

FILED
July 31, 2015
Court of Appeals
Division I
State of Washington
NO. 73351-6-I
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ANDREW ESCARTE,

Appellant.

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

The Honorable Cheryl B. Carey, Judge
The Honorable Brian D. Gains, Judge

MOTION TO WITHDRAW AND BRIEF REFERRING TO
MATTERS IN THE RECORD WHICH MIGHT ARGUABLY
SUPPORT REVIEW

DAVID B. KOCH
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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I. IDENTITY OF MOVING PARTY

Nielsen, Broman & Koch, appointed counsel for appellant, respectfully requests the relief designated in Part II of this motion.

II. STATEMENT OF RELIEF SOUGHT

Appointed counsel for appellant requests permission to withdraw pursuant to RAP 15.2(i) and 18.3(a).

III. FACTS RELEVANT TO MOTION

By order filed April 26, 2015, the King County Superior Court authorized appointment of appellate counsel, and on May 6m 2015, this Court appointed Nielsen, Broman & Koch to represent appellant in his appeal.

In reviewing the case for issues to raise on appeal, appellate counsel did the following:

(a) read and reviewed the verbatim report of proceedings;

(b) read and reviewed all of the clerk's papers and exhibits;

(c) researched all pertinent legal issues and conferred with the attorney that represented Mr. Escarte in the Superior Court concerning legal and factual bases for appellate review;

(d) wrote to appellant, including a letter dated July 31, 2015, explaining the Anders procedure and appellant's right to file a pro se supplemental brief.

IV. GROUND FOR RELIEF

RAP 15.2(i) and 18.3(a) allow an attorney to withdraw on appeal where counsel can find no basis for a good faith argument on review. In accordance with the due process requirements of Anders v. California, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967), State v. Theobald, 78 Wn.2d 184, 185, 470 P.2d 188 (1970), and State v. Pollard, 66 Wn. App. 779, 834 P.2d 51, review denied, 120 Wn.2d 1015 (1992), counsel seeks to withdraw as appellate counsel and allow Mr. Escarte to proceed pro se. Counsel submits the following brief to satisfy his obligations under Anders, Theobald, Pollard, RAP 15.2(i), and RAP 18.3(a).

V. BRIEF REFERRING TO MATTERS IN THE RECORD THAT MIGHT ARGUABLY SUPPORT REVIEW

A. POTENTIAL ASSIGNMENTS OF ERROR

1. The trial court erred when it denied appellant's motion for new counsel.

2. Appellant's guilty pleas were not knowing, intelligent, and voluntary.

Issues Pertaining to Potential Assignments of Error

1. Did the Superior Court err when it denied appellant's motion for new counsel where appellant made his distrust of assigned counsel apparent?

2. Did the Superior Court err when it found appellant's guilty pleas knowing, voluntary, and intelligent?

B. STATEMENT OF THE CASE

Andrew Escarte – along with accomplice Michael Oliveros – was charged with multiple offenses in connection with the October 5, 2013 home invasion robbery of a Kent home in which several individuals resided. CP 1-11.

On March 3, 2014, the Honorable Cheryl Carey heard Escarte's motion to replace appointed counsel – Anuradha Luthra – with new counsel. RP 1. Escarte complained that he could not trust Luthra sufficiently to discuss his case with her and he did not believe she had his best interests in mind, resulting in what he perceived to be a conflict of interest. RP 1-2. Judge Carey denied the motion. RP 3.

Ultimately, the parties reached a plea deal on January 27, 2015. RP 7-8; CP 74. Escarte agreed to plead guilty to one count of Burglary in the First Degree (count 1) and six counts of Robbery

in the First Degree (counts 2-7). Count 1 included a firearm sentencing enhancement and count 2 included a deadly weapon enhancement, resulting in sentences of 60 and 24 months, respectively, to be served consecutively to one another and consecutively to any other term. CP 74. Escarte agreed the court could consider the certification for determination of probable cause as the real facts, agreed his offender score was 12, and agreed to the calculation of his standard ranges, which were 87 to 116 months on count 1 and 129 to 171 months on counts 2 through 7, plus the 84 months in weapon enhancements. CP 74, 83-87. Escarte also agreed to serve 18 months community custody and to pay any restitution. CP 74, 63.

Escarte signed a Statement On Plea of Guilty setting forth the terms of the deal and the rights he waived. CP 60-87. Moreover, at the plea hearing, the prosecutor engaged Escarte in a colloquy to ensure his pleas were knowing, voluntary, and intelligent. RP 8-15. Both the prosecutor and Luthra expressed a belief that Escarte understood what he was doing and the consequences. RP 15. After an additional colloquy between Escarte and the Honorable Judge Brian Gain, Judge Gain accepted the guilty pleas. RP 15-19.

Escarte and Oliveros were sentenced at the same time. RP 21. The State recommended standard range sentences of 116 months on count 1 and 171 months on counts 2 through 7, to run concurrently with each other, and consecutively to the 84 months of firearm and deadly weapon enhancements, for a total of 255 months. RP 23-24. The defense requested low-end sentences. RP 38-40. Judge Gain imposed a low-end sentence of 87 months on count 1 and a close to mid-range sentence of 144 months on counts 2 through 7. With weapon enhancements, Escarte's total sentence is 228 months. RP 43-45; CP 97. Judge Gain also imposed 24 months community custody and waived all non-mandatory financial obligations. RP 45; CP 96-98.

Escarte timely filed a Notice of Appeal. CP 103-104.

C. POTENTIAL ARGUMENTS

1. JUDGE CAREY SHOULD HAVE GRANTED ESCARTE'S MOTION FOR NEW COUNSEL.

Under the Sixth Amendment, a defendant with appointed counsel does not enjoy the same right to counsel of choice as a defendant with the means to hire an attorney. State v. Sanchez, 171 Wn. App. 518, 541-544, 288 P.3d 351 (2012). To warrant substitution of appointed counsel, a defendant "must show good

cause, 'such as a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication.'" State v. Thompson, 169 Wn. App. 436, 457, 290 P.3d 996 (2012) (quoting State v. Schaller, 143 Wn. App. 258, 177 P.3d 1139 (2007)), review denied, 176 Wn.2d 1023, 299 P.3d 1172 (2013).

Attorney-client conflicts warrant the appointment of new counsel "when counsel and the defendant are so at odds as to prevent presentation of an adequate defense." State v. Stenson, 132 Wn.2d 668, 734, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008, 118 S. Ct. 1193, 140 L. Ed. 2d 323 (1998). A general loss of confidence or trust is insufficient. Id. Whether new counsel is justified is a matter within the trial court's discretion. Id. at 733.

Guilty pleas waive most issues for appeal. State v. Majors, 94 Wn.2d 354, 356, 616 P.2d 1237 (1980); Young v. Konz, 88 Wn.2d 276, 283, 558 P.2d 791 (1977). Nonetheless, Escarte could attempt to argue that by pleading guilty he did not waive a challenge to Judge Carey's denial of his motion for new counsel and, on the merits, Judge Carey abused her discretion by denying the motion.

2. ESCARTE'S GUILTY PLEAS ARE NOT KNOWING,
VOLUNTARY, AND INTELLIGENT.

"To be valid, a guilty plea must be intelligently and voluntarily made with knowledge that certain rights will be waived." State v. Branch, 129 Wn.2d 635, 642, 919 P.2d 1228 (1996) (citation omitted). Among these rights are the right to a jury trial, to confront one's accusers, and the privilege against self-incrimination. Boykin v. Alabama, 395 U.S. 238, 243, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969).

Whether a plea is knowingly, intelligently, and voluntarily made is determined from a totality of the circumstances. Branch, 129 Wn.2d at 642 . CrR 4.2 controls the procedure for taking pleas and requires that the record of the plea hearing demonstrate that a plea was entered voluntarily and intelligently. Branch, 129 Wn.2d at 642.

Although Escarte has never moved to withdraw his pleas, on appeal he could attempt to argue his pleas were not the product of a knowing, voluntary, and intelligent waiver.

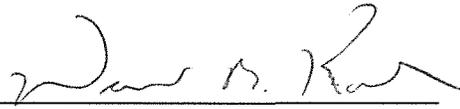
D. CONCLUSION

Counsel respectfully moves this Court for permission to withdraw as attorney of record and to permit Escarte to proceed pro se.

DATED this 31st day of July, 2015.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

A handwritten signature in cursive script, appearing to read "David B. Koch", written over a horizontal line.

DAVID B. KOCH
WSBA No. 23789
Office ID No. 91051

Attorneys for Appellant

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DIVISION ONE

STATE OF WASHINGTON/DSHS)	
)	
Respondent,)	
)	
v.)	COA NO. 73351-6-I
)	
ANDREW ESCARTE,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 31ST DAY OF JULY, 2015 I CAUSED A TRUE AND CORRECT COPY OF THE **MOTION TO WITHDRAW AND BRIEF REFERRING TO MATTERS IN THE RECORD WHICH MIGHT ARGUABLY SUPPORT REVIEW** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] ANDREW ESCARTE
DOC NO. 381194
COYOTE RIDGE CORRECTIONS CENTER
P.O. BOX 769
CONNELL, WA 99326

SIGNED IN SEATTLE WASHINGTON, THIS 31ST DAY OF JULY, 2015.

x *Patrick Mayovsky*