

65647-3

REC'D 65647-3

DEC 07 2010

King County Prosecutor  
Appellate Unit

NO. 65647-3-I

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

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STATE OF WASHINGTON,

Respondent,

v.

ROBERT KEENAN,

Appellant.

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

The Honorable Sharon S. Armstrong, Judge  
The Honorable Jeffrey M. Ramsdell, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The appellant was denied his Sixth Amendment right to counsel of choice.

Issue Pertaining to Assignment of Error

Citing a breakdown in communication with his court-appointed attorney, the appellant requested the opportunity to hire private counsel. Finding it untimely, the trial court summarily denied the request. Did the trial court improperly deny the appellant his Sixth Amendment right to counsel of choice?

B. STATEMENT OF THE CASE<sup>1</sup>

The State charged Robert Keenan with possession of cocaine, second degree driving while license suspended (DWLS), and an ignition interlock violation. CP 1-6. The court eventually dismissed the ignition interlock charge on a joint motion. CP 8-9; 2RP 131-33, 174-75.

Trial was originally set for May 11, 2010. 1RP 2. On May 7, the parties appeared for an omnibus hearing, and Keenan informed the court he wished to discharge his court-appointed counsel and hire a private attorney. 1RP 2-3. Keenan told the court his relationship with his attorney was damaged beyond repair, as demonstrated by their various

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<sup>1</sup> This brief refers to the verbatim report of proceedings as follows: 1RP – 5/7 and 7/25/2010; 2RP – 5/11 and 5/12/2010; and 3RP – 5/13/2010.

disagreements, and he complained his attorney was refusing to conduct a proper investigation. 1RP 3, 5.<sup>2</sup>

The court denied Keenan's motion, stating, "I'm not going to discharge your lawyer." 1RP 3. The court did not inquire how much time Keenan needed to obtain new counsel, simply stating, "[I]t's too late at this point to hire a private attorney." 1RP 3, 6.

Keenan thereafter moved to suppress evidence that police found on his person, arguing the traffic stop leading to his arrest was unlawful. Supp. CP \_\_\_ (sub no. 28, Motion and Memo to Suppress Evidence). The court denied the motion. 2RP 11-59, 75-90; Supp. CP \_\_\_ (sub no. 54, Written Findings of Fact and Conclusions of Law on CrR 3.6 Motion to Suppress).

The following day, Keenan waived his right to a jury and stipulated that the case should be tried to the bench on the contents of the police reports, laboratory reports, and similar materials. CP 10-14; 3RP 2-24. After reviewing the materials, the court found Keenan guilty of possession of cocaine and second degree DWLS. 3RP 28-29; Supp. CP \_\_\_ (sub no. 53, Order on Stipulated Facts).

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<sup>2</sup> Before a different judge, Keenan later asked to represent himself, but retracted the request after a lengthy colloquy and a recess. 2RP 90-110, 136-71. During the colloquy, Keenan explained that he made his request to hire new counsel only shortly before trial because his attention was consumed by another trial. 2RP 92-93.

The court sentenced Keenan within the standard range on the possession count and to a concurrent sentence on DWLS, a gross misdemeanor. CP 17-27; 1RP 23-24.

C. ARGUMENT

THE TRIAL COURT ERRED WHEN IT SUMMARILY DENIED MR. KEENAN THE OPPORTUNITY TO BE REPRESENTED BY COUNSEL OF CHOICE.

The Sixth Amendment protection of the right to counsel encompasses the right to be represented by counsel of choice. United States v. Gonzalez-Lopez, 548 U.S. 140, 146, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006); Wheat v. United States, 486 U.S. 153, 158-59, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988). “[A] defendant should be afforded a fair opportunity to secure counsel of his own choice.” Powell v. Alabama, 287 U.S. 45, 53, 53 S. Ct. 55, 77 L. Ed. 158 (1932). Accord, State v. Early, 70 Wn. App. 452, 457, 853 P.2d 964 (1993); State v. Chase, 59 Wn. App. 501, 506, 799 P.2d 272 (1990).

“Lawyers are not fungible, and often the most important decision a defendant makes in shaping his defense is his selection of an attorney.” United States v. Gonzalez-Lopez, 399 F.3d 924 (8th Cir. 2005) (quoting United States v. Mendoza-Salgado, 964 F.2d 993, 1014 (10th Cir.1992)), aff’d, 548 U.S. 140 (2006). The right to privately retain one's own counsel derives from the defendant's right to determine his defense. United States v.

Laura, 607 F.2d 52, 56 (3rd Cir. 1979). A violation of this right is a "structural defect" that is not subject to harmless error analysis. Gonzalez-Lopez, 548 U.S. at 148.

As a general rule, courts have little leeway to interfere with a defendant's choice of counsel. United States v. Lewis, 759 F.2d 1316, 1326 (8th Cir. 1985). Although the trial court has some discretion to limit the exercise of this right, it must pay deference to the defendant's choice and may limit the exercise of this right only if it would unduly hinder the fair and orderly administration of justice. United States v. Panzardi Alvarez, 816 F.2d 813 (1st Cir. 1987). The trial court may not rigidly insist on expedited trial proceedings in the face of a justifiable request. United States v. Rankin, 779 F.2d 956, 960 (3rd Cir. 1986).

The trial court must therefore balance the defendant's interest in counsel of choice with the public's interest in the prompt and efficient administration of justice. State v. Price, 126 Wn. App. 617, 632, 109 P.3d 27, review denied, 155 Wn.2d 1018 (2005). Factors to be considered include (1) the timeliness of the substitution motion; (2) whether the court has granted prior continuances at defense request; (3) whether the defendant has legitimate cause for dissatisfaction with current counsel, even where it falls short of incompetent representation; (4) whether the defendant has retained preferred counsel and how soon he or she could be prepared to go to trial;

and (5) whether the court's insistence on a particular trial date is justified under the circumstances. Id.; Rankin, 779 F.2d at 960.

Here, the trial court made no clear findings on any of these factors except to find Keenan's request was not timely. But while Keenan's request was made only a few days before trial, the other factors strongly suggest the court should have granted Keenan a brief continuance to retain counsel.

There is nothing to indicate Keenan made his request to obtain private counsel for illegitimate reasons. In contrast, in State v. Staten, where Staten repeatedly sought extensions, refused to come to court for unsubstantiated "medical reasons," was granted lengthy continuances, and appointed counsel specifically told the court that he was prepared to go to trial, the court found no error in denying a motion to substitute counsel and continue the trial. State v. Staten, 60 Wn. App. 163, 165-67, 173, 802 P.2d 1384, review denied, 117 Wn.2d 1011 (1991).

In State v. Kelly, when Kelly requested a new attorney after trial, the court declared a mistrial and granted the motion. Kelly moved to substitute again after a new trial date had been set. The court set a third trial date and Kelly again requested a continuance. Under those facts, the reviewing court held the trial court did not abuse its discretion in denying the defendant's request. State v. Kelly, 32 Wn. App. 112, 114-15, 645 P.2d 1146, review denied, 97 Wn.2d 1037 (1982).

Unlike in those cases, Keenan did not repeatedly seek new counsel each time the new trial date approached. The record indicates a single joint continuance request for plea negotiations, Supp. CP \_\_\_\_ (sub no. 20, Stipulated Order to Continue Omnibus Hearing). In fact, nothing in this case indicates Keenan made his request simply to delay the start of trial. Rather, Keenan offered legitimate concerns regarding his ability to work with appointed counsel.

Similarly, the record does not support the court's rigid insistence on maintaining the May 11 trial date. This was not a complex case with many witnesses. Keenan's theory was that the evidence found on his person and his statements to police should be suppressed based on an illegal traffic stop.<sup>3</sup> The State called only one police officer as a witness at the suppression hearing. There could thus be no legitimate concern that a brief continuance would seriously inconvenience either the parties or the witnesses. Moreover, the trial court did not even permit Keenan to indicate how much time might need to secure counsel.

On balance, Keenan's right to counsel of choice outweighed any public interest in expediting the trial. The trial court thus unreasonably denied Keenan the opportunity to secure counsel of choice. This violated

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<sup>3</sup> Indeed, after the court denied his motion to suppress, Keenan agreed the court could decide the case based on stipulated evidence. CP 10-14; 3RP 2-3.

Keenan's Sixth Amendment right and constituted structural error. Gonzalez-Lopez, 548 U.S. at 148. Reversal is, therefore, required.

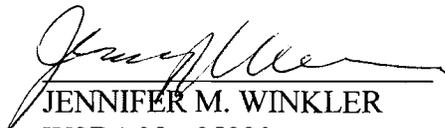
D. CONCLUSION

This Court should find the trial court denied Keenan his Sixth Amendment right to counsel of choice. Because such denial was structural error, this Court should reverse Keenan's convictions and remand for a new trial.

DATED this 7<sup>TH</sup> day of December, 2010.

Respectfully submitted,

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