

COURT OF APPEALS DIVISION II  
STATE OF WASHINGTON

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NO. 36818-8-II

STATE OF WASHINGTON,

Appellant.

vs.

MICHAEL MCBROOM

Respondent.

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FILED  
COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
BY *[Signature]*  
DEPUTY

**RESPONSE BRIEF**

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## STATEMENT OF THE CASE

The Appellant's statement of the case is adequate for the purposes of responding to this appeal.

### ARGUMENT

#### **I. THE TRIAL COURT DID NOT ERR IN REFUSING TO APPOINT NEW COUNSEL FOR THE DEFENDANT.**

McBroom argues that the trial court should have appointed new counsel for him because his relationship with his attorney had "disintegrated" and because McBroom had filed a "non-frivolous" bar complaint against his trial counsel. There is no merit to these arguments.

Whether an "indigent defendant's dissatisfaction with court-appointed counsel is justified and warrants the appointment of a new lawyer lies within the sound discretion of the trial court." State v. Sinclair, 46 Wn.App. 433, 730 P.2d 742 (1986), citing State v. Dougherty, 33 Wn.App. 466, 471, 655 P.2d 1187 (1982); State v. Brittain, 38 Wn.App. 740, 689 P.2d 1095 (1984). Furthermore, a defendant's filing of a bar complaint against his attorney does not mean that trial counsel must be permitted to withdraw. Merely filing a bar complaint does not show an actual conflict of interest unless a defendant can show that his counsel actively represented

conflicting interests. State v. Martinez, 53 Wn.App. 709, 715-16, 770 P.2d 646 (1989) (discussing conflicting interests). Indeed, were filing a bar complaint against his attorney "sufficient to disqualify court-appointed counsel. . . a defendant could force the appointment of a new attorney simply by filing such a complaint, regardless of its merit." State v. Sinclair 46 Wn.App. at 437 (holding that the trial court did not abuse its discretion by denying Sinclair's request for a new attorney despite his filing of a bar complaint).

Courts in other jurisdictions have likewise held that a defendant's filing of a bar complaint against his counsel does not *per se* disqualify the attorney. See e.g., State v. Estacio, 208 Or.App. 107, 144 P.3d 1016 (2006), where that court held, "[d]efendant's unspecified bar complaint failed to demonstrate an actual conflict of interest as distinguished from a theoretical one and therefore his complaint did not require the trial court to make further inquiry or to grant defendant's motion," citing Mickens v. Taylor, 535 U.S. 162, 172, 122 S.Ct. 1237, 152 L.Ed.2d 291 (2002); Wood v. Georgia, 450 U.S. 261, 272-74, 101 S.Ct. 1097, 67 L.Ed. 2d 220 (1981); State v. Taylor, 207 Or.App. 649, 142 P.3d 1093 (Or.App. 2006)(Under all of the circumstances, "including the fact

that defendant had filed an ethics complaint against his counsel, the trial court did not abuse its discretion in refusing to appoint another attorney); State v. Robertson, 30 Kan.App. 2d 639, 641-42, 44 P.2d 1283 (2002) (filing of a disciplinary complaint against defense counsel does not create a *per se* conflict of interest); State v. Scales, 946 P.2d 377, 381-383 (Utah Ct.App. 1997)(indigent defendant does not have a constitutional right to substitute counsel simply because he filed a complaint against his appointed attorney) Shegog v. Commonwealth, 142 S.W.3d 101, 105-06 (Ky. 2004) ("we do not agree with [the defendant] that the filing of a bar complaint against a public defender automatically entitles a defendant to new counsel"); People v. Johnson, 592 N.E.2d 345, 355 (Ill. Ct.App. 1992)(noting "the danger of any holding implying that defendants can manufacture conflicts of interest by initiating lawsuits against their attorneys"); Dunn v. State, 819 S.W.2d 510, 519 (Tex. Crim.App. 1991)(filing of civil action against court appointed counsel not *per se* conflict of interest warranting disqualification of attorney "at the whim of the criminal defendant"); State v. Michael, 161 Ariz. 382, 385, 778 P.2d 1278 (1989) ("[a]s a matter of public policy, a defendant's filing of a bar complaint against his attorney should not mandate removal of that attorney");

Gains v. State, 706 So.2d 47, 49 (Fla.App. 5 Dist. 1998)("the filing of a bar complaint against the [public defender] does not automatically create a conflict of interest requiring the appointment of substitute counsel" citing Boudreau v. Carlisle, 549 So.2d 1073, 1077 (Fla. 4th DCA 1989)*dismissed*, 557 So.2d 866 (1990)).

Moreover, "a criminal defendant who is dissatisfied with appointed counsel must show good cause to warrant substitution of counsel, such as a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication." In re Personal Restraint of Stenson, 142 Wn.2d 710, 723, 16 P.3d 1 (2001). A reviewing court will review a trial court's refusal to appoint new counsel for an abuse of discretion and will examine three factors: (1) the extent of the conflict, (2) the adequacy of the inquiry, and (3) the timeliness of the motion. State v. Cross, 156 Wn.2d 580, 132 P.3d 80 (2006); In re Stenson 142 Wn.2d at 723, 724, citing United States v. Moore, 159 F.3d 1154, 1158-59 (9th Cir. 1998).

**A. The filing of a bar complaint against trial counsel does not create a conflict of interest *per se* which would automatically require recusal of trial counsel.**

As set out above, the case law shows that the mere filing of a bar complaint is insufficient to show an actual conflict of interest--

unless the defendant can show that counsel *actively represented conflicting interests*. There has been no such showing here. There is nothing in the record showing that trial counsel's learning about the filing of the bar complaint caused him to represent conflicting interests. For one thing, trial counsel in this case only learned about the bar complaint *on the day of trial*. 7/18/07 RP 10 (trial counsel saying about the bar complaint, "Well, that's the first I've heard of that, your honor.") For another, although the Defendant continually refers in his brief to a "non-frivolous" bar complaint, the State has no idea *how* McBroom has determined that the bar complaint was "non frivolous." The Washington State Bar Association Office of Disciplinary Counsel is the entity in charge of determining whether a Bar complaint is frivolous --this determination is certainly not made by the person filing the complaint. The State simply has no idea how McBroom came up with the conclusion that his complaint was "non-frivolous." However, even if the bar complaint was "non-frivolous," the case law does not hold that an attorney must withdraw simply because a complaint is filed. State v. Sinclair, supra. Moreover, there has been no showing that counsel here actively represented "conflicting interests," especially given the fact that counsel only learned of the

bar complaint on the day of trial. 7/18/07 RP 10. In any event, according to the above-set out law, the mere filing of a bar complaint by the defendant against his counsel in the instant case does not mean that his counsel had to withdraw because of the bar complaint. As the cases say, if this were true then defendants would be filing bar complaints continuously just to "get rid of" his or her attorney. State v. Sinclair, supra; People v. Johnson, supra. Moreover, McBroom's conclusion that his Bar complaint against his trial counsel was "non-frivolous" is simply not supported by any authority and should not be given consideration by this Court.

In sum, McBroom cannot show that the filing of a bar complaint against his trial counsel created a *per se* conflict of interest and his argument to the contrary is without merit.

**B. Trial counsel was not rendered "ineffective" because of the Bar complaint.**

McBroom also argues that his trial counsel was rendered "ineffective" due to the "conflict of interest" caused by McBroom's filing of the Bar complaint, which McBroom argues "seems to have influenced" his attorney at trial. Brief of Appellant 20. This argument, too, is without merit. As touched upon previously, there is nothing in this record to support McBroom's claim that his filing of

a Bar complaint either created an actual conflict of interest, or that this supposed conflict adversely affected the way his trial counsel handled his case.

Both the State and Federal Constitutions guarantee the right to effective assistance of counsel in criminal proceedings.

Strickland v. Washington, 466 U.S. 668, 684-86, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Strickland established a two-part test for ineffective assistance of counsel. First, the defendant must show deficient performance. Id. at 688-89. A Court's review of counsel's performance is highly deferential and the reviewing court will begin its analysis with a strong presumption of reasonableness. State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). If counsel's conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim. State v. Adams, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978). Also, "case law does not support the application of the concept of a conflict of interest to conflicts between an attorney and client over trial strategy." In re Personal Restraint of Stenson, 142 Wn.2d at 722 (emphasis added). Furthermore, "the Sixth Amendment does not guarantee a meaningful relationship between an accused and his counsel." In re Stenson, 142 Wn.2d at 725, *citing* Morris v. Slappy, 461 U.S. 1,

3-4, 103 S.Ct. 1610, 75 L.Ed.2d 610 (1983) (rejecting [Slappy's] claim that a defendant has a right to a certain "rapport" with his attorney). Again, case law does not hold that the mere filing of a Bar complaint by a criminal defendant against his attorney automatically creates a conflict of interest for his attorney. State v. Sinclair, supra; State v. Scales, supra; State v. Robertson, supra. Second, under Strickland, the defendant must show prejudice - "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996) (*quoting Strickland*, 466 U.S. at 687). To meet the second prong, a defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Thomas, 109 Wn.2d at 226 (*quoting Strickland*, 466 U.S. at 694). McBroom cannot meet any of these tests.

McBroom claims that he filed a Bar complaint against his counsel because his counsel was ineffective because his counsel refused "to obtain an independent test of the drugs, his poor communication with Mr. McBroom, and his unrealistic threat of an

exceptional sentence if Mr. McBroom refused to plead guilty." Brief of Appellant 20. McBroom's attorney said that he had no reason to believe that the Washington State Patrol Crime Lab's processes for testing were defective. 7/18/07 RP 9; 18. The trial court also asked trial counsel about the substance, "Mr. McBroom has provided you with nothing that would indicate that it could possibly be some other substance, controlled or otherwise, other than methamphetamine?" Defense counsel replied, "no." 7/18/07 RP 19.

McBroom's trial counsel also explained:

What I was trying to explain to [the defendant] also, albeit in a polite way, was issues of trial strategy and whether or not to make objections to evidence or stipulate to the admissibility of evidence is a trial tactic issue which is generally considered the providence [sic] of the attorney. He [the defendant] has certain rights obviously as well, but it's not to conduct the trial itself. I mean, obviously if he were in a position to pay for an independent drug test, I mean, he could do that. What I indicated to him was I wasn't intending to myself seek a --an additional test because I did not have reason to suspect that results produced by the Washington State Patrol Crime Lab were not valid. And certainly, if there was an issue about that since at least on this criminal defense panel, in this county, all of the attorneys talk quite frequently, and if there was any whisper that there was some issue with the credibility of the results produced by the Washington State Patrol Crime Lab, I am certain I would have heard about them, and I've never been privy to any such information, nor have I heard any such rumor.

7/18/07 RP 11, 12 (statement by Defense Counsel Havarco). And, as to the other issues regarding his representation of McBroom defense counsel said:

[W]hat I told him [the defendant] was that it's only if he has more than one current offense pursuant to *State vs. Stevens* that you can get more than 24 months. Just based on his history, certainly the court could impose a sentence of the top end of the range of 24 months. The State had offered --his range is 12 to 24 months. He has a range of --rather an offender score of 9 plus points, and the state had offered 16 months, so I was just trying to explain to him the various reasons why it could make sense to enter a plea in this situation. If he does take the stand, there are numerous impeachable offenses that I anticipate that could come in that the jury could learn about.

7/18/07 RP 13, 14. As to the issue of the amount of prison time McBroom might get, his attorney said, "I told him what the maximum was." 7/18/07 RP 14. As to the issue of providing discovery to McBroom his trial counsel said:

Your Honor, I met with the defendant in the jail on at least three occasions. I've gone over all the police reports with him. They're very short. I read through them with him, one on one. I talked about this case multiple times. We talked on the phone. . . . When I went to the jail I had my file. They're quite short. The narrative is short. And it's a simple possession case. And [I] went through all of the discovery, all of what little there is with him, and it's --the case is factually a very simple case.

7/18/07 RP 18. These facts show that McBroom's trial counsel was doing his job. These facts show that this was a simple possession of methamphetamine case, that there was no reason to suspect the substance was anything other than methamphetamine and that McBroom's counsel had been to the jail to see him to go over the case and to read over all of the admittedly "short" discovery in the case. None of these facts or the arguments by McBroom demonstrate ineffective assistance of counsel and McBroom's contrary claim should be disregarded.

But McBroom, in his section of his brief arguing "ineffective assistance of counsel, again states that "[a]n attorney should not represent a client who has filed a non-frivolous bar complaint against the lawyer." Brief of Appellant, 19. First of all, as far as the State is aware, the determination of whether a Bar complaint is "non-frivolous" must come from the Washington State Bar Association --not from McBroom, who is the very person who filed the complaint. It is simply not for McBroom to say whether his Bar complaint was frivolous or not. Additionally, McBroom's Bar complaint had only recently been filed as of the day of trial, so there had not been any determination whatsoever by the Bar Association Disciplinary Office as to whether the complaint was frivolous.

Furthermore, there is nothing in the record that shows that McBroom's counsel's performance was adversely affected by his knowledge that McBroom had just filed a Bar complaint. His attorney just learned of the complaint on the day of trial. 7/18/07 RP 10. However, as discussed previously, case law does not support McBroom's allegation that "defense counsel developed a conflict of interest when he learned that Mr. McBroom had filed a bar complaint against him." Appellant's Brief, 20; State v. Sinclair, supra. Neither do the facts of this case support McBroom's argument that his counsel's performance was "seemingly influenced" by his learning that McBroom had filed a bar complaint.

Significantly, McBroom concedes that trial counsel's "performance at trial might not rise to the level of ineffective assistance" without the "conflict of interest created by the bar complaint." Thus, because case law holds that the mere filing of a Bar complaint does not create a conflict of interest requiring removal of counsel *per se*, and because by his own admission McBroom's counsel's performance "might not rise to the level of ineffective assistance" without the Bar complaint, this argument is also without merit. Brief of Appellant 21; State v. Sinclair, supra.

In essence, all of McBroom's complaints center around his filing of a Bar complaint against his counsel that, according to McBroom, creates a *per se* conflict of interest mandating removal of his defense counsel. But Washington case law states otherwise and so does the law of a number of other jurisdictions. State v. Sinclair, supra (Washington); People v. Johnson, supra (Illinois); Shegog v. Commonwealth, supra (Kentucky) ; State v. Scales, supra, (Utah); State v. Estacio, supra (Oregon); State v. Robertson, supra (Kansas); Dunn v. State, supra (Texas); State v. Michael, supra (Arizona); Gains v. State, supra (Florida); This Court should follow Washington law and should find the law of these other jurisdictions persuasive and should rule that the filing of a Bar complaint in this case did not *per se* mandate removal of defense counsel. This court should also agree that McBroom's arguments are simply unpersuasive, and his conviction should be affirmed.

### **CONCLUSION**

Case law holds that the mere filing of a Bar complaint by a criminal defendant against his counsel does not create a conflict of interest *per se*. McBroom had only very recently filed the Bar complaint against his trial counsel in this case, and trial counsel only learned of the complaint on the day of trial. Nor was trial

counsel ineffective. There is simply nothing in the record to show that McBroom's counsel's performance was adversely affected by his learning of the Bar complaint. Furthermore, the trial court adequately inquired into the reasons for McBroom's dissatisfaction with his attorney, and properly decided that there were no grounds to remove trial counsel from the case.

Because McBroom essentially bases all of his arguments on his filing of the Bar complaint against his counsel, and claims that doing so created a conflict mandating removal of his counsel, but because case law holds that this is not a conflict *per se*, all of McBroom's arguments are without merit and his conviction should be affirmed in all respects.

RESPECTFULLY SUBMITTED this 5 day of June, 2008.

L. MICHAEL GOLDEN  
LEWIS COUNTY PROSECUTOR

by:   
LORI SMITH, WSBA 27961  
Deputy Prosecutor

COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION II

STATE OF WASHINGTON, ) NO. 36818-8-II  
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DECLARATION OF  
MAILING

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COURT OF APPEALS  
DIVISION II  
08 JUN -6 PM 1:15  
STATE OF WASHINGTON  
BY DEPUTY

LORI SMITH, Deputy Prosecutor for Lewis County, Washington,

declare under penalty of perjury of the laws of the State of Washington that  
the following is true and correct: On 6/10/08, I served  
appellant with a copy of the **RESPONSE BRIEF** by depositing same in the  
United States Mail, postage pre-paid, to attorney for Appellant at the name  
and address indicated below:

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Olympia, WA 98501

DATED this 5th day of June, 2008, at Chehalis, Washington.

  
\_\_\_\_\_  
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