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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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NO. 36118-3-II

**COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II**

STATE OF WASHINGTON,

Respondent,

vs.

JOHN ALPHONSE FISHER,

Appellant.

BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
I. ASSIGNMENTS OF ERROR.....	1
1. The trial court erred when it compelled defendant John Fisher to be represented at resentencing by his trial attorney when the trial attorney had a conflict at resentencing.	1
2. The trial court's error denied Fisher effective representation at resentencing.	1
II. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR.....	1
1. A criminal defendant is entitled to the effective assistance of counsel at a resentencing hearing. When defendant John Fisher was before the court for resentencing, his trial attorney claimed a conflict of interest and the court agreed that there was a conflict. But rather than assign conflict-free counsel to assist Fisher at resentencing, the court resentenced Fisher assisted by the attorney who the court declared had a conflict. Was Fisher deprived of his right to counsel?.....	1
III. STATEMENT OF THE CASE	1
IV. ARGUMENT.....	5
A. THE COURT DENIED FISHER HIS CONSTITUTIONAL RIGHT TO AN EFFECTIVE, CONFLICT-FREE ATTORNEY AT RESENTENC-ING.	5
(1) A defendant is entitled to effective attorney representation at resentencing.	5
(2) An attorney with a conflict is no attorney at all.....	7
V. CONCLUSION.....	9

TABLE OF AUTHORITIES

	Page
Cases	
<i>Chapman v. California</i> , 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)	8
<i>Holloway v. Arkansas</i> , 435 U.S. 475, 98 S. Ct. 1173, 55 L. Ed. 2d 426 (1978)	8
<i>In re Personal Restraint of Richardson</i> , 100 Wn. 2d 669, 675 P.2d 209 (1983)	8
<i>Powell v. Alabama</i> , 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158 (1932)	7
<i>State v. Davenport</i> , 167 P.3d 1221, Wash. App. LEXIS 2685 (Sept. 25, 2007).....	6
<i>State v. Davis</i> , 141 Wn.2d 798, 10 P.3d 977 (2000).....	7
<i>State v. McDonald</i> , 96 Wn. App. 311, 979 P.2d 857 (1999)	8
<i>State v. Rupe</i> , 108 Wn.2d 734, 743 P.2d 210 (1987)	5
<i>State v. White</i> , 80 Wn. App. 406, 907 P.2d 310 (1995).....	7
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 674 (1984)	7
<i>Wood v. Georgia</i> , 450 U.S. 261, 1010 S. Ct. 1097, 1103, 67 L. Ed. 2d 220 1981).....	7
Other Authorities	
United States Constitution Sixth Amendment.....	5

Walter V. Shaefer, *Federalism and State Criminal Procedure*, 70
Harv. L. Rev. 1, 8 (1956)..... 6

Washington State Constitution Article I, Section 22 5

I. ASSIGNMENTS OF ERROR

- 1. The trial court erred when it compelled defendant John Fisher to be represented at resentencing by his trial attorney when the trial attorney had a conflict at resentencing.**
- 2. The trial court's error denied Fisher effective representation at resentencing.**

II. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

- 1. A criminal defendant is entitled to the effective assistance of counsel at a resentencing hearing. When defendant John Fisher was before the court for resentencing, his trial attorney claimed a conflict of interest and the court agreed that there was a conflict. But rather than assign conflict-free counsel to assist Fisher at resentencing, the court resentenced Fisher assisted by the attorney who the court declared had a conflict. Was Fisher deprived of his right to counsel?**

III. STATEMENT OF THE CASE

A last-minute plea deal was struck. RP 1-2. Defendant John Fisher plead guilty to a second amended information charging two counts of second degree assault each with a 12-month deadly weapon enhancement. RP 2-7; CP 3-10. Rather than impose a

standard range sentence, Fisher joined the state in asking the court to impose an exceptional sentence of 48 months.¹ RP 2; CP 11.

On June 15, 2006, the court, Judge Nichols, accepted the plea and the 48-month sentencing recommendation. RP 7, 10-11. Fisher had no prior offenses that counted in his offender score but each assault counted against the other giving him an offender score on each assault of 2 with a presumptively concurrent range of 12-14 months on each count. RP 4, 8. With a 12-month weapon enhancement added to each range, Fisher faced 24-26 months on each count. RP 4, 8. Missing from both the state's and Fisher's sentencing argument was any specific calculation as to how the 48-month sentence would be structured. RP 8-11. The court simply adopted the recommendation and did not articulate on the record how it structured the 48-month sentence. RP 11. Instead, the court specified in the judgment and sentence that 48 months were to be served concurrently on each count. CP 17.

On August 15, 2006, the court received a letter from the Department of Corrections (DOC). CP 24-36. DOC found an

¹ Practically speaking, without the exceptional sentence, Fisher was facing 36-38 months. The substantive range on each count was 12-14 months, plus the 12 month enhancement, made for a total of 24-26 months. The range established for the substantive part of each sentence is presumptively concurrent (12-14 months). The enhancement time is consecutive to the whole sentence (an additional 24 months added to the presumptive concurrent range).

inconsistency on the judgment and sentence: section 2.3 of the judgment and sentence noted the 12-month weapon enhancement on each count; but under section 2.1 there was no deadly weapon finding as to either count. CP 24. DOC asked for clarification of the sentence. CP 24. Did the 48-month exceptional sentence include two weapon enhancements or not?

In response to DOC's letter, Judge Nichols presided over a resentencing hearing on February 22, 2007. RP 13-19. Fisher was present and represented by his original trial counsel, Matthew Hoff. RP 13-19. Attorney Hoff started the hearing by explaining that he understood all parties at the original sentencing were in agreement to the following sentence: 12 months for each of the two assaults and 12 months for each of the two enhancements all of which would run consecutively for a total of 48-months. RP 13. Immediately, Fisher voiced an objection telling the court that he did not want to capitalize on any misunderstanding about his original plea and sentence and thus, would not claim a specific performance remedy. RP 13. Rather, Fisher stated that he wished to withdraw his plea. RP 13.

Hoff responded that he and Fisher had a different recollection of events and that he would not help Fisher withdraw

his plea. RP 13. The court agreed Hoff and Fisher had a conflict based upon their different understanding about the original sentence. RP 14. Rather than appoint a conflict-free attorney to assist Fisher at the resentencing, the court bifurcated the proceedings. RP 14. Hoff remained Fisher's counsel on the resentencing. RP 14-19. The court appointed the Vancouver Defenders to assist Fisher in a future motion to withdraw his plea. RP 17; CP 40.

With Hoff's approval, but without Fisher's approval, the court signed the state's Order Correcting Judgment and Sentence. RP 13-19; CP 38-39. The Order modified the original judgment and sentence by adding deadly weapons findings to both counts I and II, and by clarifying that the sentence on each count was 12 months. CP 38-39. Thus, the total sentence was 48 months. CP 38-39.

On March 23, Fisher filed a notice of appeal of the February 22 modification to his judgment and sentence. CP 41.

On May 21, attorney Jeff Simpson from the Vancouver Defenders filed a motion and a supporting brief to withdraw Fisher's guilty plea that included a declaration from Fisher. CP 42-53.

Judge Nichols heard and denied the motion on June 21. RP 20-31. On June 26, Fisher filed an amended notice of appeal requesting that the denial of his motion to withdraw his plea be added to the existing appeal.² CP 59-60.

IV. ARGUMENT

A. THE COURT DENIED FISHER HIS CONSTITUTIONAL RIGHT TO AN EFFECTIVE, CONFLICT-FREE ATTORNEY AT RESENTENCING.

(1) A defendant is entitled to effective attorney representation at resentencing.

Effective assistance of counsel is guaranteed by the United States Constitution Sixth Amendment and Washington State Constitution Article I, Section 22. The right to effective counsel is constitutionally guaranteed at all critical stages of a criminal proceeding, including sentencing. *State v. Rupe*, 108 Wn.2d 734, 741, 743 P.2d 210 (1987) ("Sentencing is a critical stage of the proceedings, at which a defendant is constitutionally entitled to be

² In Appellant's Brief, I have only addressed an issue pertaining to the resentencing hearing. I assume defendant Fisher will address issues pertaining to both of the original notice of appeal and the amended notice of appeal in his Statement of Additional Grounds for Review (SAG).

represented by counsel.") See also CrR 3.1³ This right extends to resentencing hearings. *State v. Davenport*, 167 P.3d 1221, Wash. App. LEXIS 2685 (Sept. 25, 2007).

The primary importance of the right to counsel cannot be overemphasized: "[o]f all the rights that 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 rights he may have." Walter V. Shaefer, *Federalism and State Criminal Procedure*, 70 Harv. L. Rev. 1, 8 (1956). Over 65 years ago, United States Supreme Court Justice Sutherland wrote:

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may

³ CrR 3.1 RIGHT TO AND ASSIGNMENT OF LAWYER

(a) Types of Proceedings. The right to a lawyer shall extend to all criminal proceedings for offenses punishable by loss of liberty regardless of their denomination as felonies, misdemeanors, or otherwise.

(b) Stage of Proceedings.

.....
(2) A lawyer shall be provided at every stage of the proceedings, including sentencing, appeal, and post-conviction review. A lawyer initially appointed shall continue to represent the defendant through all stages of the proceedings unless a new appointment is made by the court following withdrawal of the original lawyer pursuant to section (e) because of geographical considerations or other factors make it necessary.

be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect. If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.

Powell v. Alabama, 287 U.S. 45, 68-69, 53 S. Ct. 55, 77 L. Ed. 158 (1932).

(2) An attorney with a conflict is no attorney at all.

Effective assistance of counsel includes the right to conflict-free counsel. *State v. Davis*, 141 Wn.2d 798, 860, 10 P.3d 977 (2000) (citing *Wood v. Georgia*, 450 U.S. 261, 271, 1010 S. Ct. 1097, 1103, 67 L. Ed. 2d 220 1981)). Effective assistance includes "a duty of loyalty, [and] a duty to avoid conflicts of interest." *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 674 (1984). An actual conflict of interest exists "when a defense attorney owes duties to a party whose interests are adverse to those of the defendant." *State v. White*, 80 Wn. App.

406, 411-12, 907 P.2d 310 (1995) . When defense counsel asks to withdraw because he has a conflict of interest, and the trial court fails to inquire into the nature of the conflict, reversal is required even if there is no actual prejudice. *In re Personal Restraint of Richardson*, 100 Wn. 2d 669, 675 P.2d 209 (1983). In other words, when a trial court requires an attorney who asserts a conflict of interest to continue representing a defendant without making a full inquiry into the nature and potential consequences of the conflict, "reversal is automatic." This is because the "assistance of counsel is among those 'constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error.'" *State v. McDonald*, 96 Wn. App. 311 , 319, 979 P.2d 857 (1999). *Holloway v. Arkansas*, 435 U.S. 475, 444-89, 98 S. Ct. 1173, 55 L. Ed. 2d 426 (1978) (quoting *Chapman v. California*, 386 U.S. 18, 23, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967) (Stewart, J. concurring)).

Here, the trial court committed reversible error when it failed to conduct a sufficient inquiry into attorney Hoff's request to withdraw due to a conflict of interest. At resentencing, Hoff offered information about the intended structure of the original sentence. Hoff said that this information was "agreed." Fisher strongly objected to any such agreement. Hoff told the court that he was

aware of Fisher's disagreement that they were at odds over it. In fact, Hoff asserted a claim of ineffective assistance of counsel and asked to withdraw from any further representation of Fisher. Although Hoff claimed that there was a conflict and even moved to withdraw, the court failed to inquire into the conflict. Instead, the court went ahead with the resentencing even though Fisher was not represented by the conflict-free counsel guaranteed by the state and federal constitutions.

V. CONCLUSION

Fisher's case should be remanded for resentencing. At that resentencing, Fisher should be represented by conflict-free effective counsel.

Respectfully submitted this 19th day of November, 2007



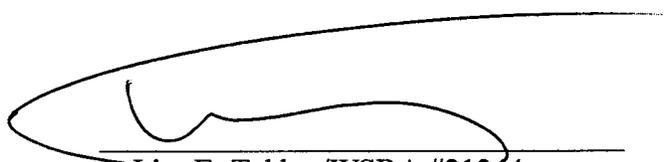
LISA E. TABBUT WSBA #21344
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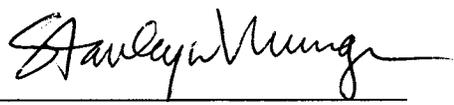
- (1) APPELLANT'S BRIEF
- (2) AFFIDAVIT OF MAILING

Dated this 19th day of November 2007



~~Lisa E. Tabbut~~ / WSBA #21344
Attorney for Appellant

SUBSCRIBED AND SWORN to before me this 19th day of November 2007.



Stanley W. Munger
Notary Public in and for the
State of Washington
Residing at Longview, WA 98632
My commission expires 05/24/08

