

original

07 SEP 14 AM 09:01

No. 35738-1-II

STATE OF WASHINGTON
BY mm

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

NORMAN FLOYD WHITTIER,

Appellant.

FILED
COURT OF APPEALS DIV. II
STATE OF WASHINGTON
2007 AUG 30 PM 4:52

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

The Honorable Sergio Armijo

BRIEF OF APPELLANT

THOMAS M. KUMMEROW
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR 1

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR..... 1

C. STATEMENT OF THE CASE2

D. ARGUMENT4

DEFENSE COUNSEL’S RESPONSE TO MR.
WHITTIER’S COMMENTS AT SENTENCING
DIRECTLY CONTRADICTING HIM AND
ADVOCATING ON HER OWN BEHALF CREATED
AN IRRECONCILABLE CONFLICT DENYING MR.
WHITTIER HIS RIGHT TO COUNSEL AT
SENTENCING 4

1. Mr. Whittier had the right to counsel at the sentencing
and motion to withdraw the guilty plea hearing4

2. The court denied Mr. Whittier’s right to counsel at the
sentencing hearing by creating a conflict between Ms. Corey
and Mr. Whittier.5

3. The remedy for the abandonment of counsel at
sentencing by defense counsel is to vacate Mr. Whittier’s
sentence and remand for a hearing.9

E. CONCLUSION 10

TABLE OF AUTHORITIES

UNITED STATES CONSTITUTIONAL PROVISIONS

U.S. Const. amend. VI.....4

FEDERAL CASES

Coleman v. Alabama, 399 U.S. 1, 90 S.Ct. 1999, 26 L.Ed.2d 387
(1970)5

North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162
(1970)3

United States v. Gonzalez, 113 F.3d 1026 (9th Cir. 1997), *cert.*
denied, 526 U.S. 1057 (1999)..... 7, 8, 10

United States v. Sanchez-Barreto, 93 F.3d 17 (1st Cir. 1996), *cert.*
denied, 519 U.S. 1068 (1997)..... 8

United States v. Wadsworth, 830 F.2d 1500 (9th Cir. 1987)6, 7

WASHINGTON CASES

State v. Robinson, 153 Wn.2d 689, 107 P.3d 90 (2005) 4

State v. Rupe, 108 Wn.2d 734, 743 P.2d 210 (1987)..... 4

A. ASSIGNMENTS OF ERROR

1. The court erred in effectively denying Mr. Whittier's motion to substitute counsel.

2. The court erred in effectively denying Mr. Whittier's motion to withdraw his guilty plea.

2. The trial court denied Mr. Whittier the right to counsel at the hearing on his motion to substitute counsel and motion to withdraw his guilty plea.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

A defendant has the constitutionally protected right to counsel at all critical stages of the proceedings including sentencing. A defendant may be left without the assistance of counsel where the attorney and defendant have a conflict. When the court invited Mr. Whittier's attorney to contradict Mr. Whittier during the hearing on motion to withdraw his guilty plea and for the appointment of new counsel, thereby undermining Mr. Whittier's veracity, was Mr. Whittier left to defend himself without counsel during the hearings, thus violating his constitutionally protected right to counsel?

C. STATEMENT OF THE CASE

Norman Whittier was originally charged with one count of assault in the first degree, intimidating a witness, and felony harassment. CP 1-2. The parties subsequently entered into a plea agreement with Mr. Whittier entering an *Alford*¹ plea to an amended information which charged only one count of intimidating a witness and one count of felony harassment. CP 37-47. As part of the agreement, the parties stipulated to an exceptional sentence which consisted of the statutory maximum for the two offenses; ten years for the intimidating a witness count and five years for the felony harassment to run consecutive to each other for a total sentence of 15 years (180 months). CP 43.

At sentencing, Mr. Whittier moved to replace his appointed counsel, Barbara Corey, and withdraw his guilty plea. RP 177 (“Judge, my client wishes to fire me at this point and withdraw his plea so I don’t know how the Court wants to proceed.”). The court allowed Mr. Whittier to speak and the court read the written note Mr. Whittier had provided. RP 178. The prosecutor objected to the motions on timeliness grounds. RP 178-79. The court then invited Ms. Corey to respond:

¹ *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

I understand that my client doesn't wish me to represent him and that he wants to, you know, try to withdraw his plea. I think the Court was here, obviously, last Thursday and took the plea from him that was made after we read through the police statement, after he and I extensively discussed the State's plea offer and the benefit to him of that offer. He did sign the plea paperwork and assure the Court his plea was knowing, intelligent and voluntary.

With regard to his criticism of me, I want to put this on the record: One, I did go see him many times. I received numerous mail from him, all of which was read. I interviewed [the victim]. He's apparently angry with some idea that at one point when she was in jail I told the prosecutor she was in jail. The Court obviously knows that the prosecutor knows who's in jail better than a defense attorney.

RP 179.

When Mr. Whittier attempted to say something he was cut short by Ms Corey:

I'm speaking. He was angry that Mr. Blinn was not the prosecutor throughout the time. Mr. Blinn has been on the case as long as I've been on the case.

He also said I didn't talk to his friends. His friends called, they proposed names of witnesses. I gave them to our investigator. Bob Crew talked to everybody. We have thoroughly worked up the case. I interviewed all the witnesses, wrote motions on his behalf.

It was my opinion last Thursday that his plea was knowing, intelligent, and voluntary. That's my opinion today. I think he regrets having entered the plea but the plea is not defective.

RP 180.

The court ruled on neither of Mr. Whittier's motions, thus effectively denying the motions, noting:

Okay. Let's proceed to sentencing.

RP 180.

The court ultimately sentenced Mr. Whittier to the stipulated exceptional sentence. CP 43, 56; RP 185.

D. ARGUMENT

DEFENSE COUNSEL'S RESPONSE TO MR. WHITTIER'S COMMENTS AT SENTENCING DIRECTLY CONTRADICTING HIM AND ADVOCATING ON HER OWN BEHALF CREATED AN IRRECONCILABLE CONFLICT DENYING MR. WHITTIER HIS RIGHT TO COUNSEL AT SENTENCING

1. Mr. Whittier had the right to counsel at the sentencing and motion to withdraw the guilty plea hearing. A criminal defendant has a right to counsel at every critical stage of the proceedings. U.S. Const. amend. 6; *Coleman v. Alabama*, 399 U.S. 1, 90 S.Ct. 1999, 26 L.Ed.2d 387 (1970). "Sentencing is a critical stage of the proceedings, at which a defendant is constitutionally entitled to be represented by counsel." *State v. Robinson*, 153 Wn.2d 689, 694, 107 P.3d 90 (2005); *State v. Rupe*, 108 Wn.2d 734, 741, 743 P.2d 210 (1987).

2. The court denied Mr. Whittier's right to counsel at the sentencing hearing by creating a conflict between Ms. Corey and Mr. Whittier. In *United States v. Wadsworth*, the Ninth Circuit ruled that the trial court can create a conflict between counsel and his or her client thereby denying the client his or her constitutionally protected right to counsel, when the court invites counsel in open court to contradict his or her client, thereby undermining the client's credibility. 830 F.2d 1500, 1510 (9th Cir. 1987). In *Wadsworth*, the defendant had moved for substitute counsel a day prior to the beginning of trial, alleging counsel was unprepared and incompetent. *Id* at 1505. A hearing on the motion was held in open court and allowed the defendant to present his case. During the defendant's argument, the prosecutor continually interrupted pointing out details to the court. *Id* at 1506-07. At the conclusion of the defendant's argument, the court invited defense counsel to respond. *Id*. Defense counsel directly contradicted his client when he justified his preparation and performance in the case. *Id* at 1507. The court denied the defendant's motion, relying on the unsworn statements of the prosecutor and defense counsel. *Id* at 1506. The Ninth Circuit disagreed with the district court's conclusion and reversed the defendant's conviction, finding:

We are also convinced that the proceeding conducted by the court on defendant's motions resulted in the denial of his right to due process and the right to counsel *at that hearing*.

...
The record shows that the district court relied heavily on [counsel]'s claim of a lack of cooperation and hostility towards his client in ruling that the defendant must proceed to trial the next day without an attorney or time to prepare a defense. Thus, not only was the defendant unrepresented by counsel at this hearing, his attorney admitted that he was bitter about his client's lack of confidence in him and provided the most damaging evidence against his client's demand that the court substitute competent counsel for his defense. Under the unusual circumstances of this case, the district court should have suspended the proceedings and appointed an attorney for the defendant at the competency of counsel hearing, as soon as it became apparent that [counsel] had taken an adversary and antagonistic position on a matter concerning his client's right to counsel and to prepare for trial.

(Italics in original.) *Wadsworth*, 830 F.2d at 1510-11.

Wadsworth was subsequently followed by *United States v. Gonzalez*, 113 F.3d 1026 (9th Cir. 1997), *cert. denied*, 526 U.S. 1057 (1999). In *Gonzalez*, Mr. Gonzalez moved for substitution of counsel after pleading guilty but before the sentencing hearing, asserting that his attorney coerced and physically intimidated him into pleading guilty. *Gonzalez*, 113 F.3d at 1028.

Gonzalez, in answer to the court's question whether he still wanted a new attorney and why, stated that [counsel] had forced him to plead. The court then

asked [counsel], in open court and in the presence of Gonzalez, whether this charge was true. [Counsel] denied it. At that point, the government urged the court to conduct a hearing on Gonzalez's motion. The court declined to do so and denied the motion, essentially on the strength of Gonzalez's sworn responses at the plea-taking that no one was threatening him or forcing him to plead; the court then sentenced Gonzalez.

Gonzalez, 113 F.3d at 1028. The Ninth Circuit reversed Mr. Gonzalez's sentence, finding the district court's actions had exacerbated any existing conflict between counsel and Mr. Gonzalez:

Whatever conflict may have existed between Gonzalez and his attorney going into the sentencing hearing, the district court clearly created one when it questioned Gonzalez's attorney in open court with Gonzalez present. When the court invited [counsel] to contradict his client and to undermine his veracity, Gonzalez in effect "was left to fend for himself *without* representation by counsel"

(Emphasis in original.) *Gonzalez*, 113 F.3d at 1029, *quoting United States v. Sanchez-Barreto*, 93 F.3d 17, 22 (1st Cir. 1996), *cert. denied*, 519 U.S. 1068 (1997).

In the case at bar, Mr. Whittier found himself in the same predicament in which Messrs. Gonzalez and Wadsworth found themselves. Once the court sought comments from Ms. Corey regarding Mr. Whittier's allegations, in open court in front of Mr.

Whittier and the prosecutor, the court created a conflict between Ms. Corey and Mr. Whittier which left Mr. Whittier to fend for himself without the assistance of counsel, the same as Mr. Gonzalez and Mr. Wadsworth. Instead of holding an *in camera* hearing or an evidentiary hearing where both counsel for the State and Ms. Corey could testify under oath, the court relied upon the unsworn statements of the prosecutor and Ms. Corey in effectively denying Mr. Whittier's motions.

Whatever conflict may have existed between Mr. Whittier and Ms. Corey prior to the hearings on the motions, Ms. Corey clearly created one when she advocated for the guilty plea, thereby undermining Mr. Whittier's credibility. Ms. Corey justified her representation and preparation prior to the plea hearing then gratuitously offered her opinion that Mr. Whittier's guilty plea was knowing, voluntary, and intelligent, *and* her unsolicited opinion that Mr. Whittier's actions were based upon his regret about having entered the guilty plea. RP 180. Ms. Corey's statements constituted an abandonment of her role as counsel for Mr. Whittier and left him without counsel at the sentencing hearing. Consequently, Mr. Whittier's constitutionally guaranteed right to counsel at all critical stages of the proceedings was violated.

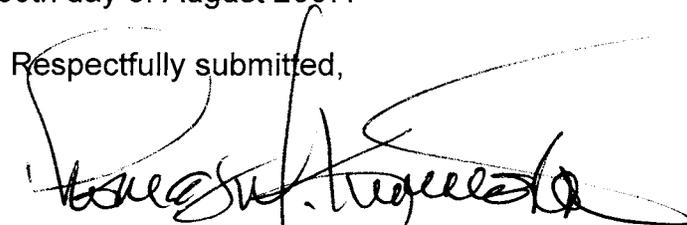
3. The remedy for the abandonment of counsel at sentencing by defense counsel is to vacate Mr. Whittier's sentence and remand for a hearing. The remedy for the denial of counsel at the sentencing hearing is to vacate the sentence and remand for the appointment of new counsel, and a hearing on the motion to withdraw the guilty plea. *Gonzalez*, 113 F.3d at 1029. Because of his attorney's abandonment of him during the sentencing hearing, Mr. Whittier was denied his right to counsel. As a result, this Court must reverse Mr. Whittier's sentence and remand for the appointment of new counsel and a hearing on his motion to withdraw his guilty plea.

E. CONCLUSION

For the reasons stated Mr. Whittier submits this Court must reverse his sentence and remand to the trial court for the appointment of counsel and a hearing on the motion to withdraw the guilty plea.

DATED this 30th day of August 2007.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Thomas M. Kummerow', is written over a horizontal line. The signature is stylized and cursive.

THOMAS M. KUMMEROW (WSBA 21518)
Washington Appellate Project – 91052
Attorneys for Appellant

