

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Plaintiff/Respondent,

v.

RICHARD L. HARRINGTON

Defendant/Appellant

FILED
COURT OF APPEALS
DIVISION II
11 JUL 27 PM 12:14
STATE OF WASHINGTON
BY [Signature] DEPUTY

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

The Honorable Michael J. Sullivan, Judge

RESPONDENT'S OPENING BRIEF

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I. ASSIGNMENTS OF ERROR

1. Appellant Richard L. Harrington assigns error to the trial court's order disqualifying Harrington's first attorney and allowing him to withdraw from representation 18 days after Harrington's arraignment.

2. Appellant Richard L. Harrington assigns error to trial counsel's failure to timely object to the trial court's allowing Harrington's first attorney to withdraw and in his failure to timely object to a trial that was allegedly scheduled outside the allowable time for trial, allegedly resulting in ineffective assistance of counsel.

II. STATE'S RESPONSE TO ASSIGNMENTS OF ERROR

Appellant's claim of ineffective assistance of counsel is untenable because the second prong of prejudice fails. Appellant cannot show that any error prejudiced Mr. Harrington to the extent that he was deprived of a fair trial and cannot show that a different outcome would have resulted had the alleged error never occurred.

With the claim of ineffective assistance of counsel thereby eliminated, Appellant cannot, for the first time on appeal, raise the issue of whether the trial court erred in disqualifying Mr. Harrington's first attorney and in granting his motion to withdraw from representation, when such objection was not timely made and therefore not preserved on appeal.

Similarly, Appellant lost the right to complain of his trial being set outside the allowable time for trial because he failed to object within ten days to the August 2, 2010, trial date.¹ Furthermore, Harrington's second attorney never moved to dismiss the case below for violation of the time for trial. Appellant may not now raise the issue for the first time on appeal.

The trial court did not abuse its discretion in disqualifying Harrington's first attorney when said attorney represented to the court that, due to his case load, he could not represent Harrington in a time frame that's required to provide him with adequate representation.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Was the Defendant prejudiced by his second attorney's failure to object in a timely fashion to the court's order disqualifying his first attorney and granting the motion to withdraw from representation? In other words, would the outcome of the trial have been any different had the alleged error not occurred?

2. When a criminal defendant does not object within ten days to a trial setting that is allegedly outside of the time for trial, does he lose the right to object, and does he thereby waive his right to appeal the alleged violation of CrR 3.3?

¹ I.e., within ten days of June 11, 2010.

3. When a criminal defendant's attorney moves to withdraw, and represents to the court that, due to his case load, he is unable to represent the defendant in a time frame that's required to provide Defendant with adequate representation, does a trial court abuse its discretion in disqualifying said attorney and in entering an order allowing him to withdraw from representation?

IV. STATEMENT OF THE CASE

The State accepts the Appellant's statement of the case, with the following additions:

The record is devoid of any evidence that Appellant's trial counsel objected to the August 2, 2010, trial date within ten days of June 11, 2010 (i.e., within ten days of the order setting dates). There was no written objection to the trial setting filed with the court at any time. And there was no oral objection on the record at any time prior to July 23, 2010. Even though Harrington's second attorney was appointed on June 11, 2010, he waited until July 23, 2010, i.e., until *forty-two days after the new trial date had been set*, before complaining to the trial court. This was also four days after the original July 19th trial date had passed.

Harrington never moved the court to dismiss the action for violation of the time for trial. The record below is devoid of any such motion.

V. ARGUMENT

A. Appellant's claim of ineffective assistance of counsel fails because he cannot demonstrate that he was prejudiced by the alleged deficient performance.

The Appellant must satisfy two elements to prevail on a federal and state constitutional claim of ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *State v. Thomas*, 109 Wash.2d 222, 225–26, 743 P.2d 816 (1987); *State v. Thompson*, 69 Wash.App. 436, 441, 848 P.2d 1317 (1993). First, the defendant must show that counsel's performance was deficient by showing that counsel's conduct fell below an objective standard of reasonableness. *Thompson*, at 440, 848 P.2d 1317. Second, the defendant must show that counsel's deficient performance resulted in prejudice by showing that there is a reasonable probability that, but for counsel's unprofessional errors, the outcome of the proceeding would have been different. *Thompson*, at 440, 848 P.2d 1317. However, an appellate court need not address both elements if the defendant makes an insufficient showing as to one element. *Thompson*, at 440, 848 P.2d 1317.

Harrington has failed to prove actual prejudice from counsel's inadvertent waiver of the right to object to the speedy trial violation. A timely objection would not have changed the result. Instead of dismissing the charges because of the speedy trial violation, the court would have

merely reset the trial date within the speedy trial period. Thus, Harrington was not denied effective assistance of counsel. *State v. Malone*, 72 Wash.App. 429, 437-438, 864 P.2d 990 (1994).

B. Defendant did not timely object to the court's order disqualifying his first attorney and granting his motion to withdraw from representation. Therefore, the issues are waived and are not preserved on appeal.

The failure of trial counsel to timely object waives the claim on appeal. RAP 2.5(a); *State v. Ryan*, 160 Wash. App. 944, 252 P.3d 895 (2011); *State v. Kirkman*, 159 Wash.2d 918, 926, 155 P.3d 125 (2007).

Appellate courts will not approve a party's failure to make a timely objection at trial that could have identified errors which the trial court might have corrected (e.g., through reconsidering its decision and/or resetting the trial date to conform with the applicable court rule). *State v. Scott*, 110 Wash.2d 682, 685, 757 P.2d 492 (1988). Failure to object deprives the trial court of this opportunity to prevent or cure the error.

The decision not to object is often tactical. If raised on appeal only after losing at trial, a retrial may be required with substantial consequences. *State v. Madison*, 53 Wash.App. 754, 762-63, 770 P.2d 662 (1989). Where the error involves an alleged violation of the time-for-trial

rules, a violation could require dismissal of the conviction with prejudice. CrR 3.3(h)².

Pursuant to RAP 2.5(a)(3), to raise an error for the first time on appeal, the error must be “manifest” and truly of constitutional dimension. *State v. WWJ Corp.*, 138 Wash.2d 595, 602, 980 P.2d 1257 (1999); *State v. Scott*, 110 Wash.2d 682, 688, 757 P.2d 492 (1988). The defendant must identify a constitutional error and show how the alleged error actually affected the defendant's rights at trial. It is this showing of actual prejudice that makes the error “manifest,” allowing appellate review. *McFarland*, 127 Wash.2d at 333, 899 P.2d 1251; *Scott*, 110 Wash.2d at 688, 757 P.2d 492. “Manifest” in RAP 2.5(a)(3) requires a showing of actual prejudice. *State v. Walsh*, 143 Wash.2d 1, 8, 17 P.3d 591 (2001); *State v. McFarland*, 127 Wash.2d 322, 333-34, 899 P.2d 1251 (1995). “ ‘Essential to this determination is a plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case.’ ” *State v. WWJ Corp.*, 138 Wash.2d 595, 603, 980 P.2d 1257 (1999); (quoting *State v. Lynn*, 67 Wash.App. 339, 345, 835 P.2d 251 (1992)). This reading of “manifest” is consistent with *McFarland's*

² But see also CrR 3.3(a)(4), which provides "The allowable time for trial shall be computed in accordance with this rule. If a trial is timely under the language of this rule, but was delayed by circumstances not addressed in this rule or CrR 4.1, the pending charge shall not be dismissed unless the defendant's constitutional right to a speedy trial was violated."

holding that exceptions to RAP 2.5(a) are to be construed narrowly. *WWJ Corp.*, 138 Wash.2d at 603, 980 P.2d 1257. If the trial record is insufficient to determine the merits of the constitutional claim, the error is not manifest and review is not warranted. *Id.* at 602, 980 P.2d 1257; *McFarland*, 127 Wash.2d at 333, 899 P.2d 1251 (citing *State v. Riley*, 121 Wash.2d 22, 31, 846 P.2d 1365 (1993)). As noted above, Appellant has not here demonstrated actual prejudice; therefore, the alleged error is not of manifest constitutional dimension and may not be raised for the first time on appeal.

C. Defendant did not timely object to the August 2nd trial setting, and thereby lost the right to object.

CrR 3.3(d)(3) provides as follows:

Objection to Trial Setting. A party who objects to the date set upon the ground that it is not within the time limits prescribed by this rule must, within 10 days after the notice is mailed or otherwise given, move that the court set a trial within those time limits. Such motion shall be promptly noted for hearing by the moving party in accordance with local procedures. A party who fails, for any reason, to make such a motion shall lose the right to object that a trial commenced on such a date is not within the time limits prescribed by this rule.

Defendant lost his right to object to the August 2nd trial date when he did not object within 10 days to the time it was set (i.e., within ten days of June 11, 2010).

D. In the absence of a timely objection to the court's order disqualifying Harrington's first attorney, the court properly computed the time for trial in accordance with CrR 3.3.

CrR 3.3(c)(2) provides that upon the occurrence of certain specified events, a new commencement date shall be established, and the elapsed time for trial shall be reset to zero. One such specified event is the disqualification of a criminal defense attorney. CrR 3.3(c)(2)(vii). In the event of the disqualification of the defense attorney, the new commencement date shall be the date of the disqualification. *Id.* The court did not err in setting a new trial date of August 2nd after the first defense attorney was disqualified on June 11th.

E. The trial court did not abuse its discretion in disqualifying Harrington's first attorney.

The trial court did not abuse its discretion in disqualifying Harrington's first attorney when said attorney represented to the court that, due to his case load, he could not represent Harrington in a time frame that's required to provide him with adequate representation. 1 RP at 32-33. Mr. Harrington faced multiple Class A sex offenses with aggravating factors, as well as multiple Class B and C sex offenses, each of which would have increased his offender score. The Class A sex offenses each carried an indeterminate life sentence with a minimum term of at least 93

to 103 months. See RCW 9.94A.507(5). Each Class A sex offense carried the possibility that Mr. Harrington would be incarcerated indefinitely. *Id.*

Under these circumstances, Appellant's argument that the first defense attorney's "schedule and case load does not distinguish him from any other attorney in criminal practice in the State of Washington" is simply unpersuasive. See Appellant's Opening Brief at 9-10. Not just *any* other attorney in criminal practice in the State of Washington would be faced with this attorney's situation; to wit, a client facing the possibility of multiple life sentences coupled with a case load that does not leave the attorney with sufficient time to provide Harrington with adequate representation. See 1 RP at 32-33. Under these circumstances, it would seem that if the shoe were on the other foot—in other words, if the court had denied defense counsel's motion to withdraw, and Harrington was subsequently convicted—then the Appellant would undoubtedly now be arguing on appeal that the court abused its discretion in *denying* the motion to withdraw; and that reversal of his conviction would therefore be warranted.

CrR 3.1(e) provides that after a criminal case has been set for trial, an attorney shall not be allowed to withdraw except for good and sufficient reasons. An appellate court reviews an order allowing counsel to withdraw for abuse of discretion. *State v. Schmitt*, 124 Wash.App. 662,

666, 102 P.3d 856 (2004); *State v. Barrysmith*, 87 Wash. App. 268, 280, 944 P.2d 397 (1997); *Pub. Util. Dist. No. 1 (PUD) v. Int'l Ins. Co.*, 124 Wash.2d 789, 812, 881 P.2d 1020 (1994). A trial court abuses its discretion when it bases its decision on untenable grounds or untenable reasons. *State v. Stenson*, 132 Wash.2d 668, 701, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008, 118 S.Ct. 1193, 140 L.Ed.2d 323 (1998); *State v. Brown*, 132 Wn.2d 529, 572, 940 P.2d 546 (1997), (citing *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995)), *cert. denied*, 523 U.S. 1007 (1998).

Harrington's first defense attorney indicated to the court, that he was too busy with his other work to provide Defendant with adequate representation *within the necessary time frame*. 1 RP at 32-33. A reasonable inference is that the necessary time frame was a problem for him—suggesting that had Mr. Harrington was willing to waive his right to a speedy trial, the attorney might have been able to represent him. Faced with these facts, the trial court was placed in a dilemma: either deny the motion and possibly face the charge that in so doing, it had deprived the defendant of his speedy trial rights, and possibly also deprived the defendant of his far more important rights to a fair trial and to effective assistance of counsel; or, on the other hand, grant the motion and possibly face the charge that in so doing, it had acted without sufficient grounds

and thereby deprived the defendant of his speedy trial rights. Under the circumstances, the court chose the lesser of two evils, and the resultant delay cost the defendant only 14 days. The court did not disqualify the original defense attorney for tenable reasons.

An abuse of discretion exists only if no reasonable person would have taken the view the trial court adopted, the trial court applied the wrong legal standard, or it relied on unsupported facts. *Salas v. Hi-Tech Erectors*, 168 Wash.2d 664, 668–69, 230 P.3d 583 (2010). “An abuse of discretion occurs only ‘when no reasonable judge would have reached the same conclusion.’” *State v. Bourgeois*, 133 Wash.2d 389, 406, 945 P.2d 1120 (1997) (quoting *Sofie v. Fibreboard Corp.*, 112 Wash.2d 636, 667, 771 P.2d 711, 780 P.2d 260 (1989)). Restated, a trial court abuses its discretion when it adopts a view no reasonable person would take. *State v. Castellanos*, 132 Wash.2d 94, 97, 935 P.2d 1353 (1997); *Davies v. Holy Family Hosp.*, 144 Wash.App. 483, 497, 183 P.3d 283 (2008); *State v. Lord*, 161 Wash.2d 276, 295, 165 P.3d 1251 (2007), citing *Mayer v. Sto Indus., Inc.*, 156 Wash.2d 677, 684, 132 P.3d 115 (2006); *State v. Atsbeha*, 142 Wash.2d 904, 913–14, 16 P.3d 626 (2001).

Although the court's decision delayed the trial by approximately 14 days, it assured Mr. Harrington of a much more indispensable right: the right to competent representation by counsel with sufficient time to devote

to his defense. It cannot be said that the court adopted a view that no reasonable person would take. The court did not abuse its discretion.

VI. CONCLUSION

Appellant's claim of ineffective assistance of counsel is untenable because the second prong of prejudice fails. Appellant cannot show that any error prejudiced Mr. Harrington to the extent that he was deprived of a fair trial and cannot show that a different outcome would have resulted had the alleged error never occurred.

With the claim of ineffective assistance of counsel thereby eliminated, Appellant cannot, for the first time on appeal, raise the issue of whether the trial court erred in disqualifying Mr. Harrington's first attorney and in granting his motion to withdraw from representation, when such objection was not timely perfected and therefore not preserved on appeal. Harrington cannot ask an appellate court to dismiss his convictions for alleged violations of the time-for-trial rules when he never brought such a motion below.

Similarly, Appellant lost the right to complain of his trial being set outside the allowable time for trial because trial counsel failed to object within ten days to the August 2, 2010, trial date.³ Had Harrington's trial attorney raised the issue in a timely manner, the trial court might have

³ I.e., within ten days of June 11, 2010.

corrected the error by reversing its order disqualifying the first attorney and by rescheduling the trial date so as to comport with CrR 3.3—before running out of time.

The trial court did not abuse its discretion in disqualifying Harrington's first attorney when said attorney represented to the court that, due to his case load, he could not represent Harrington in a time frame that's required to provide him with adequate representation. The court acted reasonably in allowing the first attorney to withdraw from representation.

The court should affirm Mr. Harrington's convictions.

DATED this 26th day of July 2011

Respectfully submitted,
DAVID J. BURKE
PACIFIC COUNTY PROSECUTING ATTORNEY

BY: 
DAVID BUSTAMANTE, WSBA #30668
Attorney for the Respondent

APPENDIX A

Proof of Service

CERTIFICATE OF SERVICE

11 JUL 27 PM 12:14

I, David Bustamante, do solemnly declare and affirm ~~STATE OF WASHINGTON~~
penalty of perjury under the laws of the State of Washington ~~BY C. DEPUTY~~

that I served the subjoined Respondent's Opening Brief on the
Appellate Counsel for RICHARD L. HARRINGTON, Plaintiff/Appellant,
this 26th day of July, 2011, by mailing a copy to Peter B.
Tiller, The Tiller Law Firm, P.O. Box 58, Centralia, WA 98531.

I also served the same on the Defendant this 26th day of July,
2011, by mailing a copy to RICHARD L. HARRINGTON, DOC #342618,
WSRU-B-327-L, 16700 177th Avenue S.E., P.O. Box 777, Monroe, WA
98272-0777.

Signed at South Bend, Washington, this 26th day of July, 2011.

BY:



DAVID BUSTAMANTE
DECLARANT

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