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No. 67500-1-I

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

CITY OF SEATTLE,
Respondent,

vs.

ANDREA LISTER,
Petitioner.

BRIEF OF RESPONDENT

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~~FILED~~
JAN 13 2009
CLERK OF COURT
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TABLE OF CONTENTS

A.	<u>RESPONSE TO ASSIGNMENT OF ERROR</u>	1
	The superior court did not violate defendant's constitutional right to counsel by deciding her RALJ appeal without oral argument on the basis of a brief written by defense counsel.	
B.	<u>ISSUE PRESENTED FOR REVIEW</u>	1
	Has defendant been deprived of the constitutional right to counsel where her RALJ appeal is decided without oral argument on the basis of a brief written by a defense counsel who subsequently withdrew.	
C.	<u>STATEMENT OF THE CASE</u>	1-2
D.	<u>ARGUMENT</u>	
	The superior court did not violate defendant's constitutional right to counsel by deciding her RALJ appeal without oral argument on the basis of a brief written by defense counsel.	2-5
E.	<u>CONCLUSION</u>	5

TABLE OF AUTHORITIES

Table of Cases

Federal:

<i>United States v. Birtle</i> , 792 F.2d 846 (9 th Cir. 1986)	3
---	---

Washington state:

City of College Place v. Staudenmaier, 110 Wn. App. 841,
43 P.3d 43, *review denied*, 147 Wn.2d 1024 (2002) 4

State v. Deryke, 110 Wn. App. 815, 41 P.3d 1225 (2002) 4

State v. Louie, 68 Wn.2d 304, 413 P.2d 7 (1966),
cert. denied, 386 U.S. 1042 (1967) 3

Other jurisdictions:

Commonwealth v. Walters, 431 Pa. 74, 244 A.2d 757 (1968) 4

Rules

RALJ 8.4 4

A. RESPONSE TO ASSIGNMENTS OF ERROR

The superior court did not violate defendant's constitutional right to counsel by deciding her RALJ appeal without oral argument on the basis of a brief written by defense counsel.

B. ISSUE PRESENTED FOR REVIEW

Has defendant been deprived of the constitutional right to counsel where her RALJ appeal is decided without oral argument on the basis of a brief written by a defense counsel who subsequently withdrew? (Assignment of Error 1)

C. STATEMENT OF THE CASE

Defendant was convicted of False Reporting and Violation of an Abused Child Protection Order in Seattle Municipal Court. She appealed, contending that the Violation of an Abused Child Protection Order charge should have been dismissed because the order was invalid,¹ and the trial court improperly instructed the jury. RP at 10; CP _____. Oral argument was initially scheduled for December 10, 2010, but was continued at defendant's request to

January 27, 2011, then to April 5, 2011, then to July 1, 2011. CP _____. On April 27, 2011, the superior court allowed appellate counsel to withdraw, but its order stated that no further continuances would be granted with respect to the oral argument date. RP at 4; CP 1. On July 1, 2011, defendant appeared without counsel and the superior court, at the suggestion of the prosecutor, decided the case without oral argument, as authorized by RALJ 8.4. RP at 25. The superior court affirmed defendant's convictions. RP at 28-30; CP 2.

D. ARGUMENT

The Superior Court did not violate defendant's constitutional right to counsel by deciding her RALJ appeal without oral argument on the basis of a brief written by defense counsel.

Defendant contends that she was denied the constitutional right to counsel at "critical stage" of the criminal proceedings. To be a violation of this right, the refusal or denial of counsel at a particular point in the criminal proceeding must result in some

¹ The validity of the juvenile court orders regarding defendant and her children was upheld by this court in *In re Dependency of A.P.*, Court of Appeals No. 65707-1-I (August 29, 2011).

reasonably discernible prejudice to the effectiveness of legal assistance ultimately furnished the accused.²

In *United States v. Birtle*,³ the court concluded the absence of counsel at appellate oral argument did not violate the defendant's right to counsel:

The Supreme Court formulated the critical stage doctrine to extend sixth amendment protections to "any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate the accused's right to a fair trial." In *Evitts [v. Lucey]*, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985), the Supreme Court concluded that the protection of the due process clause guarantees an accused a right to effective assistance of counsel on a first appeal as of right. Birtle argues that his sixth amendment rights were also implicated and, therefore, that a first appeal as of right is a critical stage within the meaning of [*United States v. Cronic*], 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984).

We need not reach this issue. Even if a first appeal as of right is a critical stage within the meaning of *Cronic*, it does not follow that every step of the appeal is similarly a critical stage. The conclusion that oral argument and the filing of a reply brief are not critical stages reflects the fact that the failure to file a reply brief or to appear at oral argument does not prevent review of the issues raised on appeal.

² *State v. Louie*, 68 Wn.2d 304, 308-09, 413 P.2d 7 (1966), cert. denied, 386 U.S. 1042 (1967).

³ 792 F.2d 846, 847-48 (9th Cir. 1986) (citations omitted).

RALJ 8.4⁴ authorizes the court, on its own motion, to decide an appeal without oral argument and without waiting for a reply brief. To decide an appeal without oral argument is not error.⁵ As the court stated in *Commonwealth v. Walters*,⁶ “we fail to see how the submission of a case on briefs alone runs afoul of the Constitution of the United States, which forms the basis for *Douglas [v. California]*, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963)], so long as appellant has the assistance of counsel on his brief.”

The Superior Court was authorized to decide defendant’s RALJ appeal without oral argument and decided that appeal on the basis of a brief written by defense counsel. The Superior Court was well within its discretion to refuse to continue the case a fourth time. Defendant has not identified any reasonably discernible prejudice to the effectiveness of the legal assistance ultimately furnished her.

⁴ RALJ 8.4 provides, in pertinent part:

The court may, on its own initiative, direct that there be no oral argument, once it has received the brief of appellant and the brief of respondent.

⁵ *City of College Place v. Staudenmaier*, 110 Wn. App. 841, 845-46, 43 P.3d 43, review denied, 147 Wn.2d 1024 (2002); see also *State v. Deryke*, 110 Wn. App. 815, 818-19, 41 P.3d 1225 (2002).

⁶ 431 Pa. 74, 244 A.2d 757, 760 (1968).

The Superior Court did not violate defendant's constitutional right to counsel.

E. CONCLUSION

Based on the foregoing argument, the superior court's decision affirming defendant's conviction should be affirmed.

Respectfully submitted this 12th day of December, 2012.

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**No. 67500-1-I
CERTIFICATE OF PROOF
OF SERVICE**

I am an Assistant City Attorney representing respondent in this case. On November 15, 2012, I served a true copy of the Brief of Respondent on counsel for petitioner by mailing the same to counsel, postage prepaid, at the following address:

Damon Agnos
100 West Harrison St. #N440
Seattle, WA 98119

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

Signed this 12th day of December, 2012 at Seattle, Washington.

Richard Greene
Richard Greene

**CERTIFICATE OF PROOF
OF SERVICE 1**

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