

NO. 40617-9-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

CHRIS ANTHONY LINDHOLM, Appellant

Appeal from the Superior Court of Pierce County
The Honorable John Hickman
Pierce County Superior Court Cause No. 05-1-03828-6

BRIEF OF APPELLANT

By:

Barbara Corey
Attorney for Appellant
WSB #11778
902 S. 10th Street
Tacoma, WA 98405
(253) 779-0844

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A. ASSIGMENTS OF ERROR:

1. The trial court erred when it entered Findings of Fact NO. II, III, and IV (mixed finding of fact and conclusion of law).

2. Did Mr. Lindholm receive a fair trial where the trial court previously had represented Mr. Lindholm's brother on a matter related to this case?

4. Assuming arguendo that the trial court discovered the conflict mid-trial, did the trial court have an obligation to inform the parties and also to engage in a colloquy with the defendant to assure that the defendant understood his constitutional right and was making a constitutionally informed waiver of that right?

5. Was trial counsel ineffective for failing to inform the defendant of his constitutional right to a fair trial before an impartial court?

6. Where both the trial court and defense counsel fail to fulfill their constitutional obligations to the defendant, is the defendant entitled to reversal of his case and remand for new trial?

7. Is the harmless error doctrine inapplicable to this case?

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR:

1. A criminal defendant is constitutionally guaranteed the right to trial before an impartial court.
2. A criminal defendant's constitutional right to a fair trial is undermined when the trial court previously has represented a member of the defendant's family. The trial court's representation of the defendant's family member concerned a change of will. That change of will removed the defendant and his wife as executors because of their domestic and drug problems which were simultaneous to this case.
3. Where the trial court discovers the conflict during trial, the trial court must recuse itself immediately. The mandatory canons for judges compels this recusal so that the defendant may receive his constitutionally guaranteed fair trial.
4. A criminal defendant is guaranteed the right to effective assistance of counsel. Where trial counsel is informed of a judicial conflict during the trial, trial counsel must ask the court to recuse itself.
5. A criminal defendant is guaranteed the right to effective assistance of counsel. Assuming arguendo that the trial court's obligation to recuse

itself was discretionary, trial counsel should have discussed the waiver of the constitutional right to a fair trial with the defendant.

C. STATEMENT OF THE CASE:

CHRIS ANTHONY LINDHOLM, defendant herein, was convicted by jury before Department 22, the Honorable John R. Hickman, of the crimes of kidnapping in the first degree, assault in the second degree, felony harassment, assault in the third degree, and unlawful use of drug paraphernalia.

After a direct appeal and tortured journey through the appellate courts, the matter was remanded for sentencing. State v. Lindholm, 2007 Wash. App. LEXIS 669 (Wash. Ct. App., Apr. 10, 2007); 2008 Wash. LEXIS 113 (Wash., Feb. 5, 2008); review granted and remanded by State v. Lindholm, 164 Wn.2d 1019, 196 P.3d 139 (2008); remanded by State v. Lindholm, 2009 Wash. App. LEXIS 688 (2009).

During Mr. Lindholm's trial, the court informed the parties that the court, while in private practice, had represented close personal relatives of the defendant. RP 57 (trial verbatim report of proceedings attached as Appendix A to defendant's motion for new trial). CP 8-27 The trial court's disclosure did not occur prior to trial and in fact occurred well after the trial was underway. CP 8-27. In the course of that representation, the court likely learned potentially prejudicial information about Mr.

Lindholm and his wife (the alleged victim) in this case. CP 8-27. Discussion of this conflict was minimal. Appendix A. Although Mr. Lindholm expressed some concerns about the matter to attorney Dino Sepe, counsel relied on the oral disclosure made in court. Appendices C and D, CP 8-27.

Had Dino Sepe, then Mr. Lindholm's trial counsel, known the extent and nature of the court's representation of the defendant's brother, then Mr. Sepe would have called it to his client's attention and discussed it with him. Appendix A CP 8-27.

Mr. Lindholm had been in custody prior to trial and had little, if any, communication with Steve Lindholm prior to and during trial. CP 8-27.

Contrary to the information disclosed on the record, the court represented Mr. Lindholm's brother Steve Lindholm on several occasions over the years. Appendix B CP 8-27

1. In 1980-81, Steve Lindholm retained John R. Hickman to represent him against Uniland for a property line dispute.

2. In September 1988, Steve Lindholm retained John R. Hickman to prepare an easement and road maintenance agreement. CP 34-44; Appendix A

3. In February – March, 1991, Steve Lindholm retained John R. Hickman to represent him in court to settle his mother's estate.

4. In 1998-99, Steve Lindholm retained John R. Hickman to prepare his last will and testament.

5. In December 2003, Steve Lindholm hired John R. Hickman to prepare a new last will and testament. On that occasion, Steve Lindholm removed Chris and Jill Lindholm from the will. At that time, Steve Lindholm informed John R. Hickman that the second will was being made for the express purposes of removing Chris Lindholm as his personal representative and also excluding Chris and Jill Lindholm as beneficiaries of the estate. The nature of the ill feelings that Steve Lindholm had which motivated the change of will was explained to John Hickman. Those ill-feelings were not flattering to the defendant and his wife and concerned issues of "domestic discord" and drug use, which were directly related to this case. CP 8-27; Appendices B and C.

6. In December 2004, Steve Lindholm and John. Hickman had a phone conversation about issues relating to the discharge of a nephew from the military.

7. In addition, on October 23, 1997, Steve Lindholm purchased a rifle from John R. Hickman. CP 34-44; Appendix B

Mr. Lindholm had no knowledge that Judge Hickman had ever represented his brother. Mr. Lindholm particularly did not know that Steve Lindholm had removed Mr. Lindholm and his wife Jill from his will because of ill feelings. Steve Lindholm discussed these concerns with John R. Hickman.

The defendant learned the full extent of John R. Hickman's prior representation of Steve Lindholm only within the past several months prior to his motion for new trial.

After oral argument, the court denied Mr. Lindholm's motion for new trial.

The court entered findings of fact which are challenged herein. CP 85-88.

Mr. Lindholm thereafter timely filed this appeal. CP 67-84.

D. LAW AND ARGUMENT:

Under Washington law there are two kinds of affidavits of prejudice in a superior court case. A party has the right to affidavit any judge for no reason whatsoever providing that the court has made no discretionary rulings. The second type of affidavit of prejudice may be exercised when the party establishes that the judge is so prejudiced against the party that a reasonable person would conclude that the defendant had

not received a fair and impartial trial. The party seeking to establish actual prejudice must make the motion prior to any ruling by the court.

RCW 4.12.050 permits a party to change judges once as a matter of right, upon a timely motion, without substantiating the claim of prejudice. This means that a party or attorney can replace the assigned judge without demonstrating why a fair and impartial trial is impossible before that judge. In addition, the judge's honesty and integrity serves as a bulwark against prejudice: under CJC (Canons of Judicial Conduct 3(D)(1), judges should disqualify themselves in a proceeding in which their impartiality might reasonably be questioned. In short, independent appellate review, the right to file an affidavit of prejudice, and the Code of Judicial Conduct advance the parties' right to a fair and disinterested judiciary and reduce the risk of prejudice.

Further, RCW 4.12.050 provides in pertinent part: Any party to or any attorney appearing in an action or proceeding in a superior court, may establish by such prejudice by motion, supported by affidavit that the judge before whom the action is pending is prejudiced against such party or attorney, so that such party or attorney cannot, or believes that he cannot received a fair trial before that court. Thus RCW 4.12.050 provides in pertinent part:

Any party to or any attorney appearing in any action or proceeding in a superior court, may establish such prejudice by motion, supported by affidavit that the judge before whom the action is pending is prejudiced against such party or attorney, so that such party or attorney cannot, or believes that he cannot, have a fair and impartial trial before such judge: PROVIDED, That such motion and affidavit is filed and called to the attention of the judge before he shall have made any ruling whatsoever in the case.

In the instant case, Mr. Lindholm could not exercise his right to affidavit the court because the court did not timely disclose the information upon which an affidavit could be based. Instead the court disclosed the information after the trial had commenced and witnesses had testified.

When defense counsel learned of the facts warranting an affidavit of prejudice he did not ask for sufficient time to discuss this important constitutional issue with Mr. Lindholm. As a result Mr. Lindholm could not make any decision regarding waive of this important constitutional right,

Mr. Lindholm's appeal thus concerns the exercise of this right.

1. Mr. Lindholm did not receive a fair trial because the trial court previously represented Mr. Lindholm's brother on a matter related to this case. The trial court did not disclose this prior representation in timely manner thus prohibiting Mr. Lindholm from timely exercising his right to file an affidavit of prejudice.

As established above in the statement of the case, the trial court had represented Mr. Lindholm's brother on numerous matters, including a

change of executors to his will. Mr. Lindholm's brother removed the defendant and his wife as executors in part because of their emergent domestic violence and use of street drugs, including methamphetamine. CP 8-27. This action occurred in late 2003 and early 2004. This action thus was proximate to the instant case that was filed on August 5, 2005. CP 8-27.

The trial court's finding of fact No. 1 is not supported by the record. Although the trial court recalled that the discussion about his representation with Stephen Lindholm occurred once, the trial court was wrong. RP 3/26/10 36. The trial court also was wrong when it recalled disclosing the potential conflict prior to trial. To the contrary the trial court made the disclosure several days into the trial. RP 3/26/10 22. At this point, Mr. Lindholm's ability to exercise an affidavit of prejudice based on the trial court's representation of his brother was untimely and in violation of the statutory authority for any such affidavit. RCW 4.12.040, 4.12.050

2. Upon discovery of the conflict, the trial court had a mandatory obligation to recuse itself absent the waiver required by CJC 3(e).

Although Mr. Lindholm's ability to file an affidavit of prejudice had expired prior to disclosure by the trial court, the trial court had an obligation to immediately withdraw declare a mistrial and immediately

withdraw from the case. This is so because Canon 3 of the Code of Judicial Conduct requires such withdrawal. This Canon, 3(D)(1) judges should disqualify themselves in a proceeding in which their impartiality might be questioned a situation including but not limited:(a) the judge has a personal bias or prejudice against a party, including personal knowledge of disputed evidentiary facts concerning the proceeding.

CJC 3(e) provides the remedy for a judge who must be disqualified under Canon 3(D)(1)(d). In this situation, instead of withdrawing from the proceeding, the judge may disclose on the record the basis for the disqualification. If, based on the disclosure, the parties and the lawyers, independently of the judge's participation, all agree in writing or on the record that the judge's relationship is immaterial, the judge is no longer disqualified and may participate in the proceeding.

Instead of adhering to the procedures of CJC(e), the trial court informed the parties:

“But I wanted all parties to know that one of the declarations [regarding bail] was someone who I representedThis is going to happen and we are very conscious of it and so we peruse the witness list and we peruse the defendants to make sure, but this was something that I never saw because I didn't read the file, but Ms. Mangus [judicial assistant] discovered it, and I wanted you to know about it, and if anyone has any concerns about it, please, you know state it on the record.” Trial RP 57-58.

There apparently was no further discussion of this matter. Although the court acknowledged that the parties might have concerns about this, the court did not follow CJC(3)(e). After such disclosure, the parties and lawyers, independently of the judge's participation, all agree in writing or the record that the reason for disqualification is de minimis, the judge is no longer disqualified and may participate in the proceeding,

In this case, the court failed to follow the required procedure and the attorneys were ignorant of the required procedure. Instead the court simply stated, "I just want you to know that I didn't know that that had occurred." TRIAL RP 58. By that the court clearly referred to the discovery that while in private practice he had represented the defendant's brother "on a one-time estate planning/drafting will situation and that was it." Id.

The court understandably failed to accurately recall its private practice dealings with the defendant's brother. However, the court should have followed the procedure in CJC 3(e). The trial court's failure to do anything but put the matter on the record deprived defense counsel the opportunity to consult with the defendant outside the presence of the court and decide whether to retain or seek to disqualify the trial court.

3. Trial counsel was ineffective for failing to inform the defendant of his constitutional right to a fair trial before an impartial court.

The state and federal constitutions guarantee a defendant the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The purpose of the effective assistance of counsel guarantee of the Sixth Amendment is to ensure that a criminal defendant receives a fair trial. *Strickland* at 684-85. To establish ineffective assistance of counsel, Mr. Lindholm must show both deficient performance—that his attorney's representation fell below the standard of reasonableness—and resulting prejudice. *Strickland*, 466 U.S. at 687; *State v. Bowerman*, 115 Wn.2d 794, 808, 802 P.2d 116 (1990) (adopting the standards in *Strickland*). If a defendant fails to establish either prong, the appellate court will not inquire further. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). Put another way, In order to prevail on an ineffective assistance claim, the defendant must demonstrate “(1) deficient performance, that his attorney's representation fell below the standard of reasonableness, and (2) resulting prejudice that, but for the deficient performance, the result would have been different.” *State v. Hassan*, 151 Wn. App. 209, 216-17, 211 P.3d 441 (2009).

In the instant case, the trial court, while in private practice, had prepared and then modified the defendant's brother's will. The last change

to the will removed the defendant and his wife from executors as well as beneficiaries. The defendant's brother removed them because of concerns about domestic violence as well as drug [methamphetamine] use. The defendant's brother obviously did not inform the defendant of these alterations to the will. Moreover, the defendant had no knowledge of this. The defendant had been in custody for more than four years prior to learning that his brother had Judge Hickman write and change his will. Although the defendant's brother wrote a letter to the court in favor of low bail/release at the initial hearing, the defendant had little, if any, contact with him after that.

Although the court's initial recollections of his encounters with the defendant's brother were a little sketchy, the court later learned of the full scope of that representation.

Defense could have and should have inquired about the full scope of the court's representation of the defendant by consulting with the defendant's brother and asking the court for a thorough examination of the court's private practice files.

As a result of these deficiencies the defendant was denied his constitutional right to trial by an impartial tribunal. This right is a structural right

Structural errors are "defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards." *Id.* Examples of structural error include the denial of an impartial tribunal, the denial of counsel, *id.*, and the failure to give a reasonable doubt instruction to the jury. [**24] *Sullivan v. Louisiana*, 124 L. Ed. 2d 182, 113 S. Ct. 2078, 2083 (1993). These errors are structural because "without these basic protections, a criminal trial [*1238] cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." *Fulminante*, 111 S. Ct. at 1265 (quoting *Rose v. Clark*, 478 U.S. 570, 577-78, 92 L. Ed. 2d 460, 106 S. Ct. 3101 (1986)). Trial errors, in contrast, impact a defendant's constitutional rights without destroying the trial's basic structure. *Standen v. Whitley*, 994 F.2d 1417, 1422 (9th Cir. 1993) (citing *Arizona v. Fulminante*, 111 S. Ct. at 1264-65).

4. The harmless error doctrine is inapplicable to this case.

Structural errors—"defect[s] affecting the framework within which the trial proceeds"—are not subject to harmless error review. *Arizona v. Fulminante*, 499 U.S. 279, 310, 111 S.Ct 1246, 113 L.Ed.2d 203 (1991).

In contrast, trial errors—those affecting "the trial process itself"—may be reviewed for harmless error. *Id.*

The Supreme Court of the United States has distinguished two kinds of constitutional error in a trial: structural, destructive of such basic elements as an impartial tribunal, public trial, and competent counsel, and those "trial errors" impacting constitutional rights without destroying the trial's structure. Arizona v. Fulminante, 113 L. Ed. 2d 302, 111 S. Ct. 1246, 1264-65 (1991); Chapman v. California, 386 U.S. 18, 23 n.8, 17 L. Ed. 2d 705, 87 S. Ct. 824 (1967) (*Accord*, Sullivan v. Louisiana, 124 L. Ed. 2d 182, 113 S. Ct. 2078, 2083 (1993) "These errors are structural because "without these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." Fulminante, 111 S. Ct. at 1265 (quoting Rose v. Clark, 478 U.S. 570, 577-78, 92 L. Ed. 2d 460, 106 S. Ct. 3101 (1986)).

Further, the Supreme Court in Washington v. Recuenco, 548 U.S. 212, 218-19, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006):

[M]ost constitutional errors can be harmless. [I]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other [constitutional] errors that may have occurred are subject to harmless error analysis." Only in rare cases has the Court held that an error is structural, and thus requires automatic reversal. In such cases, the error "necessarily

render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.”

Those “rare cases” in which the Supreme Court has deemed an error structural have involved *a complete denial of counsel, a biased trial judge, racial discrimination in the selection of a grand jury, denial of self-representation at trial, and a defective reasonable-doubt instruction. Id., at 218 n.2. (Emphasis added).*

Similarly the 9th circuit has defined structural errors to include the denial of an impartial tribunal, the denial of counsel, *id.*, and the failure to give a reasonable doubt instruction to the jury. *Unites States v. Armijo*, 3 F.3d 1229, 27 A.L.R. Fed. 661; 93 Cal. Daily Op. Service 6730 (1993)

In *Sullivan v. Louisiana*, 124 L. Ed. 2d 182, 113 S. Ct. 2078, 2083 (1993) the court reiterated that these errors are structural because “without these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair.” *Fulminante*, 111 S. Ct. at 1265 (quoting *Rose v. Clark*, 478 U.S. 570, 577-78, 92 L. Ed. 2d 460, 106 S. Ct. 3101 (1986))

In this case the trial court and trial counsel committed errors that are “structural errors” under the United State Supreme Court cases. “Structural errors” are exempt from harmless error analysis.

For these reasons this court must reverse Mr. Lindholm's convictions and remand the matter for new trial.

E. CONCLUSION:

Based upon the law and arguments herein, Mr. Lindholm respectfully asks this court to reverse his convictions and remand the case for a new trial. Mr. Lindholm asks for a trial before a court free from the appearance of bias as well as one that adhere to the mandatory recusal rule.

DATED this 24th day of November, 2010.

Respectfully submitted,


BARBARA COREY, WSBA#11778
Attorney for Appellant

CERTIFICATE OF SERVICE:

I declare under penalty of perjury under the laws Of the State of Washington that the following is a true and correct: That on this date, I delivered via ABC- Legal Messenger/U.S. Mail-postage pre-paid, a copy of this Document to: Kathleen Proctor, Pierce County Prosecutor's Office, 930 Tacoma Ave So, Room 946 Tacoma, Washington 98402 and to Chris Lindholm, DOC#268561, Washington State Penitentiary, 1313 North 13th, Walla Walla, WA 99362.

11-24-10
Date


Signature