

NO. 63036-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

VERNON MARK CALHOUN,

Appellant.

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COURT OF APPEALS
DIVISION I

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGES STEVEN GONZÁLEZ
AND HELEN HALPERT

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

EMILY PETERSEN
Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000

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A. ISSUES PRESENTED

1. In order to establish any violation of the Sixth Amendment based on a conflict of interest, a defendant must demonstrate that an actual conflict of interest adversely affected his lawyer's performance. Was Mr. Calhoun's Sixth Amendment right to conflict-free counsel violated when the trial court refused to allow substitution of defense counsel because the court found no actual conflict of interest existed and Mr. Calhoun was just displeased with defense counsel's trial strategy?

2. Reversal of a trial court's order denying substitution of counsel on the grounds that no actual conflict of interest existed, where the court made the appropriate inquiry into the potential conflict, is reversed only for an abuse of discretion. Did the trial court abuse its discretion when it made a careful inquiry into the nature of the asserted conflict and determined that none of the factors requiring new counsel existed?

B. STATEMENT OF THE CASE

1. PROCEDURAL AND SUBSTANTIVE FACTS

On February 27, 2008, Vernon Calhoun was charged with one count of Malicious Mischief in the First Degree. CP 1.

Mr. Calhoun was released by the Court on his personal recognizance on condition that he abide by a no contact order.

1/6/09 RP 59. Mr. Calhoun was also ordered to appear at all of his future court dates. Id. Mr. Calhoun was informed "if I fail to appear for court hearings, I will be committing an additional crime of bail jumping." 1/6/09 RP 60. On June 9, 2008, the defendant set his case for trial; omnibus was scheduled for August 1, 2008. 1/6/09 RP 61, 70-71. Mr. Calhoun signed for his August 1, 2008, court date. RP 71. Mr. Calhoun failed to appear for his August 1, 2008, omnibus hearing and a warrant was issued. 1/6/09 RP 62-63, 71. The State gave Mr. Calhoun notice of its intent to add a charge of Bail Jumping if the case proceeded to trial. 11/13/08 RP 4, 8. Defense counsel set a motion for substitution of counsel due to a potential conflict of interest which was heard before the Honorable Judge Helen Halpert. 11/13/08 RP. The court heard from defense counsel Justin Wolfe of Northwest Defender's Association (NDA) regarding the potential conflict. Id. Counsel represented to the court that the alleged conflict arose out of Mr. Calhoun's desire to call Mr. Wolfe's paralegal Wendy Livesly in defense to the bail jumping charge. 11/13/09 RP 5. Mr. Wolfe explained Mr. Calhoun's proffered defense "Mr. Calhoun's representation to me

was that he had received notice of his omnibus date, that he had lost the piece of paper that had his omnibus hearing scheduled on. Mr. Calhoun indicated that he had contacted my office, he specially said he tried to contact me, that I had not returned the call...at that point he followed the instructions on my voice mail message and contacted my paralegal, and he asked her when his scheduled omnibus hearing was. He indicated in a conversation with me that she had told him his scheduled omnibus hearing was August 10th. But, in fact, his scheduled omnibus hearing was August 1st."

11/13/09 RP 4-5. Mr. Wolfe went on to explain that he was not going to call his paralegal as a matter of trial strategy based on his conversation with her regarding her potential testimony. 11/13/09 RP 5. Mr. Wolfe explained to the court "Now I have spoken to my paralegal, and my paralegal confirmed that there was a call, a conversation. However, she did not confirm the contents of that conversation." Id. Mr. Wolfe explained that his decision to not call his paralegal was trial strategy and gave no indication that it was to protect his paralegal, as Mr. Calhoun claimed. Id. After hearing from Mr. Wolfe, Judge Halpert denied the motion. 11/13/09 RP 6. In her ruling, the Court explained the reason for her decision saying "[T]he fact that someone else, even if it were true, that a paralegal

gave him the wrong information is not a defense." Id. After asking for the cause number and commenting on the number of prior hearings, the Court went on to explain "He was given an appropriate court date, he signed the report date. I think that it is questionable that this testimony would even be relevant, and the fact that the offer of proof is that your paralegal would testify contrary to what your client says makes this a purely trial fact. I am denying the motion." 11/13/09 RP 6-7. Mr. Calhoun made a timely objection to the Court's ruling. 11/13/09 RP 7.

The State filed an amended information charging Mr. Calhoun with the crime of bail jumping based on his failure to appear at his omnibus hearing on August 1, 2008. CP 12-13. Mr. Calhoun proceeded to jury trial before the Honorable Judge Steven González. 1/5/09 RP 4. At trial, Mr. Calhoun was represented by Marcel Green, another attorney with Northwest Defender's Association, because Mr. Wolfe rotated out of the felony division. 1/5/09 RP 4-6. At trial, Mr. Green renewed NDA's motion to withdraw as counsel on the bail jumping charge due to a potential conflict of interest. 1/5/09 RP 5. Judge González would not reconsider Judge Halpert's previous ruling as defense did not proffer any additional facts for him to consider. 1/5/09 RP 6-8.

Mr. Wolfe's paralegal was not called as a witness at trial.

Mr. Calhoun was tried before a jury and was convicted of Malicious Mischief in the First Degree and Bail Jumping. CP 14, 15.

Mr. Calhoun filed a timely appeal. CP 42-48.

C. ARGUMENT

1. MR. CALHOUN'S SIXTH AMENDMENT RIGHT TO CONFLICT-FREE COUNSEL WAS NOT VIOLATED WHEN THE COURT DENIED HIS MOTION FOR SUBSTITUTION OF COUNSEL.

The Sixth Amendment, applicable to the states through the Fourteenth Amendment, guarantees that “[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense.” The constitutional right to counsel includes the right to assistance of counsel free from conflicts of interest. State v. Davis, 141 Wn.2d 798, 859, 10 P.3d 977 (2000).

A defendant does not have an absolute right under the Sixth Amendment to counsel of his or her choice. State v. Stenson, 132 Wn.2d 668, 733, 940 P.2d 1239 (1997). A criminal defendant who is dissatisfied with appointed counsel must show good cause to warrant a substitution of counsel such as a conflict of interest, an

irreconcilable conflict or a complete breakdown in communication between the attorney and the defendant. Id. at 734.

There are two situations where counsel conflict of interest is reversible error even without a showing of actual prejudice:

(1) where there is an actual conflict that impairs the attorney's performance; and (2) where the trial court "knows or reasonably should know of a particular conflict into which it fails to inquire."

In re Personal Restraint Petition of Richardson, 100 Wn.2d 669, 677, 675 P.2d 209 (1983). See also Cuyler v. Sullivan, 446 U.S. 335, 348, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980).

In this case, the issue on appeal is whether there was an actual conflict of interest, since there is no question that the trial court knew of, and inquired into the potential conflict of interest. 11/13/08 RP. To establish reversible error based upon an allegation of an actual conflict of interest "the appellant must demonstrate that counsel actively represented conflicting interests and that an actual conflict of interest adversely affected his lawyer's performance." State v. Martinez, 53 Wn. App. 709, 715-16, 770 P.2d 646 (1989). An actual conflict of interest exists when the attorney owes duties to another that are adverse to the defendant's interest. State v. White, 80 Wn. App. 406, 411-12, 907 P.2d 310

(1995). See also RPC 1.7(b). The determination of whether a conflict exists precluding continued representation of a client is a question of law and is reviewed de novo. State v. Ramos, 83 Wn. App. 622, 922 P.2d 193 (1996). In re Personal Restraint of Benn, 134 Wn.2d 868, 890, 952 P.2d 116 (1998). "The application of these [conflict of interest] rules is not limited to joint representation of codefendants. While most of the cases have involved that fact situation, the rules apply to *any situation* where defense counsel represents conflicting interests." State v. Regan, 143 Wn. App. 419, 177 P.3d 783 (2008), citing Richardson, 100 Wn.2d at 677, 675 P.2d 209.

Mr. Calhoun asserts that his appointed counsel Mr. Wolfe and Mr. Green had an actual conflict of interest because they did not call NDA paralegal Wendy Livesley as a witness at trial "due to their interest in protecting Ms. Livesley and not testifying themselves." Appellant's Brief at 6. However, this assertion is not supported by the record. Primarily, there was never any indication that either Mr. Wolfe or Mr. Green were potential witnesses for either the State or defense. Mr. Calhoun never gave any indication that he wished to call either attorney as a witness at his trial.

11/13/08 RP. As to Mr. Calhoun's assertion that Ms. Livesley was

not called out of counsel's interest to protect her, that is also not supported by the record. Mr. Wolfe explained to the court that Ms. Livesley would not corroborate Mr. Calhoun's version of events, specifically that she told Calhoun his omnibus hearing was on the 1st rather than the 10th. 11/13/08 RP 5. Mr. Wolfe's decision not to call Ms. Livesley was a trial strategy. Where the conflict involved a matter of trial strategy, defense counsel has great latitude in the choice of trial strategy. In re Personal Restraint of Stenson, 142 Wn.2d 710, 724, 16 P.3d 1 (2001). Mr. Wolfe's decision not to call Ms. Livesley was likely based on his desire to not present evidence that would be harmful to his client. Mr. Wolfe never gave any indication that he was trying to protect his paralegal from error, or even from testifying; he brought the motion only because Mr. Calhoun had accused him of doing so. 11/13/08 RP 5.

2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING MR. CALHOUN'S MOTION FOR SUBSTITUTION OF COUNSEL.

The determination of whether an indigent's dissatisfaction with his court-appointed counsel warrants appointment of substitute counsel rests within the sound discretion of the trial court. 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). 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. See Shelton, 71 Wn.2d at 839-40, 431 P.2d 201; see also State v. Dougherty, 33 Wn. App. 466, 471, 655 P.2d 1187 (1982), review denied, 99 Wn.2d 1023 (1983). An appeals court will reverse a trial court's denial of substitution of counsel only if in reaching it, the court abused its discretion, "that is only if the court exercised its discretion upon a ground, or to an extent clearly untenable or manifestly unreasonable." State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

Judge Halpert did not abuse her discretion when she refused to allow substitution of counsel because the decision was based on the court's assessment that the proffered testimony was likely not relevant. 11/13/08 RP 6. While Mr. Calhoun asserts that Ms. Livesley was a necessary witness because her testimony was not available elsewhere and because her testimony would "cast doubt on whether Mr. Calhoun had actual knowledge of his hearing date," the appellant ignores the fact that Ms. Livesley's proffered

testimony would be harmful to Mr. Calhoun. Appellant's Brief at 8-9; 11/13/08 RP 5.

The court found that substitution of counsel was not appropriate in this case because the testimony of Ms. Livesley would not be relevant. 11/13/08 RP 6-7. The court also based her decision on the fact that Ms. Livesley would testify contrary to Mr. Calhoun and on the fact that even if Ms. Livesley had told him the wrong court date, that would not be a valid defense. 11/13/08 RP 6-7.

RCW 9A.76.170 provides

(1) Any person having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before any court of this state, or of the requirement to report to a correctional facility for service of sentence, and who fails to appear or who fails to surrender for service of sentence as required is guilty of bail jumping.

The legislature has set out a limited defense to the crime of bail jumping in RCW 9A.76.170(2) which states:

It is an affirmative defense to a prosecution under this section that uncontrollable circumstances prevented the person from appearing or surrendering, and that the person did not contribute to the creation of such circumstances in reckless disregard of the requirement to appear or surrender, and that the person appeared or surrendered as soon as such circumstances ceased to exist.

It is clear from the plain reading of the statute that Ms. Livesley's testimony, had it corroborated Mr. Calhoun's version of events, would still not be relevant; the fact that it contradicts Mr. Calhoun's version of what happened makes it even less relevant.

The record does not support a finding of abuse of discretion. The judge made an appropriate inquiry into the nature of the asserted problem and determined that none of the factors requiring new counsel existed. The court's reasoning that the testimony was not relevant was based on her review of the case, the proffer made by Mr. Wolfe that his paralegal would not corroborate Mr. Calhoun's version of what happened, and the fact that Mr. Calhoun had signed for the court date he failed to appear for. 11/13/08 RP 6-7. The court's denial of substitution of counsel was not "clearly untenable or manifestly unreasonable." State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

D. CONCLUSION

For the reasons set forth above, the State respectfully requests that the Court find that Mr. Calhoun's Sixth Amendment right to conflict-free counsel was not violated because no actual

conflict of interest existed and that the trial court did not err in denying Mr. Calhoun's motion for substitution of counsel.

DATED this 22 day of December, 2009.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
EMILY PETERSEN, WSBA #36664
Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002