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COURT OF APPEALS OF THE STATE OF WASHINGTON
JUL 9 2011 2:01

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,)	No. 67676-8-I
)	
Respondent,)	APPELLANT'S PRO SE STATEMENT
)	OF ADDITIONAL GROUNDS FOR
v.)	REVIEW - RAP 10.10
)	
RANDY BROWN,)	
)	
Appellant.)	
)	
)	

COMES NOW the Appellant, Randy Brown, and pursuant to RAP 10.10, submit's the following statements of additional grounds for review in addition to those raised by counsel in the Brief of Appellant.

FIRST ADDITIONAL GROUND FOR REVIEW

1. The Superior Court's Order Revoking Brown's Telephone Privileges Deprived Brown of his Right to a Fair Trial. The tampering and violation of a court order charges were based on a series of telephone calls Brown made from the King County Jail. On December 21, 2010, following Brown's arrest on the acquitted assault charge, the King County Superior Court entered a protection order prohibiting Brown from contacting Gaines directly or indirectly, including by telephone.

In the weeks following, the jail recorded several telephone conversations Brown had with Gaines and others. The calls took place on December 21, 22, 23, and 25; January 3, 6 (two calls), and 12; and February 7. CP 108-209. The Presiding Judge, Judge Kessler, revoked Brown's telephone privileges on February 1, 2011. Brown submit's Judge Kessler's revocation of his telephone privileges infringed upon his substaintive due process rights, his right to communicate effectively with his lawyer, obstructed his attempt to bail out of jail, and amounted to punishment which contravened Brown's right to a fair trial, and eroded Brown's right to communicate with his lawyer in terms of attorney-client privilege, and, thus, to assist in his own defense.

2. Revocation of a defendant's right to use the telephone violates the defendant's substantive due process rights. Pre-trial detainees have a substantive due process right that prohibits any type of restriction that amounts to punishment. Valdez v. Rosenbaum, 302 F.3d 1038 (9th Cir. 2002). If the conditions are imposed for the purpose of punishment, the substaintive due process right is violated. *Id.*, citing Bell v. Wolfish, 441 U.S. 520, 535, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979).

3. Although the State moved to revoke Brown's telephone privileges on its contention that Brown was tampering with a witness, an evidentiary hearing will prove that the State's purpose was to obstruct Brown's attempt to bail out of jail. At the time the State moved to revoke Brown's telephone privileges and the Court revoked Brown's right to use the telephone pre-trial, Brown was in the middle of making arrangements to bail out of jail with a local bail bond agency. Brown's efforts at bail were thwarted by Judge Kessler's order. Brown could not call the bail agency and complete bail negotiation. Thus, the revocation of Brown's telephone privileges contravened Brown's right to bail.

4. The revocation of Brown's telephone privileges amounted to punishment. Brown had a pre-trial right to use the telephone. This Court can only sustain Judge Kessler's pre-trial order if it is "an incident of some legitimate governmental purpose." If it is not, then it is an unconstitutional infringement. Rosenbaum, supra, 302 F.3d 1039. Here, the revocation amounted to punishment because the restriction was not an incident of a legitimate governmental purpose.

5. The State argued at trial that restricting Brown's telephone privileges served a legitimate

governmental objective; keeping Brown from contacting Gaines, the supposed victim. However, keeping Brown from contacting Gaines did not serve a 'legitimate' governmental interest because in so doing the State was merely playing the role of protector of the victim, and that was not the State's role. The State's role was to prosecute the charges it was proceeding to trial on against Brown.

6. In prosecuting Brown, the State's role included interviewing the victim and potential witnesses, and, in some cases such as the case at bench, to provide an advocate for the victim and/or to direct the victim to other social services. Apart from that role, the State had no legitimate interest to protect; that was not the State's responsibility and such role did no[t] serve a legitimate governmental interest. Therefore, since there was no legitimate governmental interest being served related to the telephone and mail restrictions, the mail and telephone restrictions imposed upon Brown pre-trial constituted punishment. The State failed to demonstrate protecting Gaines served a legitimate governmental interest, nor a need to play the role of protector.

7. At the time the court entered the order prohibiting Brown's telephone use, the judge had not

heard the purported telephone contacts between Brown and Gaines. The Court merely took the State's word of what those conversations were about and of their scope. Brown submit's this 'evidence' was insufficient for the court to find substantial and compelling reason justifying pre-trial revocation of Brown's telephone privileges. Moreover, Brown submit's, this Court should find that Judge Kessler's order of revocation should be ruled unconstitutional by this Court as it infringed upon Brown's constitutional right to bail.

3. Brown had a constitutionally protected liberty interest in bail and to access to a telephone. Washington Administrative Code ("WAC") provides that prisoner's may have reasonable access to a telephone. See, WAC 137-43-040; 137-43-080. Arguably, the Code's provisions create a liberty interest that the courts may not suspend absent procedural due process, i.e., notice and an opportunity to be heard. The two WAC rules cited above clearly set

forth substantive predicates to govern official decision making, and, contains explicitly mandatory language, i.e., a specific directive to the decision-maker that mandates a particular outcome if the substantive predicates have been met. Thus, by revoking Brown's telephone and mail privileges, the trial judge deprived Brown of procedural due process because Washington law creates a constitutionally protected liberty interest in Brown's right to access a telephone and to mail privileges.

9. Finally, the revocation of Brown's mail privileges deprived Brown of his Sixth Amendment right to the effective assistance of counsel during a critical stage of the proceedings; during the entire period of the trial and during pre-trial proceedings. Brown was only able to contact his attorney during a random, correctional officer choice, period of time per day. As a result of this obstruction, Brown was unable to reach his attorney by telephone to discuss and prepare his case 9 out of every ten times attempted to call. The times he was able to reach his attorney infringed upon attorney-client rights because each call was conducted by speaker phone in the presence

of correctional officers. Thus, Brown was unable to converse openly and to confide and strategize with counsel in confidence. This, to reiterate, deprived Brown of his right to a fair trial, a trial whose result can be deemed reliable. See, VRP, June 14, 2011, pg. 62 - 66.

SECOND ADDITIONAL GROUND FOR REVIEW

10. Defense Counsel Was Ineffective At Trial In Failing To Prepare Declaration Setting Forth The Procedures Brown Was Subject To In Contacting Counsel.

At trial, upon Brown's request, the defense had a single motion to make orally. Whereupon counsel informed the court:

Your Honor, this is from my client. Judge Kessler terminated my client's telephone privileges at the jail in February. We are requesting that the Court reinstate my client's telephone privileges. He advises me that the only way in which he can call my office is through what sounds like a cordless phone. And he is concerned about that phone call being monitored or an unsecured line. And what he is saying is that he be given access to a phone that he can use without having jail staff hovering over him so he can make a phone call to me without having to make this phone call over an unsecured line.

Whereupon the State responded:

I don't know about the cordless phone, Your Honor. I do know that even when your phone privileges are revoked you're still allowed to call your attorney. And the jail has specific procedures so calls to attorney's

are not recorded. And, when the recorded calls are made, I don't know if this is on all calls now, this wasn't the case before, but I've noticed now in some of the more recent calls, not on this case, that now there's a new message at the beginning of the warning, when you have the call recorder, that says if you are an attorney please be aware that this call will be recorded. Please hang up and call us so we can put you on the list so you won't be recorded.

Whereupon Brown stated:

Your Honor, that's not true. They dial the number for me, and, from their office, from their room. And the last two times I've been on the speaker phone talking to my attorney through the speaker. So that's totally not true. And I can hear the officers talking up in the booth and I'm talking through the speakers.

Whereupon the Court stated:

Okay, counsel, let me have you do this before we revisit it. Put what your client has to say in a declaration or something. And Mr. Torres (the prosecutor) does not represent the jail. Nancy Baylin is the jail attorney. And if there is a violation of protocol she is the one that needs to be contacted. So, you might want to contact Ms. Baylin, because if we address this then I would want somebody that represents the jail these instead of the deputy that's only in the criminal division. . . . And, the reason I am asking that you put whatever your client has to say in writing is so we can give it to the jail attorney and they can review it and have something intelligent to say back in response. Okay. So, I guess we'll address it, but we need to have the right people in front of the court.

VRP, 06/14/2011, pg. 62 - 65.

11. Despite the Judge's instruction for trial counsel to "put what your client has to say in a declaration or something So we can give it to the jail attorney and they can review it and have something intelligent to say about it So, I guess we'll address it," VRP 06/14/2011, pg. 65, counsel failed to memorialize Brown's statement in a declaration or in any other form and the oral motion for restoration of Brown's telephone privileges was never ruled upon due to counsel's failure to follow the court's order. As a result, Brown's telephone restriction remained enforced during critical stages of the trial. The telephone procedure forced upon Brown by the jail, including the use of a cordless phone and talking to his lawyer through a speaker in front of correctional officers continued throughout Brown's trial. Due to that procedure Brown was unable to talk to his attorney in confidence and in an uncanny manner. Brown's repeated requests to counsel to initiate Brown's declaration or something detailing the telephone procedure in place at the jail were to no avail, counsel refused to initiate the appropriate remedial processes, although the court agreed to review the issue.

12. Brown's Trial Attorney Was Ineffective In Failing To Initiate His Declaration And In Failing To Obtain a Ruling on His Oral Motion For Restoration of Telephone Privileges. A person accused of a crime has a constitutional right to effective assistance of counsel. United States v. Cronin, 466 U.S. 648, 654, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984); State v. Hendrickson, 129 Wn.2d 61, 77, 917 P.2d 563 (1996); U.S. Const. amend 6; Wash. Const. art. I, § 22.

The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled.

Strickland v. Washington, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)(quoting Adams v. United States ex rel. McCann, 317 U.S. 269, 276, 63 S.Ct. 236, 87 L.Ed.2d 268 (1942)).

An accused's right to be represented by counsel is a fundamental component of our criminal justice system. Lawyers in criminal cases "are necessities, not luxuries." Their presence is essential because they are the means through which the other rights of the person on trial are secured. Without counsel, the right to trial itself would be "of little avail," as this court has recognized repeatedly. "Of all the rights an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other right he may have."

Cronin, supra, 466 U.S. at 653-54.

13. To prevail in a claim of ineffective assistance of counsel, a defendant must show, "First, [that] counsel's performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense." Strickland, 466 U.S. at 687. If there is a reasonable probability that but for counsel's inadequate performance, the result of the trial would have been different, prejudice is established and reversal is required. Hendrickson, 129 Wn.2d at 78.

14. An attorney renders constitutionally inadequate representation when he or she engages in conduct for which there is no legitimate strategic or tactical reason. State v. McFarland, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1998). A decision is not permissibly tactical or strategic if it is not reasonable. Roe v. Flores-Ortega, 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000); see also Wiggins v. Smith, 539 U.S. 510, 123 S.Ct. 2527, 2535, 156 L.Ed.2d 471 (2003)("[t]he proper measure of attorney performance remains reasonableness under prevailing professional norms," quoting Strickland, 466 U.S. at 688).

15. While an attorney's decisions are treated with difference, his or her actions must be reasonable based on all circumstances. Wiggins, 123 S.Ct. at 2541; State v. Tilton, 149 Wn.2d 775, 72 P.2d 735 (2003). To show prejudice, the defense must demonstrate grounds to conclude a reasonable probability exists of a different outcome, but need not show the attorney's conduct altered the result of the case. Tilton, 149 Wn.2d at 784.

16. Brown's Attorney Unreasonably Failed to Follow The Judges Orders To Perfect Attorney-Client Communication. Counsel's failure to obtain a declaration from Brown detailing the jail's procedure in allowing Brown attorney-client phone calls constitute ineffective assistance of counsel. At trial, Brown repeatedly complained that the jail was violating his right to private attorney client communication by requiring Brown to telephone his lawyer by speaker phone and in front of correctional officers. The Court directed counsel to take Brown's statement by declaration, to provide a copy of that declaration to the jail's attorney, and advised counsel that the Court would review the issue after that procedure was followed. VRP, 06/14/2011, pg. 62 - 65.

17. In spite of the trial judges instruction for counsel to take Brown's statement by declaration or some other form respecting the protocol in place at the jail for Brown's telephone use, and promise to review the issue, counsel failed to take Brown's statement. And as a result, and despite Brown's many attempts to get counsel to take his statement, counsel failed to take Brown's statement and Brown was deprived of his right to attorney-client privilege in communication. Everytime Brown spoke to his lawyer by telephone from the jail [h]is conversation was monitored. Thus, in failing to take Brown's statement and initiate the processes for Brown to have secured conversation with counsel, counsel's performance was deficient.

18. Counsel's deficient performance prejudiced Brown. There is a reasonable probability that, but for, counsel's inadequate performance in failing to initiate the procedure to assure that Brown's telephone calls to his lawyer were secure, the result of the trial would have been different. There are still exculpatory issues involved in this case, that are protected by attorney-client privilege, that Brown was never able to discuss with his attorney due to his conversations with counsel being monitored by correctional officers. As such,

prejudice to Brown should be presumed.

19. There was no legitimate strategic or tactical reason for counsel not to initiate processes to assure Brown's telephone calls to counsel were secure. Counsel's failure to initiate processes to assure Brown's telephone calls to counsel were secure was unreasonable under prevailing professional norms. While an attorney's decisions are treated with deference, measuring counsel's failure to act under the circumstances in this case, counsel's failure was unreasonable. Had counsel followed the judge's instruction, took Brown's statement, and initiated processes to assure that Brown's telephone calls with counsel were secure, Brown could have aided in his defense and could have provided counsel with potentially exculpatory information, information Brown contends at this point is still privileged information, that could have resulted in a different outcome at trial. Thus, this Court should rule an evidentiary hearing is required, and Brown should be allowed to discuss in confidence those issues respecting his case which support's Brown's position that there was a reasonable probability, but for counsel's failure to initiate processes to assure that Brown's telephone calls to counsel were secure, the result of the proceeding

would have been bifurcated.

OTHER ADDITIONAL GROUNDS FOR REVIEW

20. Brown's Right to a Speedy Trial Was Violated During Trial Court Proceedings. A criminal charge not brought to trial within the time limits of CrR 2.2 must be dismissed with prejudice. State v. Johnson, 122 Wash. App. 409, 411, 122 P.3d 737 (2006), review denied, 150 P.3d 106 (2007). This Court reviews the application of the speedy trial rules de novo. State v. Carlyle, 34 Wash. App. 33, 25-36, 925 P.2d 635 (1996).

21. The trial court is ultimately responsible for ensuring compliance with the speedy trial period. CrR 2.3(a). But the State bears the primary duty to bring the defendant to trial in a timely manner. State v. Jenkins, 76 Wash. App. 373, 383, 934 P.2d 1356 (1995). CrR 2.3 requires the court to set a criminal trial date within 60-days of arraignment for an in-custody defendant. CrR 2.3(b)(1)(i). When the applicable speedy trial period expires, the court must dismiss the charges if the defendant objects within 10-days of the trial, even if the defendant has not suffered prejudice. CrR 2.3(b)(2), (b); State v. Svenson, 150 Wash.2d 101, 107, 75 P.3d 1001 (2003). But the speedy trial rules contain several exceptions that extend the speedy trial period beyond 60-days. Excluded periods under CrR 2.3(b)

include continuances and delays due to unavailability or unforeseen circumstances that are beyond the control of the court or of the parties. CrR 2.2(a)(2), (3).

22. This Court reviews the trial court's decision to grant or deny a motion for a continuance for abuse of discretion. White v. Robinson, 122 Wash. 2d 400, 411, 122 P.3d 737 (2006), review denied, 150 P.3d 106 (2007).

23. On March 24, 2011, the parties appeared before Judge Laura Gene Willough, to discuss, amongst other matters, the trial memorandums prepared by the parties. At that hearing, Brown advised Judge Willough as follows:

my continuance: They are also violating my speedy trial rights. I came to court voluntarily and from the streets, and they took me into custody from court, okay? I have been in jail 91-days and have not been brought to trial. My speedy trial rights have been violated.

See, id., 03/24/2011, at 22, 10. 2 - 12. ²

24. Although Brown clearly advised the Court that his speedy trial rights had been violated, the Court failed to address the issue. Because this Court reviews the application of the speedy trial rules de novo, and continuances for abuse of discretion, the Court can not

2. Brown had actually been confined 90-days at the time he informed the court his speedy trial rights had been violated.

review the merit of Brown's speedy trial right violation claim on its merit. Attachment's numbered 2, 22, 23, 24, 25, 26, 31, 33, 35, 36, 39, 41, 42, 43, 44, and 55, manifest's Brown's complaint that his state and federal constitutional right to a speedy trial had been violated. It should be noted that Brown did not agree to any continuance of his trial. Moreover, this Court should conclude, Judge Middaugh's failure to rule on Brown's motion to dismiss for speedy trial violation, failure to direct the parties to present the issue in the proper form and to the appropriate judge, and counsel's failure to otherwise do so, constitutes abuse of discretion on Judge Middaugh's part and ineffective assistance on counsel's part. As such, this Court should reverse and remand this matter to the trial court for an evidentiary hearing.

ADDITONAL TO FIRST ADDITIONAL GROUND FOR REVIEW

25. In support of his first additional ground for review, Brown would like the Court to consider the following relevant precedent in support of his claim that "The Superior Court's Order Revoking Brown's Telephone Privileges Deprived Brown of his Right to a Fair Trial." Breneman v. Madigan, 243 P. Supp. 120, 141 (W.D. Cal. 1972) ("eavesdropping accomplished either by means of electronic equipment [or] the presence of

a custodial officer, would raise serious constitutional questions"). Brown, in addition to the grounds raised in his first additional ground argues that requiring him to use the telephone to call his attorney 'in front of custodial staff' constituted eavesdropping on part of the State, and was thus an unconstitutional infringement of his right to unfettered access to counsel and deprived him of his right to a fair trial.

26. See, In re Scimes, 233 Cal. App.3d 1175, 256, Cal. Rpt. 630, 684-85 (1989) (holding: "collect call only phone system denied court access; jail directed to install free line to public defender's office); Tealey v. Cambron, 573 P.2d 364, 374, (1st Cir. 1978) (Noting that "a complete ban on calls to non-attorney's would limit the ability of a detainee to investigate and prepare his defense); Johnson v. Galli, 506 P. Supp. 125, 128 (D. Nev. 1981) ("use of telephone is essential for a pretrial detainee to contact a lawyer, bail bondsman, or other person in order to prepare his case or otherwise exercise his rights"). But, see Lane v. Hutchenson, 701 P. Supp. 277, 281 (7th Cir. 1989) (upholding telephone system providing collect calls); Moore v. Farley, 427 P. Supp. 567, 576-77 (D. Nev. 1976) (three five-minute phone calls every five days with unlimited call for

U.S. V. GOTTI, 755 F.Supp. 1159, 1164 (E.D.N.Y.1991); accord Lock v. Jenkins, 641 F.2d 488, 498(7th cir .1981) (“we do not read anything in Wolfish to require this court to grant automatic deference to ritual incantations,of prison officials that their actions foster the goals of order And discipline)” Akey v. Haag, 2006 WL 3246146**4(D.VT.2006) (Quoting U.S. v. Gotti, Supra); U.S. v. Lopez, 327 F. Supp. 2d 138, 143(D.P.R.2004)(“while we do give deference to correction officials, We cannot turn a blind eye. Institution policies must be reasoned.”)

U.S. V. GOTTI 755 F. Supp. at 1164(placing detainees in administrative detention based on his criminal charges and witness tampering accusations, with no showing of misbehavior in jail constituted punishment).

to a fair trial, that defense counsel was ineffective at trial in failing to prepare a declaration setting forth the procedures Brown was subject to in contacting counsel, and, that Brown's right to a speedy trial was violated during trial court proceedings.

It should be so ordered.

DATED this 2nd day of July, 2010.

Respectfully submitted,
BY THE DEFENDANT:

Randy Brown

RANDY BROWN
DOC No. 742707
Coyote Ridge Corrections Center
P.O. Box 760
Connell, WA 99226-0760

DECLARATION OF MAILING

I, the undersigned, declare under penalty of perjury of the State of Washington that I deposited in the U.S. Mail at the Coyote Ridge Corrections Center, postage pre-paid and properly addressed, a true and correct copy of [REDACTED] addressed to the following sources:

David B. Koch
Attorney at Law
1000 N. Madison Street
Seattle, WA 98102

Daniel M. Satterberg
King County Prosecutor
1551 King County Courthouse
516 Third Avenue
Seattle, WA 98104

[REDACTED] in the mail July 5, 2012.

BY THE APPELLANT:

Randy Brown
RANDY BROWN

COURT OF APPEALS
STATE OF WASHINGTON
2012 JUL -9 PM 2:00

July 3, 2012

Clerk/Court Administrator
Court of Appeals of Washington
Division One
One Union Square
600 University Street
Seattle, WA 98101

RE: State v. Randy Brown,
Case No. 07070-2-1

Dear Representative:

This enclosed for filing the Appellant's Pro Se Statement of Additional Grounds for Review, attachments, and Declaration of Filing. Please acknowledge receipt of these pleadings.

Sincerely,

Randy Brown
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Coyote Ridge Corrections Center
P.O. Box 700
Connell, WA 99026-0700

07/03/12

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