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Court of Appeals  
Division I  
State of Washington

NO. 72204-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

SANTOS A. SALOY,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE ELIZABETH J. BERNS

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**BRIEF OF RESPONDENT**

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**A. ISSUES PRESENTED**

1. A trial court must balance a defendant's right to counsel of his or her choice against the public's interest in the prompt and efficient administration of justice. After successfully continuing his case seven times over a period of eight and a half months, the defendant moved on the day of trial to replace his current, prepared, retained counsel with new retained counsel and to continue the trial to allow new counsel to prepare. Did the trial court properly exercise its discretion in denying the motion?

**B. STATEMENT OF THE CASE**

1. PROCEDURAL FACTS.

The State charged the defendant, Santos Andrew Saloy, by amended information with rape of a child in the second degree, attempted rape of a child in the second degree, child molestation in the second degree, and two counts of felony communication with a minor for immoral purposes.<sup>1</sup> CP 13-14. A jury found Saloy guilty of the two counts of communication with a minor for immoral purposes, but not guilty of the remaining charges. CP 45-49. He

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<sup>1</sup> The State presented the charges of rape, attempted rape, and child molestation to the jury as alternatives for a single incident described by the victim. RP 410.

received concurrent standard range sentences of 12 months on each count. CP 75-78. Saloy timely appealed. CP 84-85.

## 2. MOTION TO SUBSTITUTE COUNSEL.

Saloy was charged on July 16, 2013, with rape of a child in the second degree for allegedly having sexual intercourse with a twelve-year-old girl in 2012, when Saloy was 33 years old. CP 1, 3-4. He retained private defense counsel Teri Rogers Kemp, who filed a notice of appearance on July 22, 2013. CP 88-90. Saloy was arraigned a week later. CP 91.

Over the next eight and a half months, the trial court granted seven continuances of case-scheduling hearings or trial dates, all of which were at Saloy's request, before the case finally went to trial on April 16, 2014.<sup>2</sup> CP 92-95, 98, 100, 106. An additional four continuances of the omnibus hearing, which did not affect the then-scheduled trial dates, occurred by mutual agreement of the parties.<sup>3</sup> CP 97, 99, 101-02.

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<sup>2</sup> The State agreed to one of those seven continuances and did not object to four others. CP 92-95, 106. The record is silent as to the State's position on the remaining two. CP 98, 100.

<sup>3</sup> The prosecutor later noted that three of the continuances of omnibus were actually done at defense counsel's request. RP 17.

When the parties appeared before the Honorable Judge Elizabeth Berns on April 16, 2014, for assignment to a trial judge, Saloy indicated that he had just retained new counsel, Robert Perez, the previous day. RP<sup>4</sup> 1, 4. Saloy moved to substitute Perez for Rogers Kemp and continue the trial date so that Perez could prepare for trial. RP 2-4. Rogers Kemp deferred to the court and took no position. RP 1. Perez confirmed that he was not prepared to take over and begin trial that day as scheduled, but did not indicate how long a continuance he would need. RP 3. Perez further asserted that Rogers Kemp had not sufficiently prepared Saloy for trial, and that Saloy would not receive constitutionally effective assistance of counsel if the court did not grant a continuance and allow him to substitute in as counsel. RP 3-4.

The State opposed the motion as untimely, arguing that Saloy had had months to obtain a new attorney if he wanted to, and the fact that he had chosen to do so on the day of trial, despite numerous previous continuances, suggested that he was simply having "cold feet" and attempting to delay the trial. RP 4-5. The

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<sup>4</sup> The five volumes of the verbatim report of proceedings are consecutively paginated, and will be collectively referred to as "RP."

State also noted all the work that Rogers Kemp had put into the case and that there was no basis for Perez's allegation that she would be constitutionally ineffective if the trial proceeded as scheduled, and pointed out that this was not a situation where an absolute breakdown of attorney-client communication warranted allowing an untimely substitution. RP 4-5.

Saloy then spoke up and asserted for the first time that there was a "lack of communication" between himself and Rogers Kemp. RP 5. Perez followed up by also asserting that there had been a breakdown in communication between Saloy and Rogers Kemp, as evidenced by the fact that defense witnesses felt unprepared and "somewhat upset," and that Saloy himself was not prepared to go to trial that day. RP 5-6.

The trial court<sup>5</sup> denied the motion to continue the trial and substitute new counsel. RP 6-7. The court found that Saloy had had "ample opportunity" to bring such a request, and that there was no information before the court indicating that a continuance on the day of trial was warranted, whether it be to allow Saloy to feel more

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<sup>5</sup> Although Judge Berns did not preside over the jury trial in this case, this brief will refer to her as the trial court because her rulings are the only ones at issue in this appeal.

prepared for trial or to allow new counsel to substitute in and become prepared. RP 6-7.

The parties were then assigned to a trial judge and reported to that courtroom. RP 10. The trial judge declined to hear Saloy's attempt to relitigate his motion, and sent the parties back to Judge Berns. RP 11-12. Shortly thereafter, the parties appeared again before Judge Berns on Saloy's motion for reconsideration of the earlier ruling. RP 15.

Perez informed the trial court that his sole objective was to ensure that Saloy receive a fair trial, and that it would be impossible to do so if Rogers Kemp represented him at trial. RP16. Perez relayed to the court that he had observed a confrontation in the hallway between Rogers Kemp and the Saloy family following the court's earlier ruling. RP 16. Perez reported that Rogers Kemp had become "argumentative" with Saloy and his family, had whispered something to Saloy in which she "essentially" accused him of lying, had stated that she would protect her professional reputation against any misleading statements by Saloy, and had refused to respond to Perez when he asked if she would do so even if it negatively affected Saloy. RP 16-17. Perez concluded that Rogers Kemp's relationship with Saloy was "as broken down

as it can be” and that Saloy could not receive a fair trial under those circumstances. RP 16-17. Perez conceded that Saloy had not sought to obtain new counsel “until the last minute,” but contended that Saloy was not at fault because he had been unaware until that point that Rogers Kemp’s preparations for trial were deficient in Perez’s view. RP 25.

Rogers Kemp continued to take no position on the motion, but disputed Perez’s characterization of her relationship with Saloy and her preparation for trial. RP 20-22. She stated that she had interviewed all those witnesses she believed necessary, was prepared for trial to start that day, and would in no way be ineffective. RP 20, 22. She also clarified that she had not called her client a liar in the hallway, and had enjoyed a good working relationship with Saloy until Perez became involved, and suggested that Perez had come “dangerously close” to interfering with her relationship with her client that morning. RP 20-21.

Rogers Kemp disclosed that she had had a “come to the truth” discussion with Saloy the previous weekend regarding the upcoming trial, the current plea offer from the State, and the consequences if he were convicted at trial, and that Saloy had subsequently turned down opportunities to meet with Rogers Kemp

to discuss those issues further. RP 21. She reported that, had Saloy notified her earlier than the day before trial that he wanted to discharge her as counsel, she would have been able to bring Saloy's motion before the court in a "more timely" manner. RP 22.

The State again opposed Saloy's motion, expressing concern that Saloy had begun claiming a breakdown in communication as soon as the State had mentioned the lack of any such breakdown. RP 19. The State also noted that it appeared that Saloy was raising his last minute motion to continue the trial and substitute counsel as a tactic to delay the trial, and that such a continuance would infringe on the public's and the now-13-year-old victim's right to have the case proceed to trial in a timely manner. RP 19-20. Saloy told the court that he did not want to be represented by Rogers Kemp any longer because he did not feel that she had done everything possible on his case, and that he felt that he would not get a fair trial as a result. RP 26.

The trial court noted that the only issue before it at this point was whether there was new information warranting reversal of the court's earlier denial of Saloy's motion for a continuance and substitution of new counsel. RP 27. The court found that the new information presented by Perez, regarding his observations of

Rogers Kemp's interactions with Saloy and his family in the hallway, did not warrant such a reversal, and denied the motion for reconsideration. RP 27-28.

The parties then proceeded to trial that day with Saloy represented by Rogers Kemp. RP 28. In the end, Rogers Kemp successfully obtained acquittals for Saloy on the three most serious charges against him, avoiding a potential indeterminate sentence of 146 months to life in prison in favor of a sentence of just twelve months on Work/Education Release. RP 29-30; CP 45-47, 77.

**C. ARGUMENT**

1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING SALOY'S UNTIMELY MOTION FOR A CONTINUANCE AND SUBSTITUTION OF COUNSEL.

Saloy contends that his conviction must be reversed because the trial court's denial of his day-of-trial request for a continuance and substitution of new counsel violated his constitutional right to counsel of his choice. This claim should be rejected. In light of the numerous prior continuances requested by Saloy and the public's interest in avoiding any further delays of the

trial, the trial court properly exercised its discretion in denying Saloy's untimely motion.

The Sixth Amendment guarantees criminal defendants the right to the assistance of counsel. U.S. Const. amend. VI; United States v. Gonzalez-Lopez, 548 U.S. 140, 144, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006). For defendants who do not require appointed counsel, an element of this right is the right to counsel of the defendant's choice. Id. If a trial court improperly denies a defendant his counsel of choice, he is automatically entitled to a new trial, and need not show that the denial prejudiced him. Id. at 150.

However, the right to counsel of choice is not absolute. Id.; State v. Aguirre, 168 Wn.2d 350, 364-66, 229 P.3d 669 (2010). A trial court has wide latitude in balancing the right to counsel of choice against the demands of its calendar, and trial courts must be granted broad discretion on matters of continuances. Id. at 152 (citing Morris v. Slappy, 461 U.S. 1, 11-12, 103 S. Ct. 1610, 75 L. Ed. 2d 610 (1983)); Slappy, 461 U.S. at 11.

A trial court must balance a defendant's right to counsel of his or her choice against the public's interest in the prompt and efficient administration of justice, and its decision is reviewed for abuse of discretion. Aguirre, 168 Wn.2d at 365. Thus, "only an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay" violates a defendant's right to counsel of choice. Slappy, 461 U.S. at 11-12; State v. Price, 126 Wn. App. 617, 632, 109 P.3d 27 (2005).

Until recently, Washington courts traditionally applied a four-factor test when considering motions to substitute new retained counsel. State v. Hampton, 182 Wn. App. 805, 820-21, 332 P.3d 1020 (2014), review granted, 182 Wn.2d 1002 (2015). The four factors were:

- (1) whether the court had granted previous continuances at the defendant's request;
- (2) whether the defendant had some legitimate cause for dissatisfaction with counsel, even though it fell short of likely incompetent representation;
- (3) whether available counsel is prepared to go to trial; and
- (4) whether the denial of the motion is likely to result in identifiable prejudice to the defendant's case of a material or substantial nature.

Id. (citing State v. Price, 126 Wn. App. 617, 632, 109 P.3d 27 (2005)). However, shortly after Saloy's trial this Court held that consideration of the second and fourth factors is "incompatible with

the United States Supreme Court's explication of a defendant's right to counsel of choice" in Gonzalez-Lopez.<sup>6</sup> Id. at 822.

In this case, the trial court's denial of Saloy's motion for a continuance and substitution of counsel was proper under both the two factors that survived Hampton and the older, four-factor test. The motion was brought on the day of trial, the case had been pending for more than eight months, and the trial court had granted seven prior continuances of case scheduling hearings or trial, all at Saloy's request. RP 1; CP 92-95, 98, 100, 106. Additionally, three of the four continuances of omnibus that did not directly affect the trial date were also at Saloy's request. RP 17; CP 97, 99, 101-02. By the time the day of trial finally arrived, the public's and the now-13-year-old victim's interest in avoiding any additional delays was very strong. Cf. Slappy, 461 U.S. at 14 (trial courts may not ignore crime victims' interests when ruling on a motion for a continuance to allow defendant to have counsel of choice). The first post-

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<sup>6</sup> There is reason to question the correctness of this holding, as Gonzalez-Lopez did not narrow the circumstances under which it is proper to deny a defendant his counsel of choice, and logic suggests that a defendant's right to counsel of choice should weigh more heavily against the public's interest in prompt administration of justice when the consequences of denying him counsel of choice are more severe. See Gonzalez-Lopez, 548 U.S. at 151-52 ("Nothing we have said today casts any doubt or places any qualification upon our previous holdings that limit the right to counsel of choice . . ."). Although the Washington State Supreme Court has accepted review of this Court's decision in Hampton, it has not yet issued its opinion. However, the ultimate result in Hampton will not affect the result in this case.

Hampton factor thus weighed heavily in favor of denying Saloy's motion for a continuance and substitution of counsel.

Additionally, Saloy's existing counsel, whom he had retained at the beginning of the case and with whom he had expressed no dissatisfaction until the day before trial, was prepared for trial and ready to proceed as scheduled. RP 20-22. In contrast, the counsel Saloy wished to substitute had been retained only the day before, had not reviewed any discovery or consulted with existing counsel, and required what would likely be a lengthy continuance in order to prepare for trial. RP 3-4, 20. The other remaining post-Hampton factor thus also weighed in favor of denying Saloy's motion. See also State v. Roth, 75 Wn. App. 808, 823-27, 881 P.2d 268 (1994) (when balancing defendant's interest in counsel of choice against public's interest in prompt administration of justice, trial court need not tolerate as much inconvenience where defendant has other competent counsel prepared to go to trial).

Furthermore, the two factors that were later disavowed by this Court in Hampton also weighed in favor of denying Saloy's motion. Based on what Saloy, Perez, and Rogers Kemp told the trial court, it appeared that Saloy's sudden dissatisfaction with current counsel related more to Saloy's unhappiness with the

State's plea offer and the consequences of proceeding to trial, his resulting desire to delay the trial, and Perez's disagreement regarding Rogers Kemp's tactical decision not to interview certain minor witnesses, than with any legitimate grievance against Rogers Kemp. RP 2, 5, 20-22, 26. Given the nature of Saloy's dissatisfaction, there was also no reason to believe that denial of the motion would be likely to result in identifiable and material prejudice to Saloy's case.<sup>7</sup> Thus, even the factors of the pre-Hampton test weighed uniformly in favor of denying Saloy's motion.

Because Saloy had already been permitted to delay the trial numerous times and there was no good cause to allow yet another continuance so that new counsel could take over, and because all of the currently and previously applicable factors weighed in favor of denying Saloy's untimely motion to continue the trial and substitute new counsel, the trial court properly exercised its discretion in denying the motion. See State v. Early, 70 Wn. App. 452, 457-59, 853 P.2d 964 (1993) (upholding denial of morning-of-trial motion for continuance to retain private counsel); State v. Chase, 59 Wn. App. 501, 505-07, 799 P.2d 272 (1990) (upholding

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<sup>7</sup> That prediction was proven accurate when Rogers Kemp obtained an excellent result for Saloy in the form of outright acquittals on the three most serious charges against him. CP 45-47.

denial of mid-trial request for continuance to obtain new counsel);  
State v. Young, 11 Wn. App. 398, 399, 523 P.2d 946 (1974)  
(upholding denial of morning-of-trial motion for continuance to allow  
substitution of new counsel retained the previous day). Saloy's  
request for reversal should therefore be denied.

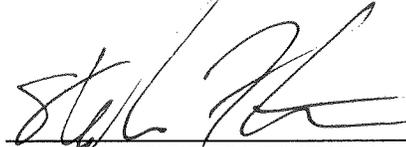
**D. CONCLUSION**

For all of the foregoing reasons, the State respectfully asks  
this Court to affirm Saloy's convictions.

DATED this 3<sup>rd</sup> day of November, 2015.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Christopher Gibson, the attorney for the appellant, at Gibsonc@nwattorney.net, containing a copy of the BRIEF OF RESPONDENT, in State v. Santos A. Saloy, Cause No. 72204-2, in the Court of Appeals, Division I, for the State of Washington.

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

Dated this 3 day of November, 2015.

  
Name:  
Done in Seattle, Washington