the above, the trial court denied Soto's second motion to substitute appointed counsel:

> **Court**: So I'm going to find that you've not given this Court a legal basis for counsel—for new counsel, recognizing that there's some frustration here because things take time, I understand that, and I am denying your request.

3RP 9.

Omnibus was rescheduled for December 20 and trial for January 8, 2014. Supp. CP __ (Sub No. 74, Order Continuing Trial). Again, omnibus and trial were continued several times, on Mr. Schmidt's motion, to accommodate ongoing issues with defense expert witness consultation. See Supp. CP __ (Sub No. 76, Order for Continuance of Trial Date), __ (Sub No. 78, Order to Continue Omnibus Hearing), __ (Sub No. 79, Order

for Continuance of Trial Date), __ (Sub No. 83A, Order to Continue Omnibus Hearing).

At omnibus on February 3, 2014, with trial scheduled on February 5, Soto moved a third time to discharge Mr. Schmidt. 4RP 3. Before relinquishing the floor to Soto, Mr. Schmidt reiterated that the primary delay in preparing for this case concerned the accidental depositing of a Crime Laboratory employee's DNA on the firearm, which required additional investigation and preparation. 4RP 4. Mr. Schmidt stated that he was still waiting for the expert witness to complete his report, but anticipated that it would be completed by the end of the week or the next week. 4RP 4. He added that, after receiving the report, he would be ready to proceed to trial "very quickly" if the court did not grant Soto's motion to substitute appointed counsel. 4RP 5.

Soto then presented argument, repeating his frustrations with trying to get in touch with Mr. Schmidt, and expressing his opinion that it should not have taken so long to secure expert DNA analysis:

> **Soto:** I would like to make a motion to fire my attorney for his lack of help. Um, I call him and can't still get ahold of him. Last time he was here, we went through the same thing. I understand he has other people he's working on, I'm not the only person, but I don't think you should take 13 months to get the evidence that he needs.
>
> And every time we go to court, he comes and tells the court the same thing, and I haven't seen no progress. I keep hearing the same thing that comes out of my attorney's—and I don't see

> anything different, you know, or anything that—that shows that—we should have been already in trial.[6]

4RP 5.

The trial court asked Soto to confirm his understanding of Mr. Schmidt's explanation, regarding the mix-up at the Crime Laboratory and the resulting delays. 4RP 5. Soto conceded that Mr. Schmidt had "just got the evidence," but complained that it "sound[ed] like he's still having trouble with the evidence." 4RP 6. The trial court assured Soto that it would inquire also of the State, to verify the nature of the delay. 4RP 6.

The trial court asked the prosecutor when the State had submitted the firearm for DNA testing. 4RP 6. The prosecutor explained that the firearm had been submitted "some time ago," and that the defense had then begun consultations with an expert witness; but after the defense had already began consultations, it was discovered that the firearm had been contaminated with the DNA of a Crime Laboratory employee. 4RP 6-7. At that point—already part way through his evaluation—the defense expert requested the employee's DNA profile, which required the attorneys from both parties to work with the Crime Laboratory's attorney in order to agree on the terms of a protective order that would allow the employee's genetic information to be disclosed. 4RP 7. The prosecutor

[6] In this third motion, as well, Soto did not mention any concerns about a previous case.

and Mr. Schmidt both believed that the consultations over the protective order had occurred in September of 2013. 4RP 7. The genetic information was disclosed to the defense expert, who, after performing the additional analysis required by the contamination, was nearing the completion of his report. 4RP 8.

After hearing the explanation from both parties, the trial court sought to assuage Soto's concerns, but Soto only repeated his opinion that it should not have taken so long to perform the additional DNA analysis:

> **Court:** All right. That's a lot of work. That's a lot of work. Just because he's not staying in touch with you on a regular basis doesn't mean he is not preparing for your case. Do you understand that?
>
> **Soto:** Yeah, I understand that, but I don't think we should—it sounds—it sounds like they—he doesn't know specifically how long this was, so it must have been a while back.
>
> **Court:** Yeah.
>
> **Soto:** And if he—
>
> **Court:** Yeah, he has no—this is all out of his control. Do you understand that? He can't walk over somewhere and say, "Yo, I need the evidence" and they say, "Sure, not a problem. Here." That's not how this works. It takes time. So I think it's important that you understand that.
>
> **Soto:** I do understand, but things—maybe they were doing their job. Maybe. I mean, I'm not nobody that can tell them how to do their job, but I think it—if they were maybe—maybe doing something, it wouldn't, like, take that long.

4RP 9-10.

The trial court then denied Soto's third motion. 4RP 11. The court acknowledged that Soto was frustrated with the pace of his case, but reiterated that he had articulated no legal basis to substitute counsel, and that, if the court were to grant Soto's motion, it would only cause further delay:

> **Court:** Well, someday you might want to find yourself a DNA expert and find out if that's true or not [that the DNA analysis and evaluation shouldn't take so long], but I think probably they know better. So I'm not hearing any legal basis for you to ask this Court to fire your lawyer. What I'm hearing is, yes, you're in custody. No, that's not fun, I understand it, and you've been there for a long time, and it doesn't feel fair. I get that. But that's not a reason to have your attorney fired.
>
> If this Court were to grant your request, and, again, you have not provided me any legal basis, you might as well times that [delay] by two because you'd have a brand new lawyer who wouldn't have a clue what's going on and would have to start all over again where your attorney has already been in order to understand what the evidence is.
>
> So I appreciate the frustration. I get that. And I'm sorry, but this is not a legal basis for a new lawyer. You don't really want a new lawyer, I assure you of that, but it is not a legal basis for a new attorney.
>
> So I'm going to deny your request. I understand this is over your objection. Based on the information that I've heard, the law allows me to do so, and, in the administration of justice, we'll go to February 26th.

4RP 10-11.

On February 27, the parties convened for pre-trial motions and subsequently for voir dire. See, generally, 5RP; 6RP. Testimony commenced on March 5. 7RP 106.

At trial, Mr. Schmidt cross-examined the State's police witnesses, pointing out that none of them had observed Soto hold a firearm or drop or throw a firearm. 7RP 123-24, 174. He also cross-examined the State's DNA witness extensively on the limitations of her methodology. 9RP 481-516, 524-30, 532-33. Finally, Mr. Schmidt presented detailed testimony from Dr. Randell Libby, a neurogeneticist and forensic geneticist. 10RP 556-94. Dr. Libby opined that the State's DNA testing methodology was flawed, and that the real chance of a random match was many orders of magnitude lower than that represented by the State's witness. 10RP 578-82.

Despite this vigorous defense, the jury convicted Soto of both the firearm and controlled substance violations. CP 86-87; 10RP 651-52. The trial court imposed a standard range sentence. CP 95, 97; 11RP 12.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING SOTO'S MOTIONS FOR SUBSTITUTE COUNSEL.

Soto asserts that his conflict with Mr. Schmidt was so great that he constructively was denied the assistance of counsel guaranteed by the Sixth Amendment. He argues that the trial court abused its discretion by failing to grant his motions for new counsel.

Soto's claim should be rejected. First, the record does not establish that Soto and Mr. Schmidt had an irreconcilable conflict or suffered a complete breakdown in communication. Second, the trial court held an appropriate inquiry that allowed Soto to address his complaints in open court. Finally, Soto's request, made more than nine months after Mr. Schmidt's appointment, and close to scheduled trial dates, would only have caused further delay—thereby exacerbating Soto's chief complaint.

a. Standard Of Review.

A criminal defendant does not have an absolute Sixth Amendment right to choose a particular advocate.[7] State v. Stenson, 132 Wn.2d 668, 733, 940 P.2d 1239 (1997) ("Stenson I"), cert. denied, 523 U.S. 1008 (1998). Nor does the Sixth Amendment guarantee a "meaningful relationship" between the defendant and his attorney. Morris v. Slappy, 461 U.S. 1, 13-14, 103 S. Ct. 1610, 75 L. Ed. 2d 610 (1983). A general loss of confidence or trust in counsel is not sufficient to warrant new counsel. Stenson I, 132 Wn.2d at 734; State v. Varga, 151 Wn.2d 179, 200, 86 P.3d 139 (2004).

[7] The right to counsel of choice does not extend to a defendant who requires appointed counsel. United States v. Gonzalez-Lopez, 548 U.S. 140, 144, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006) (citing Wheat v. United States, 486 U.S. 153, 159, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988)).

To justify appointment of new counsel, a defendant must show good cause, such as (1) a conflict of interest, (2) an irreconcilable conflict, or (3) a complete breakdown in communication. Stenson I, 132 Wn.2d at 734. When reviewing a trial court's refusal to appoint new counsel, the court considers: (1) the extent of the conflict, (2) the adequacy of the inquiry, and (3) the timeliness of the motion. State v. Cross, 156 Wn.2d 580, 607, 132 P.3d 80, cert. denied, 549 U.S. 1022 (2006).

Whether an indigent defendant's dissatisfaction with appointed counsel is meritorious and justifies appointment of new counsel is within the trial court's discretion. Stenson I, 132 Wn.2d at 733. A trial court abuses its discretion when no reasonable person would adopt the view taken by the trial court. State v. Greiff, 141 Wn.2d 910, 921, 10 P.3d 390 (2000).

b. The Trial Court Properly Exercised Its Discretion.

As noted, an appellate court considers three factors in reviewing the denial of a motion for new appointed counsel. Cross, 156 Wn.2d at 607. These factors are discussed in turn, below.

i. The extent of the conflict did not warrant new appointed counsel.

A conflict amounts to good cause to appoint new counsel if it constitutes a conflict of interest, an irreconcilable conflict, or a complete

breakdown in communication. Stenson I, 132 Wn.2d at 734. Soto appears to allege only two of these bases: that he and Mr. Schmidt had an irreconcilable conflict and a complete breakdown in communication. The record does not bear out these claims.

First, there was no irreconcilable conflict. To determine whether there was an irreconcilable conflict, a court considers the nature and extent of the breakdown in the attorney-client relationship and its effect on the representation actually provided. In re Pers. Restraint of Stenson, 142 Wn.2d 710, 724, 16 P.3d 1 (2001) ("Stenson II"); State v. Thompson, 169 Wn. App. 436, 458, 290 P.3d 996 (2012); State v. Schaller, 143 Wn. App. 258, 270, 177 P.3d 1139 (2007). An irreconcilable conflict will be found only if the conflict resulted in a "complete denial of counsel." Schaller, 143 Wn. App. at 268 (citing Stenson II, 142 Wn.2d at 722). So long as the representation was adequate, the defendant bears the burden of showing prejudice. Thompson, 169 Wn. App. 458 (citing Schaller, 143 Wn. App. at 270 (citing Cross, 156 Wn.2d at 580)).

In his first motion for new appointed counsel, when given a chance to articulate his grievances in open court, Soto made only vague, unintelligible complaints about a previous case in which Mr. Schmidt apparently defended him against similar charges. 2RP 4. Soto said first that Mr. Schmidt told him "to wait without telling [him] that [he] couldn't

come to trial." 2RP 4. This appears to mean that Mr. Schmidt had failed to tell Soto *not* to go to trial—i.e., had allowed him to go to trial. But then, Soto said that Mr. Schmidt "told [him] in a way without telling [him] that [he] could have gone to trial on similar charges, and he let [him] take a deal." 2RP 4. Here, Soto appears to have complained that Mr. Schmidt intimated (at some point) that Soto could have gone to trial, but did not prevent him from pleading guilty.

On appeal, Soto urges a rather specific interpretation of these comments: that he "explained to the court that he did not trust his attorney because he believed that when Mr. Schmidt previously represented him, Mr. Schmidt had withheld critical information about his case, which ultimately caused Mr. Soto to enter a plea of guilty rather than exercise his right to trial," and that he therefore "believed that Mr. Schmidt had committed a serious breach of trust during the prior representation." Br. of App't at 11 (citing 2RP 4).

This simply is not what Soto said. The most that can be gleaned from Soto's actual comments is that Mr. Schmidt previously represented him against similar charges, that Soto pleaded guilty, and that Mr. Schmidt later possibly implied—"told [him] in a way without telling [him]," 2RP 4—that he could have demanded a trial, instead. There is no indication that Mr. Schmidt actually affirmatively misadvised Soto at any point. It is

just as likely that he made some comment that Soto should have, in retrospect, gone to trial—perhaps in light of Soto's new charges. Regardless, it was within the trial court's discretion to determine that Soto's vague, contradictory allegations were insufficient to establish an irreconcilable conflict.[8]

Neither can Soto's frustrations with the length of time that it took for the defense DNA expert to complete his analysis amount to an irreconcilable conflict with his attorney. Mr. Schmidt explained, and the prosecutor confirmed, that a mishap at the Washington State Patrol Crime Laboratory had delayed the completion of the expert witness's report. 3RP 6-8; 4RP 4, 6-9. Soto even acknowledged these unexpected delays; he just maintained that, in his opinion, it should not have taken so long for a forensic geneticist to isolate a contaminated genetic profile and prepare findings on the crime laboratory's methodology for comparing DNA samples. 3RP 8; 4RP 6, 9-10. But the record does not establish that Soto was in any position to opine on these issues. His attorney was, in the good

[8] The appellate court is not limited to the reasons articulated by the trial court and may affirm the trial court on any basis that is supported by the record. State v. Henderson, 34 Wn. App. 865, 870-71, 664 P.2d 1291 (1983); see also RAP 2.5(a) ("A party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground."). Thus, even if the trial court did not expressly articulate the same reasoning presented here, its ruling should be affirmed so long as any reasonable judge would have ruled the same way.

faith discharge of his duties, pursuing critical evidence to mount an effective defense. There was no irreconcilable conflict.

Soto relies on cases of the Ninth Circuit for the proposition that, "Where a criminal defendant has, *with legitimate reason*, completely lost trust in his attorney, and the trial court refuses to remove the attorney, the defendant is constructively denied counsel." Br. of App't at 11 (quoting Daniels v. Woodford, 428 F.3d 1181, 1198 (9th Cir. 2005) (citing United States v. Adelzo-Gonzalez, 268 F.3d 772, 779 (9th Cir. 2001)) (emphasis added). Soto's reliance on this principle is unavailing because he failed below to articulate a legitimate reason for his loss of trust. The burden was upon him to do so.

Washington courts have declined to find an irreconcilable conflict even in cases involving an egregious breakdown of the attorney-client relationship. Recently, in Thompson, the defendant accused his public defender of being corrupt and prejudiced, and threatened repeatedly to kill him. 169 Wn. App. at 449-56. He made multiple motions for a new attorney or to proceed *pro se*. Id. at 449-57. His public defender also moved multiple times to withdraw, informing the court that there was "no way" that he could effectively represent the defendant. Id. at 451. The court found no irreconcilable conflict because the public defender provided effective representation, even in the face of such tumult, and

because the defendant could not show prejudice. Id. at 458-61. Likewise, in the instant case, there is no indication that Soto's complaints about his previous case had any effect on the representation provided by Mr. Schmidt. Soto's claim fails.

Second, the record also does not support Soto's claim that he and Mr. Schmidt suffered a complete breakdown in communication. Soto complained that Mr. Schmidt was slow to return his calls and to provide him with copies of some unspecified discovery. 3RP 4-6; 4RP 5. But Mr. Schmidt explained to the trial court that he had been in trial continuously for months and was working on catching up with client communications. 3RP 6. He had also informed Soto of the constraints of his schedule. 3RP 7. Soto admitted that he had only been assuming that Mr. Schmidt was available and at his office during the times that Soto called to speak to him. 3RP 5-6. He also admitted that he eventually was able to reach Mr. Schmidt. 3RP 6. Soto does not explain on appeal how the scheduling constraints of a busy, publically-appointed attorney—who still communicates with his client, even if not as quickly as that client would prefer—amount to a complete breakdown in communications.

Further, even if Mr. Schmidt was unable promptly to return Soto's phone calls because of his trial schedule, Mr. Schmidt was still able to

provide Soto with effective representation.[9] Thus, Soto bears the burden of showing that the complained-of difficulty in communicating caused him prejudice. Thompson, 169 Wn. App. 458 (citing Schaller, 143 Wn. App. at 270 (citing Cross, 156 Wn.2d at 580)). He has not made this showing.

The State had evidence that the chances of the DNA found on the handgun belonging to someone other than Soto were only one in 530 quintillion. 9RP 478. Mr. Schmidt did what was necessary to adequately defend Soto by securing expert testimony to combat this evidence. The delay in securing this testimony cannot be imputed to Mr. Schmidt, because, as both he and the prosecutor explained, the delay was caused by the Crime Laboratory. 3RP 7-8; 4RP 3-4, 6-8.

Although courts "have held that a complete breakdown of communication may occur even where counsel is providing competent representation," they have done so "only in extreme cases." Stenson v. Lambert, 504 F.3d 873, 887 (9th Cir. 2007) ("Stenson III") (citing United States v. Nguyen, 262 F.3d 998, 1003 (9th Cir. 2001) (defendant "left to fend for himself" by attorney who would "walk out" on him and refuse to explain his case)). The instant case entailed neither a complete breakdown

[9] In fact, Soto does not claim that he received ineffective representation.

in communications nor extreme circumstances. Soto's convictions should be affirmed.

ii. The trial court conducted an adequate inquiry.

A trial court's inquiry into the basis of a defendant's motion for new appointed counsel is adequate when the court "allow[s] the defendant and counsel to express their concerns fully." Schaller, 143 Wn. App. at 271 (citing Varga, 151 Wn.2d at 200-01; Stenson II, 142 Wn.2d at 731). In this case, Soto was allowed to express his concerns fully on three separate occasions. 2RP 4; 3RP 4-6, 8; 4RP 5-6, 9-10. Upon Soto's second two motions (regarding his difficulties in reaching Mr. Schmidt and the amount of time it was taking to secure DNA evidence), the trial court questioned both Mr. Schmidt and the prosecutor about Soto's concerns. 3RP 6-8; 4RP 4-5, 6-9. This inquiry was more than adequate.

Soto argues that the trial court failed to inquire adequately into the basis of his first motion, which regarded Mr. Schmidt's representation in a prior case, because the trial court did not ask Soto any follow-up questions. Br. of App't at 7-10. He cites language in federal cases, suggesting that trial courts are required to question defendants "privately and in depth," Daniels, 428 F.3d at 1200, and that, "in most circumstances a court can only ascertain the extent of a breakdown in communication by

asking specific and targeted questions," Adelzo-Gonzalez, 268 F.3d at 777-78. Br. of App't at 8 (quoting Daniels and Adelzo-Gonzalez, supra). But these cases are distinguishable. The language they contain must be viewed in context.

In Daniels, the defendant sent the trial court a letter, detailing his concerns about his attorneys. 428 F.3d at 1200. The trial court completely "disregarded" his concerns, and never questioned the defendant or his attorneys regarding any of the issues. Id. When noting that the trial judge should have questioned the defendant "privately and in depth," the Daniels court quoted language from Nguyen, 262 F.3d at 1004—a case in which the trial judge dismissed the defendant's proposed substitute counsel without telling the defendant, did not consult with the defendant about his reasons for wanting a new attorney, denied the defendant's request for a new attorney without explanation, and refused to grant the defendant a continuance in order to retain private counsel, simply because the judge "didn't travel halfway around the world to continue this trial." 262 F.3d at 1000-01.

Nguyen, in turn, derived its "privately and in depth" language from United States v. Moore, 159 F.3d 1154 (9th Cir. 1998). Nguyen, 262 F.3d at 1004 (quoting Moore, 159 F.3d at 1160). In Moore, the trial court failed to question the defendant or counsel on the defendant's allegations

that his trial attorney had an actual conflict of interest because of a close relationship with his co-defendant, and instead urged the defendant and his attorney "to bury the hatchet[.]" 159 F.3d at 1157-60. This was in spite of the fact that the defendant's attorney *admitted* to the conflict of interest, telling the court that he *could not* zealously represent his client. Id. at 1160. These cases are dramatically unlike the case at bar.

Finally, in Adelzo-Gonzalez, when writing that, "[I]n most circumstances a court can only ascertain the extent of a breakdown in communication by asking specific and targeted questions," the Ninth Circuit Court of Appeals noted that the record presented "compelling reasons" to inquire further. 268 F.3d at 778. The defendant had alleged that his attorney had threatened to get him sentenced to 105 years in prison, so that he would never see his wife and children again. Id. The attorney opposed his client's motions, tried to prevent him from bringing them, openly called him a liar, and suggested that he had been coached by some unknown third party. Id.

The instant case simply bears no resemblance to these scenarios. Soto had a full opportunity to explain his allegations in his first motion—allegations that did not bear further inquiry. Following Soto's second

and third motion (in which Soto did not repeat any concerns about Mr. Schmidt's prior representation), the trial court inquired appropriately of Mr. Schmidt and even the prosecutor. The trial court did not abuse its discretion.

iii. The trial court properly considered the timeliness of the motions.

The trial court correctly noted that Soto's motions for new appointed counsel—brought at least nine months after arraignment, and close to scheduled trial dates—would have created significant delay if granted, because a new attorney would have had to familiarize herself with the case. See 3RP 3 (noting that trial was scheduled "just down the road"); 4RP 10 ("If this Court were to grant your request, and, again, you have not provided me any legal basis, you might as well times that [delay] by two because you'd have a brand new lawyer who wouldn't have a clue what's going on and would have to start all over again where your attorney has already been in order to understand what the evidence is."). A delay would have been especially problematic because one of Soto's chief complaints was that he believed that it was taking too long to bring his case to trial. See 3RP 4 (complaining that case was "taking . . . so

long"); 4RP 10 (asserting that, if Mr. Schmidt did his job better, "it wouldn't, like, take that long").

Courts have found no abuse of discretion where allowing substitute counsel would engender significant delay. See Thompson, 169 Wn. App. at 462-63; State v. Price, 126 Wn. App. 617, 633, 109 P.3d 27 (2005); State v. Stark, 48 Wn. App. 245, 253, 738 P.2d 684 (1987); see also Stenson II, 142 Wn.2d at 732 (observing that where motion for new counsel is made close to trial, "'the Court may, in the exercise of its sound discretion, refuse to delay the trial to obtain new counsel and therefore may reject the request'" (quoting United States v. Williams, 594 F.2d 1258, 1260-61 (9th Cir. 1979)).

Because Soto's motions were repeatedly brought close to the scheduled trial date, because new counsel would have created significant delay—and especially where Soto's chief complaint was the length of trial preparations—the trial court properly exercised its discretion in denying new counsel.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Soto's convictions for Unlawful Possession of a Firearm -

First Degree and for Violation of the Uniform Controlled Substances Act - Possession of Methamphetamine.

DATED this 20th day of April, 2015.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Kathleen Shea, the attorney for the appellant, at Washington Appellate Project, 1511 Third Avenue, Suite 701, Seattle, WA 98101, containing a copy of the Brief of Respondent, in State v. Jesse Jesus Soto, Cause No. 71907-6, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 20 day of April, 2015.

Name
Done in Seattle, Washington