Supreme Court No. 93961-6

Court of Appeals No. 75641-9-I

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

MARLON HOUSE,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Marlon House ("Mr. House"), is the Petitioner in this Review Petition. He was convicted of two counts of a Rape of a Child in the First Degree.

II. COURT OF APPEALS DECISION

Mr. House seeks this Court's review of the decision of the Court of Appeals of the State of Washington, unpublished opinion, State v. House, No. 75641-9-I, 2016 WL 6837970 (Wash. Ct. App. Nov. 21, 2016), which affirmed the decision of the Court of Appeals, Division I. A true copy of the Court of Appeals, Division I of the State of Washington dated November 21, 2016, is appended hereto as Appendix "A".

III. ISSUES PRESENTED FOR REVIEW

The trial court made comments that clearly manifested the appearance of bias or prejudice toward Mr. House. Mr. House was also misled by the comments. The comments by the court for which Mr. House is seeking review are the following:

"When you have the privilege of hiring your own counsel, then you can hire and fire. When the county pays for it, on the record before me [House's counsel] is moving forward on your case. There [are] no set times that he is required to visit you in preparation for your case."

"He has interviewed all of the witnesses that you have asked him, except for the alleged victim, and you need to understand that there is a significant import when the alleged victims are interviewed by the defense, any resolution short of trial is impossible after that time."

These comments were biased and improper and suggested that the court gives less weight to the grievances of an indigent defendant. They also implied to Mr. House that he had no choice, but to plead guilty or risk life in prison by going to trial because any other outcome would be impossible. In actuality, there were numerous options in between. Furthermore, the trial court erroneously denied Mr. House's request for a new attorney and did not afford him a hearing to explain his conflicts with his trial counsel. Mr. House was also erroneously denied a special sex offender sentencing alternative ("SSOSA") pursuant to RCW 9.94A.670 because of deficiencies in the psychosexual evaluation that resulted through no fault of his own and that were clarified by the expert's testimony at the sentencing hearing. Finally, counsel was ineffective for not conducting any redirect of the expert who provided the psychosexual evaluation after the prosecuting attorney cross-examined him or requesting a supplemental evaluation to complete the deficient written psychosexual evaluation that the trial court relied on.

The issues presented are the following:

(1) Did the trial court present the appearance of unfairness when it commented that "when you have the privilege of hiring your own counsel, then you can hire and fire." "When the county pays for it on the record before me, [House's counsel] is moving forward on your case."

(2) Did the trial court present the appearance of unfairness and provide improper legal advice when it informed Mr. House

that any resolution short of trial after he interviewed the victims was impossible.

(3) Did the trial court perform sufficient analysis using the factors required by the statute to determine whether Mr. House was eligible for a SSOSA under the facts and circumstances of the case?

(4) Was Mr. House's counsel ineffective for not conducting any redirect of the expert or requesting a supplemental report when it was apparent from the expert's testimony that it was deficient and the trial court relied on the written report?

IV. STATEMENT OF THE CASE

Mr. House was charged with one count of rape of a child in the first degree and two counts of child molestation in the first degree under cause number 14–1–00938–2 and three counts of rape of a child in the first degree under cause number 14–1–00937–4. CP 97-101. The crimes were alleged to have taken place between January 2008 and February 2010. CP 39. The information was amended to dismiss the two counts of child molestation in the first degree. CP 1.

A. Pre-sentencing Investigation (PSI).

The PSI for cause number 14-1-00938-2 addresses the allegation of rape of L.M. and it stated that Mr. House's mother previously dated L.M.'s deceased father. CP 39. Mr. House's mother confirmed that she dated L.M.'s father in either 2008 or 2009 until 2010, and she had seen Mr. House around L.M. at the most three times. CP 40.

The PSI for cause number 14-1-00937-4 addresses the allegation of rape of S.K. CP 43. It was stated that Mr. House was in a three month relationship with S.K.'s mother and he watched the children while their mother was at work. CP 43. On examination by a doctor, S.K. was tested positive for genital warts and Chlamydia. CP 44. Mr. House tested positive for Chlamydia, but did not have genital warts. CP 44. The medical records substantiate that Mr. House did not have genital warts. However, neither these medical records were obtained by Mr. House's attorney, nor did his attorney make an effort to obtain the records for his defense case.

On May 15, 2015, Mr. House pleaded guilty to the conviction of two counts of rape of a child in the first degree and requested a SSOSA. CP 3; Sentencing RP 66.

Mr. House's trial counsel appeared on behalf of Mr. House at a status conference conducted on August 22, 2014. Mr. House requested the court to address his concern over the representation in the case. Status Conference RP 3-4. Before Mr. House could speak, the trial attorney stated that he had retained an investigator, Julie Armijo, who made contact with every witness that Mr. House wanted him to subpoena for trial. He explained that he had not yet interviewed the two alleged victims because he was exploring a resolution. His trial attorney explained that once the alleged victims are interviewed, a

resolution would be "difficult, if not impossible." Status Conference RP 4. He also stated that he talked to Mr. House, made notes of their conversations, and had taken all of the actions Mr. House wanted him to take. Status Conference RP 4-5. He further stated that he spoke to Mr. House's mother and if Mr. House said otherwise it was not true. Id. 5.

Finally, while Mr. House was explaining his difficulty and concerns regarding the representation of his case, the court interrupted and asked what should the court do. Mr. House requested the court to relieve his counsel from his duty to represent him in this case. Id. at 6. The court denied his request and stated as follows:

> When you have the privilege of hiring your own counsel, then you can hire and fire. When the county pays for it, on the record before me [House's counsel] is moving forward on your case.

Id. at 6-7.

The Court stated that there are no such times set his trial attorney to visit him and that he had interviewed all the witnesses Mr. House asked him to interview except the alleged victims. Id. at 7. The Court accepted the trial attorney's reasoning that any resolution short of trial is impossible after the defense interviews the alleged victims. Status Conference RP 7.

B. Recommended Sentencing.

The State recommended a standard sentence range of 120 to 160 months to life in each case to run concurrent to one another, and Mr. House requested a SSOSA.

C. Eligibility for a SSOSA.

Under RCW 9.94A.670, certain sex offenders are eligible to receive a sentencing alternative. Once a defendant is eligible for a SSOSA, the trial court may order the defendant to undergo an examination to determine whether the defendant is amenable to treatment.

D. Mr. House's Psychosexual Evaluation.

Mr. House submitted to a polygraph examination on January 6, 2015, with regard to his sexual history. There was no deception detected in the examination. CP 77. When Mr. House was asked, apart from the current case, whether he sexually touched anyone under 16 or whether he had sex with anyone under 16 while he was an adult, his answer was "no" and the polygraph results concluded he was telling the truth. CP 87.

On June 26, 2015, the Community Corrections Officer (CCO) Sally Saxton ("Ms. Saxton") interviewed Mr. House and he stated that he only met L.M. one time. CP 41-42. In the PSI, Ms. Saxton stated

two reasons for Mr. House's ineligibility for SSOSA. Primarily, Ms. Saxton did not believe that Mr. House affirmatively admitted all of the elements of the crime to which he plead guilty. CP 50. Further, Ms. Saxton believed that Mr. House's sole connection with L.M. was the crime. CP 51.

However, the information in the psychosexual evaluation from the investigative reports obtained by the defense expert, Michael Comte ("Mr. Comte"), showed that Mr. House's mother was in a dating relationship with L.M.'s father. CP 65. The PSI also suggests that Mr. House had more than one contact with L.M. and the crime was not the sole connection. CP 39-40. In fact, Mr. Comte did not directly ask Mr. House about the number of contacts he had with L.M. Sentencing RP 45-46.

Ms. Saxton was also concerned about the fact that Mr. House did not go into any type of detail of the crime he committed against L.M. beyond "the incident happened." CP 51. However, as per Mr. Comte, when he explained to Mr. House what the child said, he said he was guilty of what was told by the child. But Mr. Comte did not ask Mr. House about the incident in his own words. Sentencing RP 39. During his testimony, Mr. Comte stated that he considered Mr. House's adoption of L.M.'s version of events as an admission sufficient to satisfy his version of the events. Id. at 47.

There were minor discrepancies between the psychosexual evaluation and the PSI, such as having 100 sexual partners and over 200, respectively. CP 51. The details reported in the PSI did not exactly match other details in the psychosexual evaluation. Mr. House admitted to manipulative behavior and using sex as revenge. CP 51-52. Even with these issues, Mr. Comte testified that in his opinion, Mr. House was amenable to treatment. Sentencing RP 27, 38.

Ms. Saxton did not find the polygraph conducted on January 6, 2015, as useful in determining whether Mr. House was truthful about his statements of guilt in the case. This is because the questions asked to Mr. House were devoid of any elements in the current crime. CP 51. As a matter of fact, Mr. Comte clarified this aspect at the sentencing hearing and testified that in retrospect he would have written his report differently. Mr. Comte intended to state that Mr. House adopted all of L.M.'s statements except for the part where he chased her and pinned her down. Sentencing RP 50-51.

E. Sentencing Memorandum.

The State's sentencing memorandum recommended that Mr. House was not eligible for a SSOSA as he lacked candor and honesty during Mr. Comte's evaluation. The memorandum also questioned Mr. Comte's conclusion that Mr. House was amenable to treatment. Two victim impact statements were allegedly submitted by the State from

the mothers of the victims, along with the presentence investigation reports opposing a SSOSA.

F. The Decision of Court of Appeals Affirming the Denial of SSOSA by the Trial Court.

In reality, Mr. Comte's psychosexual evaluation was deficient and a supplemental report should have been obtained because the report failed to detail Mr. House's version of events. However, the Court of Appeals held that the trial court performed a sufficient analysis using the factors required by the statute to determine whether Mr. House was eligible for a SSOSA. Even if there are conflicting interpretations of the polygraph results, the Court of Appeals concluded that the trial court did not abuse its discretion when it denied Mr. House's request for a SSOSA.

The trial court denied Mr. House's request for a SSOSA and sentenced him to 160 months to life on each count, concurrent with one another and the Court of Appeals affirmed.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. RAP 13.4 (b) FAVORS REVIEW

A review of this case is appropriate as it presents a significant question of law under the Constitution of the State of Washington and the United States. See RAP 13.4(b)(3).

B. THE DECISION MISCHARACTERIZES THE EVIDENCE OF JUDICIAL BIAS

The biased comments by the Court for which Mr. House is seeking review are the following:

"When you have the privilege of hiring your own counsel, then you can hire and fire. When the county pays for it, on the record before me [House's counsel] is moving forward on your case. There [are] no set times that he is required to visit you in preparation for your case."

"He has interviewed all of the witnesses that you have asked him, except for the alleged victim, and you need to understand that there is a significant import when the alleged victims are interviewed by the defense, any resolution short of trial is impossible after that time."

The Sixth and Fourteenth Amendments and Const. art. I, § 22 guarantee a fair and impartial fact-finder. State v. Morgensen, 148 Wn. App. 81, 88, 197 P.3d 715 (2008). A judicial proceeding must manifest an appearance of impartiality, such that a reasonable person would conclude that it was fair neutral. State v. Bilal, 77 Wn. App. 720, 722, 893 P.2d 674 (1995). Judicial conduct violates this guarantee if the court's biased attitude can reasonably be inferred from the record. State v. Elmore, 139 Wn.2d 250, 276, 985 P.2d 289 (1999). Evidence of either actual or potential bias violates this "appearance of fairness" doctrine and requires reversal. State v. Post, 118 Wn.2d 596, 618-19, 826 P.2d 172 (1992).

The Court of Appeals perceives Mr. House's argument of the trial court's bias as mere speculation and innuendo with no proof of actual or potential bias. Opinion at 6. On the contrary, to a reasonable

person, these comments that "when you have a privilege of hiring your own counsel, then you can hire and fire" and "when the county pays for it, on the record before me [House's counsel] is moving forward on your case there is the appearance of bias or prejudice to the effect that the court gives less weight to the grievances of an indigent defendant.

Furthermore, the trial court improperly stated that "when the alleged victims are interviewed by the defense, any resolution short of trial is impossible after that time." This Court should presume Mr. House, who is not an attorney, took that proclamation from a judge at face value. This misleading comment from the bench lead Mr. House to believe that he had no choice, but to plead guilty or risk his life in prison because any other outcome would be impossible. In actuality, there were numerous options in between. This inappropriate, untrue, and misleading statement by the bench was an abuse of discretion that prejudiced Mr. House and spurred his decision to plead guilty. This "policy" is modified in actual criminal practice in Pierce County all the time based on a number of factors that House had no opportunity to explore because a Judge told him it would be impossible. The victims could have made themselves unavailable for a witness interview, recanted, or made inconsistent statements that, at a minimum, could have led to a more favorable plea bargain. The Court of Appeals does not address this improper comment despite being raised in the

appellant's opening brief and appellant's reply brief. This abuse of discretion constitutes reversal.

The law goes farther than requiring an impartial judge; it also requires that the judge appear to be impartial. State v. Madry, 8 Wn. App. 61. 70, 504 P.2d 1156 (1972). Even without proof of actual bias, if the record creates the appearance of bias or prejudice, that perception can damage public confidence in our system of justice as much as actual bias or prejudice. Id. Next in importance to rendering a righteous judgment is to avoid any question as to the fairness and impartiality of the judge.

Here, the trial court's bias is manifest and denied Mr. House the impartial tribunal guaranteed by the Sixth and Fourteenth Amendments and Const. art. I. § 22. At a minimum, the record created the appearance of bias and prejudice to Mr. House as an indigent defendant and such a perception would undoubtedly damage public confidence in our system of justice.

C. THE COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL COURT'S DECISION DENYING MR. HOUSE'S REQUEST FOR NEW COUNSEL.

A trial court has the discretion to grant or deny a motion for substitution of counsel. See In re Personal Restraint of Stenson, 142 Wn.2d 710, 723, 16 P.3d 1 (2001). However, this discretion is constrained by the accused's constitutional rights. United States v.

Nguyen, 262 F.3d 998, 1003 (9th Cir. 2002). Both the federal and state constitution's guarantee the right to counsel in criminal proceedings. U.S. Const. amend. VI; Const. art. I, § 22. "A criminal defendant who is dissatisfied with appointed counsel must show good cause to warrant substitution of counsel, such as a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication." Stenson, 142 Wn.2d 710, 723, 16 P.3d 1, (2001). But, even when an attorney is competent, the defendant's right to counsel is violated when he is forced to proceed with an attorney with whom he has an irreconcilable conflict, Brown v. Craven, 424 F.2d 1166, 1170 (9th Cir. 1970).

In determining whether a motion for substitution of counsel was improperly denied, a reviewing court considers: (1) the extent of the conflict between the accused and his attorney, (2) the adequacy of the trial court's inquiry into the conflict, and (3) the timeliness of the motion. Stenson, 142 Wn.2d at 724 (citing United States v. Moore, 159 F.3d 1154, 1158-59 (9th Cir.1998).

The trial court should at least question the attorney or defendant "privately and in depth." Nguyen, 262 F.3d at 1004 (quoting Moore, 159 F. 3d at 1160). An inquiry is adequate if it "ease[s] the defendant's dissatisfaction, distrust, and concern and provide[s] a sufficient basis for reaching an informed decision." Daniels v. Woodford, 428 F.3d 1181, 1198 (9th Cir. 2005) citing United States v. Adelzo-Gonzalez, 268 F.3d 772, 777 (9th Cir. 2001).

An inadequate inquiry is reversible error. Nguyen, 262 F.3d at 1005 (reversing where the trial court "asked [the defendant] and his attorney only a few cursory questions, did not question them privately, and did not interview any witnesses"); Moore, 159 F.3d at 1160 (reversing because while "[t]he court did give both parties a chance to speak and made limited inquiries to clarify what was said, ... the court made no inquiries to help it understand the extent of the breakdown").

Here, the trial court concedes that it did not set a full hearing as required stating:

> "All that is documented this morning is a status conference hearing. I will let you speak briefly, Mr. House, only to get a general feeling for what the issue might be. If I need to have a full hearing, then I will have to reset it"

Status Conference RP 5.

Despite the aforementioned comment, the court never reset it for a full hearing. Mr. House asked to address the court regarding his attorney's representation and the trial court did not even allow Mr. House to set a full hearing. The court then denied his request to relieve his attorney without having a hearing. Instead, he was only able to speak briefly about his issues with his trial counsel at the status conference. Status Conference RP 3-7.

The trial court abused its discretion by not conducting an adequate inquiry. Mr. House was not questioned privately or in depth. Mr. House was so dissatisfied with his attorney that he made a bar

grievance and it was only when he did so that his attorney finally contacted him. Status Conference RP 5. This alone created an inherent conflict. Mr. House's trial counsel had to position himself against his client in order to make a record that his representation did not warrant a bar grievance. Id.

Thus, the trial court's inquiry was inadequate because what should have been addressed at a full hearing was briefly addressed at a status hearing and the motion was timely because there were still two months prior to trial. Finally, there was clearly a conflict as established by the bar grievance filed by Mr. House and the reasons he articulated in the brief time he had to address the court. The Court of Appeals was conclusory stating in its opinion that the trial court's inquiry was sufficient, despite the fact that it did not comport with the principles articulated in the Nguyen case about the requirement for a full hearing.

D. THE COURT OF APPEALS ERRED IN AFFIRMING THAT THE TRIAL COURT PERFORMED SUFFICIENT ANALYSIS OF THE FACTORS UNDER RCW 9.94A.670 TO DETERMINE WHETHER MR. HOUSE WAS ELIGIBLE FOR A SSOSA UNDER THE FACTS AND CIRCUMSTANCES OF THE CASE

The Court of Appeals did note the conflicting interpretations of the polygraph results, but affirmed the trial court's denial of SSOSA. Opinion at 9. Even though there were gaps in Mr. Comte's report, the court cited Mr. House's lack of understanding of how his conduct affected the victims and his purported motives for his actions.

Sentencing RP 84. The court failed to note Mr. Comte's detailed testimony that explained Mr. House's purported motives of "curiosity" and "vengeance" while committing the crimes. During his testimony, Mr. Comte stated that he did not believe this was the true motive. According to him, Mr. House currently lacked that insight, but he is amenable to treatment and will gain that insight through treatment. Sentencing RP 20, 41-42.

But during cross-examination the State pointed several deficiencies in the report, like Mr. House's version of events. In fact, Mr. House fully adopted the version of events of the victims except for one aspect that he chased L.M. and pinned her down. However, the court relied on the report to believe that Mr. House chased L.M. and pinned her down and he did not consider this conduct to be coercive. Here, Mr. Comte did not ask Mr. House the number of contacts he had with L.M. or the beginning of his contact with her, which is still unknown.

The expert witness's conclusion was that Mr. House was amenable to treatment as acknowledged by the Court of Appeals Opinion. Opinion at 8. The court noted the deficiency in the report as the result of Mr. House's own refusal to discuss them. There were discrepancies in the report and PSI. The court also erred in finding the polygraph questions were insufficient to determine additional victims. However, the court concluded that the polygraph test does not resolve

whether there are additional victims. This was through no fault of Mr. House who simply answered the questions in the polygraph that were asked. Yet, the Court refused to allow him to take another polygraph where the correct questions would be asked. Thus, the issues pointed out by the State were procedural errors in the psychosexual evaluation and the court erred in considering this as disqualifying conduct by Mr. House. The Court of Appeals acknowledges that Comte's report concludes that Mr. House is amenable to treatment, a low risk to the community, and set forth a treatment plan. Opinion at 8. Nevertheless, the Court of Appeals erroneously concluded that the court did not abuse its discretion when denying Mr. House's request for SSOSA and in doing so has resulted in Mr. House serving over a decade in prison instead of receiving treatment.

E. COUNSEL WAS INEFFECTIVE WHEN HE FAILED TO EITHER ENSURE THE PSYCHOSEXUAL EVALUATION CONTAINED THE STATUTORY MINIMUMS OR TO REQUEST A CONTINUANCE TO SUBMIT A SUPPLEMENTAL REPORT, OR AT THE VERY LEAST RE-DIRECT THE EXPERT AT THE SENTENCING HEARING.

The right to counsel attaches at every critical state of a criminal prosecution, including sentencing. Gardner v. Florida, 430 U.S. 349, 358, 97 S.Ct. 1197, 1204-05, 51 L.Ed.2d 393 (1977). The right to counsel is the right to effective assistance by counsel. Strickland v.

Washington, 466 U.S. 668,686, 104 S. Ct. 2052 (1984); State v. Hendrickson, 129 Wn.2d 61, 77, 917 P.2d 563 (1996).

To prevail on an ineffective assistance of counsel claim, a defendant must establish that (1) his counsel's performance was deficient and (2) the deficient performance was prejudicial. *Strickland*, 466 U.S. at 687; Hendrickson, 129 Wn.2d at 77-78. Counsel's performance is deficient if it falls below an objective standard of reasonableness. State v. Maurice, 79 Wn. App. 544, 551, 903 P.2d 514 (Ct. App. Div. 3 1995). Counsel's performance is not deficient if his or her conduct can be characterized as legitimate trial strategy or tactics. State v. Adams, 91 Wn.2d 86, 90, 586 P2d 1168 (1978).

In a case such as this, where the offender is eligible for a SSOSA, the psychosexual evaluation is critical. As in Mr. House's case, it can be the difference between treatment in the community with a family support system and eleven years in prison. At the very least, Mr. House's counsel should have recognized that the report did not contain Mr. House's version of events in his own words, which is a minimal statutory requirement. RCW 9.94A.670 (3). Mr. House's attorney also should have recognized the deficiencies pointed out by the state and requested that Comte provide a new report or a supplemental report with more detailed information. For example, trial counsel should have requested more detailed follow up questions about Mr. House's explanation that he assaulted L.M. out of "curiosity".

Counsel's performance was deficient and cannot be characterized as a legitimate trial strategy or tactic. When a defendant requests a SSOSA, the evaluation should have as much information as possible so the court can consider each legislative factor in depth. Here, Mr. House was actually prejudiced by his counsel's failure to recognize that the report was deficient and his failure to request a supplemental report. The trial court denied Mr. House a SSOSA because the report did not contain enough information and explanation. House simply answered the questions he was asked. But, if he was asked more detailed questions, his answers would have been enough to persuade the court to grant a SSOSA. This is evident by the fact that Comte testified about his own perceptions, and House's answers, that were missing from the report. But, the trial court relied on the written report to make its findings and seemingly disregarded Comte's testimony. Sentencing RP 20-21, 27, 41-42, 82-84; CP 64-75.

The Court of Appeals erred in concluding that any deficiency in the report regarding Mr. House's version of the events was the result of his own refusal to discuss them. Opinion at 8. On the contrary, the expert testified that Mr. House did admit to the allegations and he found his admission sufficient. Sentencing RP 47.

But for Mr. House's counsel's ineffectiveness in not recognizing the deficiencies in the evaluation and correcting them, the court would have had all of the necessary information that Comte

testified to at the sentencing hearing and granted Mr. House a SSOSA. At a minimum, the appropriate remedy is to remand the case for resentencing with an opportunity for Mr. House to submit a new psychosexual evaluation or a supplemental report for consideration.

VI. CONCLUSION

Petitioner respectfully requests that this Court accept this review for the reasons stated in the petition and grant the petition on its merits.

Respectfully Submitted,

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Appendix "A"

RICHARD D. JOHNSON,
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November 21, 2016

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CASE #: 75641-9-I
State of Washington, Respondent v. Marlon Octavius Luvell House, Appellant

Pierce County, Cause No. 14-1-00938-2

Counsel:

Enclosed is a copy of the opinion filed in the above-referenced appeal which states in part:

"Accordingly, we affirm."

Counsel may file a motion for reconsideration within 20 days of filing this opinion pursuant to RAP 12.4(b). If counsel does not wish to file a motion for reconsideration but does wish to seek review by the Supreme Court, RAP 13.4(a) provides that if no motion for reconsideration is made, a petition for review must be filed in this court within 30 days.

In accordance with RAP 14.4(a), a claim for costs by the prevailing party must be supported by a cost bill filed and served within ten days after the filing of this opinion, or claim for costs will be deemed waived.

Should counsel desire the opinion to be published by the Reporter of Decisions, a motion to publish should be served and filed within 20 days of the date of filing the opinion, as provided by RAP 12.3 (e).

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

jh

Enclosure
c: The Honorable Vicki Hogan
Marlon Octavius Luvell House

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

STATE OF WASHINGTON, Respondent, v. MARLON OCTAVIUS LUVELL HOUSE, Appellant.	)	No. 75641-9-I UNPUBLISHED OPINION FILED: November 21, 2016

VERELLEN, C.J. — Marlon House appeals from the judgment and sentence on his conviction of two counts of rape of a child in the first degree. House pleaded guilty to the charges and requested a special sex offender sentencing alternative (SSOSA).[1] He contends that the trial court erred when it denied his motion for substitute counsel and his request for a SSOSA. House also contends his counsel was ineffective. The trial court's conclusion that House was not entitled to substitute counsel was supported by the record and counsel's representations to the court. The trial court did not abuse its discretion when it denied a SSOSA. Furthermore, House's counsel's decision to delay interviewing the two child victims was a strategic decision. House failed to show, but for his counsel's performance, the outcome would have been different. Accordingly, we affirm.

[1] RCW 9.94A.670.

FACTS

The State charged Marlon House with one count of rape of a child in the first degree and two counts of child molestation in the first degree under cause number 14-1-00938-2 and three counts of rape of a child in the first degree under cause number 14-1-00937-4.

At a status conference on August 22, 2014, House asked for a substitution of counsel. House's counsel informed the court of the procedural and tactical steps that he had taken in the case and the complications that arose because the case involved two separate victims under two separate cause numbers. House's counsel said that he had retained an investigator, who had made contact with every witness that House had identified to him, however, he had not interviewed the two alleged victims in the case. House's counsel explained the prosecutor's policy to discontinue any plea bargaining if the defense interviews the victims of child sex abuse:

> I have advised Mr. House that before we do that I would like to explore any possible resolution, because it's the normal course of the prosecutor's policy that once we interview victims[,] resolution of the case is difficult, if not impossible. So that's where we are.[2]

The court then told House that he could speak and "if I need to have a full hearing, then I will have to reset it, but tell me what it is that you wanted the Court to know."[3] House told the court his counsel "has only talked to me four times since I have been here" and "just called me yesterday because I sent in a grievance to the Bar Association."[4] House

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[2] Report of Proceedings (RP) (Aug. 22, 2014) at 4.

[3] Id. at 5.

[4] Id.

also alluded to a communication issue between his mother and his counsel regarding his "court papers."[5]

House's counsel informed the court that he had spoken with House's mother and that he did not recall a communication issue. The trial court denied House's request for a new public defender and remarked:

> When you have the privilege of hiring your own counsel, then you can hire and fire. When the county pays for it, on the record before me [House's counsel] is moving forward on your case. There [are] no set times that he is required to visit you in preparation for your case
>
> He has interviewed all of the witnesses that you have asked him, except for the alleged victim, and you need to understand that there is a significant import when the alleged victims are interviewed by the defense, any resolution short of trial is impossible after that time.[6]

As part of a plea bargain, the State presented an amended information on both cause numbers. House pleaded guilty to a total of two counts of rape of a child in the first degree. The State recommended a standard sentence range of 120 to 160 months to life in each case to run concurrent to one another, and House requested a SSOSA.

House underwent a psychosexual examination by Michael Comte, who submitted his report to the court regarding House's eligibility for a SSOSA. House provided the court with Comte's psychosexual evaluation, treatment plan, and the results of a sexual history interview polygraph examination. Comte testified during the sentencing hearing. House also wrote a letter and addressed the court.

The State filed a sentencing memorandum arguing that House was not eligible because of his lack of candor and honesty during Comte's evaluation. The State's

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[5] Id. at 6.

[6] Id. at 7.

memorandum also questioned Comte's conclusion that House was amenable to treatment. The State submitted two victim impact statements from the mothers of the victims, along with the presentence investigation reports opposing a SSOSA.

After reviewing all of the documents and considering the factors outlined in RCW 9.94A.670, the trial court denied House's request for a SSOSA and sentenced him to 160 months to life on each count, concurrent with one another.

House appeals.

ANALYSIS

I. Request for a New Attorney

House argues the trial court abused its discretion when it denied his request for a new attorney.

A defendant in a criminal prosecution has a right to the assistance of counsel.[7] Indigent defendants charged with felonies or misdemeanors involving potential incarceration are entitled to appointed counsel.[8] The determination whether an indigent defendant's dissatisfaction with his court-appointed counsel warrants appointment of substitute counsel rests within the sound discretion of the trial court.[9] "The court should consider the reasons given for the defendant's dissatisfaction, together with its own evaluation of the competence of existing counsel and the effect of substitution upon the scheduled proceedings."[10]

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[7] U.S. CONST. amend VI; WASH. CONST. art. 1, § 22 (amend. 10).

[8] McInturf v. Horton, 85 Wn.2d 704, 705-07, 538 P.2d 499 (1975); CrR 3.1(d)(1).

[9] State v. Stark, 48 Wn. App. 245, 252, 738 P.2d 684 (1987); State v. Lytle, 71 Wn.2d 83, 84, 426 P.2d 502 (1967); State v. Shelton, 71 Wn.2d 838, 840, 431 P.2d 201 (1967); State v. Sinclair, 46 Wn. App. 433, 436, 730 P.2d 742 (1986).

[10] Stark, 48 Wn. App. at 253.

A trial court conducts an adequate inquiry when it allows the defendant and counsel to fully express their concerns.[11] "Unsupported general allegations of deficient representation are inadequate to support a motion [for new counsel]."[12] To justify an appointment of new counsel, a defendant "'must show good cause to warrant substitution of counsel, such as a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant.' Generally, a defendant's loss of confidence or trust in his counsel is not sufficient reason to appoint new counsel."[13]

House asserts his counsel's refusal to interview the two victims in his case warranted the appointment of a new attorney, but House's counsel explained:

> I have not interviewed the two alleged victims yet. I have advised Mr. House that before we do that[,] I would like to explore any possible resolution, because it's the normal course of the prosecutor's policy that once we interview victims[,] resolution of the case is difficult, if not impossible. So that's where we are.[14]

Not only did House's counsel explain why he had not yet interviewed the victims, but he also described his progress and efforts on House's behalf.

Additionally, House argues the trial court made comments that appeared to be biased or unfair. Specifically, he contends, the "when the county pays for it" comment,[15]

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[11] State v. Schaller, 143 Wn. App. 258, 271, 177 P.3d 1139 (2007).

[12] State v. Staten, 60 Wn. App. 163, 170, 802 P.2d 1384 (1991).

[13] State v. Varga, 151 Wn.2d 179, 200, 86 P.3d 139 (2004) (quoting State v. Stenson, 132 Wn.2d 733, 734, 940 P.2d 1239 (1997))

[14] RP (Aug. 22, 2014) at 4.

[15] Id. at 7.

in context, reveals the court gave "less weight to the grievances of an indigent defendant."[16]

"'An appearance of fairness claim requires proof of actual or potential bias. Mere speculation is not enough. Furthermore, we presume a judge performs his or her duties without prejudice.'"[17] House's assertion relies on speculation and innuendo and fails to prove actual or potential bias.

The trial court conducted a sufficient inquiry and did not abuse its discretion when it denied House's request for a new attorney.

II. Denial of SSOSA

House argues the trial court abused its discretion when it denied a SSOSA because the denial was based on a deficient psychosexual evaluation and a clearly erroneous finding.

Under RCW 9.94A.670, certain sex offenders are eligible to receive a sentencing alternative. Once a defendant is eligible for a SSOSA, the trial court may order the defendant to undergo an examination to determine whether the defendant is amenable to treatment.[18] RCW 9.94A.670(3)(a) provides:

> (a) The report of the examination shall include at a minimum the following:
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> (i) The offender's version of the facts and the official version of the facts;

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[16] Appellant's Br. at 21.

[17] State v. Afeworki, 189 Wn. App. 327, 356, 358 P.3d 1186 (2015) (quoting State v. Harris, 123 Wn. App. 906, 914, 99 P.3d 902 (2004), abrogated on other grounds by State v. Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005)), review denied, 184 Wn.2d 1036 (2016).

[18] RCW 9.94A.670(3).

(ii) the offender's offense history;

(iii) An assessment of problems in addition to alleged deviant behaviors;

(iv) The offender's social and employment situation; and

(v) Other evaluation measures used.[19]

The statute requires the report to set forth the source of the examiner's information along with an assessment of "the offender's amenability to treatment and relative risk to the community.[20] "The court on its own motion may order, or on a motion by the State shall order, a second examination regarding the offender's amenability to treatment."[21] After the court receives the reports, it must consider numerous factors to determine whether a SSOSA is appropriate.[22] We review a trial court's refusal to impose a SSOSA for an abuse of discretion.[23]

House asserts Comte's psychosexual evaluation was deficient and the court should have ordered a supplemental report because the report failed to detail House's version of events.

In House's three meetings with Comte, House's version of the events migrated from the events did not transpire to his admitting sexual activity with the victims. At the second meeting, House told Comte "he was going to admit to all the allegations, despite the fact he was not guilty of them in order to take advantage of a plea offer, if one was

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[19] RCW 9.94A.670(3)(a).

[20] RCW 9.94A.670(3)(b).

[21] RCW 9.94A.670(3)(c).

[22] RCW 9.94A.670(4).

[23] State v. Frazier, 84 Wn. App. 752, 753, 930 P.2d 345 (1997).

proposed."[24] House admitted having difficulty acknowledging what he had done and only began to admit something had occurred after he learned about the necessary steps to obtain a SSOSA. Any deficiency in the report regarding House's version of the events was the result of his own refusal to discuss them.

Most importantly, a supplemental report was not required because the original report complied with the statutory requirements. The report was over 10 pages in length and provided a sufficient account of both parties' version of the events. It included House's background information, medical history, academic achievement, employment history, sexual history, and psychological and substance abuse history. The report also contained Comte's opinion that House was amenable to treatment, a low risk to the community, and set forth a proposed treatment plan. Comte also testified, clarifying additional details.

Next, House argues the trial court erred in finding the polygraph questions were insufficient to determine whether there were additional victims. We review a trial court's factual finding for substantial evidence.[25] During sentencing, the trial court stated:

> Whether there are additional victims is unknown. The questions that were asked in the polygraph suggest no. The questions were also phrased to take victims out of the age group for which these two victims find themselves, ages eight and nine. The question in the polygraph focused on [a] different age group.[26]

House argues this finding was not supported by substantial evidence because the questions did include the age group of the victims, eight and nine years old. The relevant questions during the polygraph examination were:

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[24] Clerk's Papers (CP) at 65.

[25] State v. Grewe, 117 Wn.2d 211, 218, 813 P.2d 1238 (1991).

[26] RP (July 14, 2015) at 82.

Q: After the age of 18, approximately how many sexual partners have you had?

A: Doesn't know for sure, at least over a hundred.

Q: Were any of these females under 18 YOA while you were an adult?

A: Yes. Maybe 7 at the most. These girls were in the 16-17 years of age range and he was in the 18-20 years of age range at the time.

Q: Were any of these females under 16 YOA?

A: No.[27]

The question asking if any of the females were under age 16, as phrased, referred to the time when House was between 18 and 20 years of age. Because a reasonable person would infer that the question refers to the time period when House was between 18 and 20 years of age, the polygraph does not resolve whether there are additional victims. The record supports the trial court's concern.

The trial court performed a sufficient analysis using the factors required by the statute to determine whether House was eligible for a SSOSA. There may be conflicting interpretations of the polygraph results, but we conclude the trial court did not abuse its discretion when it denied House's request for a SSOSA.

III. Ineffective Assistance of Counsel

House argues his counsel was ineffective during the plea bargaining phase because he did not "adequately investigate."[28]

In order to establish ineffective assistance, House must demonstrate both that counsel's representation fell below an objective standard of reasonableness and that

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[27] CP at 79.

[28] Appellant's Br. at 22.

prejudice resulted.[29] "In satisfying the prejudice prong, a defendant challenging a guilty plea must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."[30] When counsel's alleged error is the failure to investigate exculpatory evidence, the assessment of whether the error prejudiced the defendant involves the likelihood that the evidence "'would have led counsel to change his recommendation as to the plea. This assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial.'"[31] To provide constitutionally adequate assistance, "'counsel must, at a minimum, conduct a reasonable investigation enabling [counsel] to make informed decisions about how to best represent [the] client.'"[32]

We begin our analysis with the "strong presumption" that counsel's performance was reasonable.[33] To rebut this presumption, House must establish the absence of any conceivable legitimate tactic explaining his counsel's performance.[34] We review ineffective assistance claims de novo.[35]

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[29] Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

[30] In re Pers. Restraint of Riley, 122 Wn.2d 772, 780-81, 863 P.2d 554 (1993).

[31] State v. Garcia, 57 Wn. App. 927, 933, 791 P.2d 244 (1990) (quoting Hill v. Lockhart, 474 U.S. 52, 59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985)).

[32] In re Pers. Restraint of Brett, 142 Wn.2d 868, 873, 16 P.3d 601 (2001) (emphasis omitted) (alterations in original) (quoting Sanders v. Ratelle, 21 F.3d 1446, 1456 (9th Cir. 1994)).

[33] State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

[34] State v. Grier, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011).

[35] State v. Sutherby, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

House focuses on his counsel's failure to interview the victims before entering a guilty plea. The record reveals it is the normal policy of the Pierce County Prosecutor's Office to terminate all plea negotiations and proceed to trial after the defense interviews the victims of child sexual abuse cases. House's counsel chose to delay interviewing the victims in House's case in order to "explore any possible resolution."[36] It was in his reasoned professional judgment that once he interviewed the victims, any offer to resolve the case before trial would no longer be available to House. Furthermore, the record indicates House's counsel performed all other interviews House requested.

We conclude House's counsel's decision to delay interviewing the victims in order to successfully pursue a plea bargain, reducing pending charges, was a legitimate strategic decision. House is unable to show his counsel's performance was deficient or that his counsel's performance prejudiced him.

House also contends his counsel was ineffective when he failed to ensure the psychosexual evaluation met the statutory requirements or to request a continuance to submit a supplemental report, or to perform a redirect examination on Comte at the sentencing hearing.

House fails to establish his counsel's performance was deficient. As discussed, Comte's report was adequate, and his testimony clarified details. Further, even if House's counsel had requested a supplemental report or questioned Comte further, House fails to establish under the second prong of the analysis how the trial court's decision would have been different. The court focused on the "huge" risk to the

[36] RP (Aug. 22, 2014) at 4.

community and the victims' opposition to a SSOSA.[37] The trial court also expressed concern with House's lack of candor and acknowledgement of his behavior.

House fails to show his counsel was ineffective.

Affirmed.

WE CONCUR:

Trickey, J

Becker, J.

[37] RP (July 14, 2015) at 83.

CERTIFICATE OF SERVICE

I, Corey Evan Parker, certify under penalty of perjury under the laws of the United States and of the State of Washington that on December 20, 2016, I caused to be served the document to which this is attached to the partiy listed below in the manner shown next to their name:

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