FILED
Court of Appeals
Division II
State of Washington
3/12/2018 2:46 PM

NO. 50782-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

GABRIEL MORALES,

Appellant.

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

The Honorable Edmund Murphy, Judge

BRIEF OF APPELLANT

JENNIFER L. DOBSON
DANA M. NELSON
Attorneys for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

Page

A. ASSIGNMENTS OF ERROR 1

Issues Pertaining to Assignments of Error 1

B. STATEMENT OF THE CASE 2

1. Procedural Facts 2

2. Substantive Facts 3

C. ARGUMENT 5

I. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT FAILED TO EXERCISE ITS DISCRETION IN RESPONSE TO APPELLANT'S MULTIPLE REQUESTS TO REPRESENT HIMSELF. 5

II. APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL. 10

D. CONCLUSION 14

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

State v. A.N.J.
168 Wn.2d 91, 225 P.3d 956 (2010) 10

State v. Englund
186 Wn. App. 444, 345 P.3d 859 (2015)..... 6, 10

State v. Estes
188 Wn. 2d 450, 395 P.3d 1045 (2017) 10, 11, 13

State v. Grayson
154 Wn.2d 333, 111 P.3d 1183 (2005) 7

State v. Jury
19 Wn. App. 256, 576 P.2d 1302 (1978)..... 11

State v. Madsen
168 Wn. 2d 496, 229 P.3d 714 (2010) 5, 6, 8

State v. O'Dell
183 Wn.2d 680, 358 P.3d 359 (2015) 7

State v. Stenson
132 Wn.2d 668, 940 P.2d 1239 (1997) 7

State v. Thomas
109 Wn.2d 222, 743 P.2d 816 (1987) 11

TABLE OF AUTHORITIES (CONT'D)

Page

FEDERALCASES

Faretta v. California
422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975) 5

Lafler v. Cooper
566 U.S. 156, 132 S.Ct. 1376, 182 L.Ed.2d 398 (2012) 10, 11

Strickland v. Washington
466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) 10

RULES, STATUTES AND OTHER AUTHORITIES

U.S. Const. amend. VI 1, 5, 10

Const. art. 1 § 22 ..... 5, 10

A. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion when it failed to consider and rule on appellant's motion to proceed pro se.

2. Appellant was denied effective assistance of counsel.

Issues Pertaining to Assignments of Error

1. Criminal defendants have an explicit right to self-representation under the Washington Constitution and an implicit right under the Sixth Amendment to the United States Constitution. During trial and before sentencing, appellant moved to represent himself or get new counsel. The trial court found counsel was competent and did not appoint new counsel. However, both times, the court failed to consider appellant's motion to represent himself, requiring him to go forward with assigned counsel. Was this an abuse of discretion?

2. Over a year before trial, appellant provided defense counsel with the names of witnesses he believed would testify at trial as to facts establishing his innocence. A few months before trial, defense counsel represented to the court the case might be resolved via a plea, but that never happened. At that time, defense counsel had not yet interviewed the witnesses appellant named. Consequently, counsel did not discover they would not be available

or willing to testify in appellant's defense, and counsel was never able to competently advise appellant as to whether to pursue or accept a plea deal. Did appellant receive ineffective assistance of counsel?

B. STATEMENT OF THE CASE

1. Procedural Facts

On December 14, 2015, the Pierce County prosecutor charged appellant Gabriel Joseph Morales with two counts of second degree unlawful possession of a controlled substance with intent to deliver, one count of first degree unlawful possession of a firearm, and one count of possession of a stolen firearm. CP 3-5. Morales was also charged with a firearm enhancement for two counts and with committing the offenses while on community custody. CP 3-5. A jury found Morales guilty as charged. CP 56-63. He was sentenced to 226 months of total confinement. CP 193.

2. Substantive Facts

On December 11, 2015, Community Correction Officer Sara Thompson was supervising Morales. RP 16.[1] Thompson received a call from a community member who was concerned there was "drug traffic" coming in and out of Morales' residence. RP 23. She also reported she heard Morales had a weapon and she also observed him to appear under the influence of drugs. RP 24. This informant previously provided Thompson reliable information about Morales. RP 29-30.

Thompson also received a letter from Morales' drug treatment provider who indicated Morales was groggy and sleeping in class. RP 25. She suspected drug use and requested more urinalysis testing. RP 25. Additionally, at a previous compliance check, Thompson observed drug paraphernalia in Morales' residence; however, Morales was not at home at the time. RP 28.

Believing there was reasonable cause to search Morales' home and car, Thompson enlisted the help of other CCOs and conducted a search. RP 27. They discovered drugs in a jacket that was laying on Morales' bed. RP 33. Morales later admitted the drugs were his. RP 86 RP 119. Afterward, officers searched

[1] Unless otherwise specified, "RP" refers to the multi-volume, consecutively paginated trial transcript.

Morales' car and discovered a gun. RP 212. Morales explained he was using the gun to protect himself. RP 118, 218. The gun turned out to be stolen. RP 217, 281-82.

Throughout his trial, Morales was deeply distressed that his attorney was unprepared, had not conducted appropriate investigations, had failed to interview witnesses Morales believed would testify to facts establishing his innocence of the gun charges, failed to make an opening statement, and was not otherwise conducting a zealous defense. RP86-87, 131-34,199-203; RP (5-5-17) 3-7; Exhibit 9, 10. During trial, Morales moved to represent himself or obtain new counsel. RP 196, Ex. 9-10. The trial court found counsel was effective and thus did not appoint new counsel; however, it failed to consider or rule on Morales' request to proceed pro se. RP 201-02.

A few weeks prior to sentencing, Morales sought to proceed pro se during sentencing. RP (5-5-18) 2. Again, rather than considering appellant's request to represent himself, the trial court concluded that Morales had competent counsel who would represent him at sentencing. RP (5-5-18) 8-9.

C. ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT FAILED TO EXERCISE ITS DISCRETION IN RESPONSE TO APPELLANT'S MULTIPLE REQUESTS TO REPRESENT HIMSELF.

Morales moved to represent himself at trial and during sentencing. The trial court failed to consider or rule on these motions. The court's failure to exercise discretion constituted an abuse of discretion that effectively resulted in Morales being denied his right to self-representation.

Criminal defendants have an explicit right to self-representation under the Washington Constitution and an implicit right under the Sixth Amendment to the United States Constitution. Wash. Const. art. I, § 22 ("the accused shall have the right to appear and defend in person"); Faretta v. California, 422 U.S. 806, 819, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). This right is so fundamental that it is afforded despite its potentially detrimental impact on both the defendant and the administration of justice. State v. Madsen, 168 Wn. 2d 496, 503, 229 P.3d 714, 717 (2010); Faretta, 422 U.S. at 834, 95 S.Ct. 2525. "Improper denial of the right to represent oneself requires reversal regardless of whether

prejudice results." State v. Englund, 186 Wn. App. 444, 454-55, 345 P.3d 859 (2015).

A denial of the defendant's request to proceed pro se is reviewed for an abuse of discretion. Madsen, 168 Wn.2d at 504. "When a defendant requests pro se status, the trial court must determine whether the request is unequivocal and timely." Id. (emphasis added). Absent a finding that the request was equivocal or untimely, the court "must" then determine if the defendant's request is voluntary, knowing, and intelligent, usually by colloquy. Id. A court may defer ruling if it is reasonably unprepared to immediately respond to the request, but it must ultimately make a ruling. Id.

Although the court must indulge in every reasonable presumption against a defendant's waiver of his right to counsel, this presumption does not give a court carte blanche to ignore or deny a motion to proceed pro se. Id. A court may only properly deny a defendant the right to self-representation after finding the defendant's request is equivocal, untimely, involuntary, or made without a general understanding of the consequences. Id. at 504-05. The trial court must base its finding on identifiable facts. Id. at 505. If it fails to do so and the defendant is not allowed to

represent himself during trial, the defendant's right to represent himself has been violated. Id.

During trial, Morales asked the court to represent himself or to have a new lawyer appointed.[2] RP 196, Ex. 9-10. Additionally, after the verdict, Morales sought to proceed pro se during sentencing. RP (5-5-18) 2. Rather than considering Morales' requests to exercise his right to self-representation, on both occasions, the trial court concluded that he had competent counsel and therefore Morales had to proceed with counsel. RP 201-02; RP (5-5-18) 8-9. The record shows the trial court neither considered nor ruled on Morales' motions to proceed pro se. Thus, it did not exercise the discretion given it.

A trial court's failure to exercise discretion is itself an abuse of discretion subject to reversal. State v. O'Dell, 183 Wn.2d 680, 697, 358 P.3d 359 (2015); see also, State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183, 1188 (2005). Here, the trial court's failure to exercise discretion as to Morales' requests to invoke his

---

[2] An unequivocal request to proceed pro se is valid even if combined with an alternative request for new counsel. See, State v. Stenson, 132 Wn.2d 668, 741, 940 P.2d 1239 (1997). The trial court denied appellant's attempt to fire appointed counsel when it rejected Morales' argument that counsel was not defending him and essentially found counsel was providing competent representation. RP 201. However, this does not answer the separate constitutional question of whether appellant had a right to represent himself.

constitutional right to represent himself constitutes an abuse of discretion. This abuse of discretion resulted in Morales being improperly denied him his right to self-representation. Hence, reversal is required.

In response, the State may claim the requests were untimely because they came in the middle of trial or shortly before sentencing. Based on this record, however, this Court can only guess at what the trial court might have decided had it considered the merits of Morales' motion. Certainly, the trial court would have had to consider the weightiness of Morales' constitutional right to self-representation when considering the timeliness of his request. Although the trial court's duty of maintaining the timely and orderly administration of justice is extremely important, the right to represent oneself is a fundamental right explicitly enshrined in the Washington Constitution and implicitly contained in the United States Constitution. Hence, the Washington Supreme Court has concluded that "[t]he value of respecting this right outweighs any resulting difficulty in the administration of justice." Madsen, 168 Wn. 2d at 509. "Courts must not sacrifice constitutional rights on the altar of efficiency." Id.

Moreover, the facts do not necessarily support a finding that allowing Morales to exercise his right to self-representation would have obstructed the timely and orderly administration of justice. The trial court observed Morales was an articulate, intelligent man. RP (8-18-17) 17. Defense counsel had fully apprised Morales of the status of the witnesses and he was familiar with the evidence. RP 197-98. Moreover, Morales' motion to represent himself at sentencing was made a few weeks prior to the scheduled sentencing hearing. RP (5-5-18) 2.

There is nothing indicating Morales was trying to postpone the administration of justice. This record amply demonstrates he sincerely wanted to exercise his right to represent himself and run his defense as he saw fit. Morales never requested a continuance, and the trial court never established that one would be necessary. RP 196-203. Hence, based on this record, this Court cannot be reasonably certain the trial court would have denied Morales' requests as untimely.

In sum, the trial must exercise its discretion when the defendant moves to proceed pro se. The trial court's failure to do so here constitutes an abuse of discretion that effectively resulted in an improper denial of appellant's constitutional right to self-

representation. Consequently, reversal is required. Englund, 186 Wn. App. at 454-55.

II. APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

A defendant is constitutionally guaranteed the right to effective assistance of counsel. U.S. Const. amend 6; Const. art. 1 § 22. He is denied this right when his attorney's conduct: (1) falls below a minimum objective standard of reasonable attorney conduct, and (2) deficient performance prejudiced the defendant. Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)); State v. Estes, 188 Wn. 2d 450, 460, 395 P.3d 1045, 1050 (2017). The right to effective assistance of counsel applies during the plea stage. Id.; Lafler v. Cooper, 566 U.S. 156, 132 S.Ct. 1376, 182 L.Ed.2d 398 (2012).

"Counsel ... has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland, 466 U.S. at 688. Effective assistance includes "assisting the defendant in making an informed decision as to whether to plead guilty or to proceed to trial." Estes, 188 Wn. 2d at 464 (citing State v. A.N.J., 168 Wn.2d 91, 111, 225 P.3d 956 (2010)). "Even if the trial itself is free from constitutional flaw, the

defendant who goes to trial instead of taking a more favorable plea may be prejudiced from either a conviction on more serious counts or the imposition of a more severe sentence." Lafler, 566 U.S. at 166.

A defendant can overcome the presumption of effective representation by demonstrating "that counsel failed to conduct appropriate investigations." State v. Thomas, 109 Wn.2d 222, 230, 743 P.2d 816 (1987) (citing State v. Jury, 19 Wn. App. 256, 263, 576 P.2d 1302 (1978)). To effectively negotiate for a plea bargain and advise the defendant as to whether to pursue a plea bargain, defense counsel must diligently investigate the law and facts. Estes,188 Wn. 2d at 466. Timely investigation is necessary so counsel may competently advise a defendant about whether he should plead guilty and so the defendant can make informed decisions.

Here, defense counsel's failure to investigate and interview witnesses until after the trial began constituted deficient performance. Over a year before trial, Morales gave his counsel information and asked him to contact witnesses whom Morales believed would come to trial to testify as to his innocence. RP 196-97, 202. Defense counsel did not timely investigate and thereby

failed to discover until after the trial began that these witnesses were likely not available or willing to testify as Morales expected. Without this information, defense counsel was not in a position to give competent and informed advice to Morales as to whether to pursue a plea. Indeed, he left Morales believing that he had a much stronger case than it actually was. Counsel's failure to investigate was objectively unreasonable and constituted deficient performance.

Not only does the record establish counsel's deficient performance, but it also establishes prejudice. Under Strickland, prejudice is established if there is a reasonable probability that the outcome would have been different but for the attorney's conduct. Strickland, 466 U.S. at 693. Importantly, the defendant "need not show that counsel's deficient conduct more likely than not altered the outcome of the case." Id. at 693. A reasonable probability exists if counsel's deficient performance merely undermines confidence in the outcome. Id. at 634.

Defense counsel's deficient performance left Morales without the information to competently assess the relative strengths or weaknesses of Morales' case. This impeded Morales' ability to make an informed and intelligent decision regarding whether to

negotiate a plea. The record here shows that a few months before trial, the parties were considering whether to resolve this case with a plea. A plea bargain was not struck, and the case proceeded to trial.

This Court cannot speculate on whether the State would have offered a plea or what might have happened in negotiations. Instead, it must focus on what it knows about Morales' understanding regarding key points of his case. Estes, 188 Wn.2d at 466. Lacking knowledge as to crucial facts that made his case decisively weaker than he thought, Morales was in no position to be able to assess whether to negotiate or accept a plea deal. He was facing more than twenty years of prison time. Had Morales been informed that the witnesses he was counting on to establish his innocence would likely not be testifying, there is a reasonable probability that he would have more rigorously sought to negotiate a plea or accepted an offer. Hence, Morales was prejudiced by counsel's deficient performance.

In sum, Morales was denied effective assistance of counsel when defense counsel failed to timely investigate the facts so that he could competently advise Morales as to whether to plead guilty. This constituted deficient performance. Morales was prejudiced in

his ability to consider whether to accept or pursue a plea deal. Given the long sentence he was facing, had he known that his case was considerably weaker than he thought during the pleas phase, there is a reasonable probability he would have negotiated and taken a plea deal. Consequently, reversal is required.

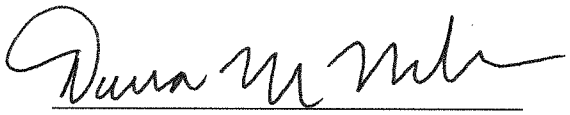
D. CONCLUSION

For the reasons stated above, this Court should reverse appellant's convictions.

DATED this 12th day of March, 2018.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



JENNIFER L. DOBSON, WSBA 30487
DANA M. NELSON, WSBA No. 28239
Attorneys for Appellant
Office ID No. 91051

NIELSEN, BROMAN & KOCH P.L.L.C.

March 12, 2018 - 2:46 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	50782-0
Appellate Court Case Title:	State of Washington, Respondent v Gabriel Joseph Morales, Appellant
Superior Court Case Number:	15-1-04976-5

The following documents have been uploaded:

- 507820_Briefs_20180312144505D2575028_5519.pdf
  This File Contains:
  Briefs - Appellants
  The Original File Name was BOA 50782-0-II.pdf

A copy of the uploaded files will be sent to:

- PCpatcecf@co.pierce.wa.us

Comments:

Copy Mailed to: Gabriel Morales, 361846 Washington State Penitentiary 1313 N 13th Ave Walla Walla, WA 99362

Sender Name: John Sloane - Email: Sloanej@nwattorney.net
Filing on Behalf of: Dana M Nelson - Email: nelsond@nwattorney.net (Alternate Email:)

Address:
1908 E. Madison Street
Seattle, WA, 98122
Phone: (206) 623-2373

Note: The Filing Id is 20180312144505D2575028