

62224-2

62224-2

NO. 62224-2-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ANTHONY JOHN PITMAN CARTY,

Appellant.

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR ISLAND COUNTY

The Honorable Vickie I. Churchill

APPELLANT'S REPLY BRIEF

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A. ARGUMENTS IN REPLY

1. MR. CARTY'S Demeanor AND CONDUCT GAVE THE TRIAL COURT REASONS TO DOUBT HIS COMPETENCE.

In determining whether there is a reason to doubt a defendant's competence, the court should consider the defendant's apparent understanding of the charge and consequences of conviction, his apparent understanding of the facts giving rise to the charge, and his ability to relate the facts to his attorney in order to help prepare the defense. City of Seattle v. Gordon, 39 Wn. App. 437, 442, 693 P.2d 741 (1985). The court should also consider the "defendant's appearance, demeanor, conduct, personal and family history, past behavior, medical and psychiatric reports and the statements of counsel." In re Pers. Restraint of Fleming, 142 Wn.2d 853, 863, 16 P.3d 610 (2001) (citing State v. Dodd, 70 Wn.2d 513, 514, 424 P.2d 302 (1967)). In exercising its discretion in determining whether there is reason to doubt competency, the court should give considerable weight to the attorney's opinion regarding a client's competency and ability to assist in the defense. Gordon, 39 Wn. App. at 442.

Mr. Carty's erratic behavior gave the trial court real reasons to doubt Mr. Carty's competence to stand trial. Along with Judge

Churchill's observation of Mr. Carty going "totally berserk," there was also testimony describing Mr. Carty smearing feces on himself, punching walls, screaming, making suicidal threats, and threatening to injure others. 5RP 2, 7, 9-10. The court obviously had concerns about Mr. Carty's mental state because it made sure to get testimony from Compass Mental Health on the record. 5RP 2. Also, the court noted that Mr. Carty's "very disturbing" behavior presented a threat to himself and to others. 5RP 31.

The State argues that Mr. Carty's behavior in court, by itself, did not trigger the need for a competency evaluation. Brief of Respondent at 11. However, there was ample evidence beyond Mr. Carty's conduct to doubt his competency. In terms of past psychiatric history, Mr. Carty reported he had been institutionalized at Eastern State Hospital and other locations. 5RP 24-25. Defense counsel also made representations about Mr. Carty's competence when Mr. Hall stated he did not think Mr. Carty "was in a state of mind" where Mr. Hall could guarantee the court that Mr. Carty would be able to refrain from more disruptive behavior. 5RP 14.

When Mr. Carty requested transport to Western State Hospital for an evaluation, the court summarily denied his request without any further inquiry of Mr. Carty or defense counsel. 5RP

49. The court should have considered Mr. Carty's conduct, demeanor, history of mental illness, and defense counsel's opinion regarding Mr. Carty's ability to assist in his own defense. Based on this record, the court had a reason to doubt Mr. Carty's competence to stand trial and abused its discretion in not ordering a competency evaluation.

Once the court had a reason to doubt Mr. Carty's competence, the court had a constitutional and statutory duty to appoint an expert and order a formal hearing to determine competency before proceeding to trial. RCW 10.77.070. Reversal is the appropriate remedy because the court's failure to adhere to adequate procedural safeguards in determining competency violated Mr. Carty's right to a fair trial. Pate v. Robinson, 383 U.S. 375, 377, 385-86, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966).

2. MR. CARTY HAD AN IRRECONCILABLE CONFLICT WITH HIS ATTORNEY AND THE TRIAL COURT MADE AN INADEQUATE INQUIRY INTO THE CONFLICT.

In determining whether an irreconcilable conflict exists, 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 for new counsel. In re Pers. Restraint of Stenson, 142 Wn.2d 710, 724, 16

P.3d 1 (2001). The State concedes Mr. Carty's motion for new counsel was timely. Brief of Respondent at 21.

Contrary to the State's assertion, Mr. Carty established an irreconcilable conflict with Mr. Hall. Mr. Carty claimed Mr. Hall "cursed him out," failed to investigate, and did not respond to Mr. Carty's phone calls. CP 67-68, 125-26, 136; 4RP 25-26. He informed the court orally and in writing several times that he believed he and Mr. Hall had a conflict of interest. CP 126, 136-37; 4RP 27. When Mr. Hall was reappointed, he informed the court he agreed with Mr. Carty that there was a conflict of interest. Mr. Hall reiterated several times he believed there was a conflict of interest in representing Mr. Carty because he had been accused in open court of ineffective assistance of counsel. 5RP 13. Mr. Hall also felt physically threatened by Mr. Carty. 5RP 14.

During trial, Mr. Carty vehemently objected to Mr. Hall's failure to ask specific questions of witnesses. 5RP 167-68. Mr. Carty expressed his distrust of Mr. Hall again when the court ordered Mr. Hall to interview a witness in the hallway outside of Mr. Carty's presence. 5RP 176. Mr. Carty also alleged that Mr. Hall called him multiple inappropriate names. 6RP 6. The conflict between Mr. Carty and Mr. Hall was obvious and irreconcilable.

The State erroneously claims Mr. Carty and his defense counsel had a “close working relationship.” Brief of Respondent at 17. In fact, the record shows Mr. Carty continued to object to Mr. Hall’s representation throughout the entire trial. Once the court refused to give Mr. Carty different counsel and denied him the right to represent himself, he had no choice but to make the best of a difficult situation because he was working with an unprepared attorney who had been reappointed one day before trial. The State erroneously asserts that “clearly [Mr. Carty’s] objection was not with Mr. Hall,” but rather with Mr. Hall’s law firm. Brief of Respondent at 22. Mr. Carty’s opening brief is replete with specific objections to Mr. Hall’s representation.

Alternatively, Mr. Carty has also proven the trial court inadequately inquired into the conflict. The State argues that when the trial court asked Mr. Carty, “So why it is that you do not want an attorney?” this was a “more than adequate” inquiry. Brief of Respondent at 21; 1RP 8. The State cites no case law to support its position that this fleeting inquiry is even remotely adequate.

A trial court should question the attorney or defendant privately and in depth, asking specific, targeted questions. United States v. Nguyen, 262 F.3d 998, 1004 (9th Cir. 2008) (citing United

States v. Moore, 159 F.3d 1154, 1160 (9th Cir. 1998)); United States v. Adelzo-Gonzalez, 268 F.3d 772, 777-78 (9th Cir. 2001).

An inquiry is adequate if it provides a sufficient basis for reaching an informed decision. Daniels v. Woodford, 428 F.3d 1181, 1200 (9th Cir. 2005).

Here, the court asked one question about Mr. Carty's desire to have a new attorney. 1RP 8. The court then interrupted Mr. Carty and told him that the court only had to find one attorney for him, not the attorney of his choice. 1RP 8. When Mr. Carty said he had a conflict with Mr. Hall, the court did not inquire into the nature of the conflict. 1RP 8. When Mr. Hall noted that he also felt there was a conflict, the court did not question Mr. Hall. 1RP 11. When Mr. Hall told the court he felt threatened by Mr. Carty, the court did not inquire further. 5RP 14.

The trial court asked the defendant and his attorney only one question and did not question them privately. This one-question "inquiry" was inadequate to protect Mr. Carty's Sixth Amendment and Article I, section 22 rights to effective assistance of counsel. Mr. Carty was then further prejudiced by Mr. Hall's reappointment the day before trial because Mr. Hall did not even have time to interview witnesses or do any sort of investigation. Mr. Carty has

satisfied all three prongs of the test for existence of an irreconcilable conflict and reversal is required.

3. THE TRIAL COURT ERRED IN MAKING MR. CARTY PROCEED PRO SE AT SENTENCING.

The State asserts the trial court did not need to conduct another pro se colloquy before Mr. Carty's sentencing because Judge Churchill's pretrial pro se colloquy was sufficient to inform Mr. Carty about the dangers of self-representation. Brief of Respondent at 28. But a trial court must always apprise the defendant of the nature of the charge, the possible penalties, and the disadvantages of self-representation. State v. Silva, 108 Wn. App. 536, 539, 31 P.3d 729 (2001). Absent such advisement, there is no showing that a defendant knowingly, intelligently, and voluntarily waived his right to counsel. State v. Bebb, 108 Wn.2d 515, 525, 740 P.2d 829 (1987); State v. Breedlove, 79 Wn. App. 101, 111, 900 P.2d 586 (1995). Here, the State cannot demonstrate a knowing, intelligent, and voluntary waiver at sentencing.

After Judge Churchill allowed Mr. Hall to withdraw from the case two days before sentencing, new counsel was appointed to represent Mr. Carty. 7RP 2. At sentencing, this new counsel was

not present. Mr. Carty expressed some equivocation in having the new counsel represent him at sentencing, but also felt unprepared to represent himself. 7RP 2. The court failed to re-engage Mr. Carty in any questioning about whether he wanted to proceed pro se at sentencing, did not allow Mr. Carty more time to talk to his new attorney, and did not continue the sentencing, stating: “we made an attorney available to you, had you wanted one, and you apparently did not want one for today because that person could be beside you today.” 7RP 3. This record does not show Mr. Carty made an unequivocal request to proceed pro se or waived his right to counsel.

The court was required to determine whether Mr. Carty was waiving his right to counsel knowingly, intelligently, and voluntarily. Breedlove, 79 Wn. App. at 111. Instead, the court forced Mr. Carty to proceed pro se during his very complicated sentencing hearing. The court’s actions amounted to an outright denial of the right to counsel, which is presumed prejudicial and warrants reversal for resentencing without a harmless error analysis. State v. Harell, 80 Wn. App. 802, 805, 911 P.2d 1034 (1996) (reversing convictions because the hearing on Harell’s motion to withdraw his guilty pleas

was a critical stage of the prosecution and was held without the assistance of counsel or a valid waiver of the right to counsel).

4. REAPPOINTMENT OF TRIAL COUNSEL WAS A CRITICAL STAGE OF THE PROCEEDING.

An accused person has the right to attend all critical stages of his trial. U.S. Const. amends. VI, XIV; Const. art. I, § 22. “[T]his right entitles a defendant to be present at every stage of his trial for which ‘his presence has a relation, reasonably substantial, to the ful[!]ness of his opportunity to defend against the charge.’” State v. Pruitt, 145 Wn. App. 784, 798, 187 P.3d 326 (2008) (quoting Snyder v. Massachusetts, 291 U.S. 97, 105-06, 54 S.Ct. 330, 78 L.Ed. 674 (1934)). A defendant’s right to be present at all critical stages of his trial applies to hearings where the defendant’s presence would contribute to the fairness of the proceedings. United States v. Gagnon, 470 U.S. 522, 526, 105 S.Ct. 1482, 85 L.Ed.2d 486 (1985).

In this case, Mr. Carty was denied the right to be present when counsel was reappointed to represent him. After an outburst by Mr. Carty in court on the day before trial, Judge Churchill reviewed the record and decided Mr. Carty made an equivocal request to represent himself and Mr. Hall should have remained as

stand-by counsel. 5RP 3. Without explanation however, the court reappointed Mr. Hall as trial counsel, not stand-by counsel. 5RP 3. Mr. Carty was not present for the reappointment. 5RP 3. Before trial started, Mr. Carty objected to his absence in court when Mr. Hall was reappointed as counsel and to Mr. Hall's reappointment. 5RP 43.

The State cites State v. Berrysmith to support its assertion that reappointment of counsel was not a critical stage of the proceedings. Brief of Respondent at 32. However, Berrysmith is factually distinct from Mr. Carty's case. Mr. Berrysmith's attorney moved in camera for withdrawal from the case because of his strong belief that Mr. Berrysmith intended to perjure himself. State v. Berrysmith, 87 Wn. App. 268, 271, 944 P.2d 397 (1997). Mr. Berrysmith was not present for the hearing. Id. The judge granted the motion to withdraw. Id. at 272. This Court held that the issue before the trial court was a pure legal issue – whether the attorney had a sufficient factual basis to believe that Mr. Berrysmith intended to commit perjury – and therefore Mr. Berrysmith's presence was not required at the hearing. Id. at 276.

Mr. Berrysmith argued his case was similar to People v. Ebert, a California case where Mr. Ebert was acting as his own

counsel and was excluded from a hearing that resulted in the loss of his appointed stand-by counsel. Id. at 274-75; People v. Ebert, 199 Cal. App. 3d 40, 244 Cal. Rptr. 447 (1st Dist. 1988). The California court reversed Mr. Ebert's conviction, holding the trial court violated Mr. Ebert's right to be present because Mr. Ebert's interests were not represented at the hearing as he was acting as his own attorney. Ebert, 199 Cal. App. 3d at 46; see also Plunkett v. State, 883 S.W.2d 349 (Tex. App. 1994) (holding denial of defendant's right to be present at his attorney's motion to withdraw was error); Myers v. State, 254 So.2d 891 (Miss. 1971) (reversing conviction where defendant was not present for counsel's motion to withdraw because defendant could not respond to serious allegations against him).

Mr. Carty's case is distinguishable from Berrysmith and similar to Ebert because Mr. Carty was representing himself at the time he was denied the right to be present at the hearing to reappoint counsel. Like Mr. Ebert, no one was present to represent Mr. Carty's wish to not have Mr. Hall continue on as his trial counsel. Mr. Carty was very vocal about his dissatisfaction with Mr. Hall, especially when he was reappointed the day before trial and had no opportunity to investigate the case. Because Mr. Carty was

only allowed to voice his objections after the trial court decided to reappoint Mr. Hall, he was not given a meaningful opportunity to argue his position. This was not purely a legal or administrative issue, and required Mr. Carty's presence.

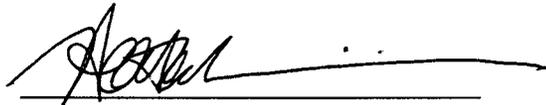
Mr. Carty did not waive his right to be present. A waiver of a constitutional right to be present must be knowing, intelligent, and voluntary, and the State bears the burden of proving the validity of that waiver. Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed.2d 1461 (1938); City of Bellevue v. Acrey, 103 Wn.2d 203, 207, 691 P.2d 957 (1984). This Court must indulge every reasonable presumption against waiver of a fundamental right. Zerbst, 304 U.S. at 464, Acrey, 103 Wn.2d at 207. The State cannot show that Mr. Carty knowingly, intelligently, and voluntarily waived his right to be present at this critical stage of the proceeding as Mr. Carty was in jail and did not voluntarily miss the reappointment hearing. The court had already made the decision to reappoint Mr. Hall by the time the court moved proceedings to the jail to talk to Mr. Carty about his behavior in the courtroom. Therefore, the trial court erred in reappointing Mr. Hall outside of Mr. Carty's presence, violating Mr. Carty's rights to counsel and to attend all critical stages of trial.

B. CONCLUSION

Based on the foregoing, Mr. Carty respectfully requests this court reverse his conviction for assault in the second degree domestic violence and remand for a new trial.

DATED this 2 day of July, 2009.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Heather McKimmie', written over a horizontal line.

HEATHER McKIMMIE, WSBA 36730
Washington Appellate Project (91052)
Attorney for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 62224-2-I
v.)	
)	
ANTHONY CARTY,)	
)	
Juvenile Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, SIMON ADRIANE ELLIS, STATE THAT ON THE 2ND DAY OF JULY 2009, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 2ND DAY OF JULY, 2009.

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