

FILED
Court of Appeals
Division II
State of Washington
11/20/2018 2:50 PM

NO. 51288-2-II

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

STATE OF WASHINGTON,

Respondent,

v.

BRENT LUYSTER,

Appellant.

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

The Honorable Robert A. Lewis, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court failed to honor appellant's constitutional right to counsel.

2. The search warrant affidavit failed to demonstrate the reliability of the informants.

3. The search warrant for the storage unit was not supported by probable cause.

4. Legal financial obligations for the criminal filing fee, jury demand fee, and DNA collection fee were improperly imposed and must be stricken.

Issues pertaining to assignments of error

1. Several months prior to trial appellant Brent Luyster informed the court that a breakdown in communication with his court appointed attorneys was negatively impacting his defense. He asked for substitution of counsel. The court denied the motion, and Luyster renewed the motion twice, detailing the reasons for his irreconcilable conflict with counsel. Where Luyster demonstrated a serious breakdown in communication with trial counsel, did the court's denial of his motions for substitution violate Luyster's constitutional right to counsel?

2. A search warrant was issued for a storage unit connected with Luyster based on information provided by two “citizen” informants, one of whom was unnamed. Where the warrant affidavit contained no information to establish the informants’ reliability, must the evidence seized as a result of the unlawfully issued warrant be suppressed?

3. Where Luyster was indigent at the time of sentencing and has prior convictions for which the State has collected his DNA, must the legal financial obligations for criminal filing fee, jury demand fee, and DNA collection fee be stricken?

B. STATEMENT OF THE CASE

1. The investigation

Around 10:30 p.m. on July 15, 2016, Breanne Leigh drove into the parking lot of the AM/PM store in Woodland. RP 400-01, 403. She was bleeding, and she told people working at the store that she had been shot. RP 389-90. An off duty nurse who happened to be at the store assisted her, and police and medical aid were called. RP 402-04, 800-01. Leigh had been shot in the face, so communication was difficult. RP 405. She indicated that a woman named Janelle had been injured as well, and the shooting took place at the home of Joe Lamar. RP 410-11, 418, 804-05.

When asked who shot her, Leigh said she did not know. RP 411-12, 807-08.

Leigh was transported to the hospital, and the paramedic who brought her to the emergency room told hospital personnel that Leigh reported she was sitting in her car when someone shot her from two feet away. She then drove to a gas station and called for help. RP 924.

A detective was waiting at the emergency room when Leigh arrived, and he attempted to interview her. RP 1149-50. Leigh was not able to speak, but she responded to questions with gestures and by writing, until she had to be sedated. RP 1150-51. The officer asked her if anyone else was hurt or shot, and she wrote Zach and Joe. She said she was outside when she was shot, and she passed out for a while. She explained that Zach was the father of her children, and she asked about his status. RP 1157.

The officer asked Leigh if she knew who shot her and she nodded her head. He asked if it was Joe Lamar, and she shook her head no. Then she wrote the name Brent Luyster, spelling the last name two different ways. RP 1162. She wrote that he was in trouble with the feds. RP 1164. Luyster's name was put out over the radio as a possible suspect. RP 506, 1164.

While Leigh was being transported to the hospital, law enforcement went to Lamar's residence to investigate. RP 428. Officers found two bodies lying on the road in front of the house. RP 454. The deceased were later identified as Joe Lamar and Zach Thompson. RP 1248. Lamar had been shot near the left temple, and Thompson was shot in the left side of his neck. RP 1295-96. The body of Janelle Knight was found on the couch in the living room. RP 1264. She had been shot in the right cheek and in the neck. RP 1267. No one else was found in the house or on the property. RP 458.

Officers found a large amount of blood in the living room, hallway and bathroom of the house. RP 470, 474, 487. Outside, there was a pile of automotive glass near Thompson's feet. RP 1249. A 9mm semiautomatic pistol was found in Thompson's back pocket. RP 1311-12.

Shell casings were collected from the floor in the hall, near the dining room table, and outside next to the bodies. RP 470, 637, 1278, 1434. All the casings were from Federal brand .45 caliber ammunition. RP 1910-14. All were determined to have been fired from the same gun. RP 1916. Bullets recovered from Leigh, Knight and Thompson were determined to have been fired from the same gun. RP 1931. About 40 to 50 companies, including Kimber, manufacture semi-automatic pistols

which leave the type of markings found on the bullets recovered in this case. RP 1933-34, 2367, 2369.

When Luyster was not located at the scene, law enforcement began to search for him. They received information that Luyster and his brother Michael might be at a family member's house in Yacolt, and officers responded to that house. Luyster was not there, but they spoke to Michael and the other adults present. RP 476-77, 838.

Law enforcement called a phone number they had for Andrea Sibley, Luyster's girlfriend, trying to reach Luyster, but there was no answer. RP 664-65. The last identified location of the phone was at Michael Luyster's house, so law enforcement went there, but they did not find Luyster. RP 668-70.

Luyster's mother Susan Dvorak lived at Michael's house as well. Law enforcement interviewed her at her sister's house around 5:30 a.m. RP 1090-91. Dvorak said she had gone to Walmart the previous evening to buy beer at Luyster's request. RP 1093. Law enforcement viewed surveillance video from the store and confirmed she was there from 11:04 to 11:10. RP 1093-94.

As part of their search for Luyster, law enforcement were on the lookout for Sibley's gold Ford Explorer. RP 844. It was spotted the next afternoon at a vehicle turnout by Abernathy Creek. RP 874-76, 1076.

Law enforcement responded, and Luyster was located and arrested without incident. RP 857-58, 878-79. He was charged with three counts of aggravated first degree murder, attempted first degree murder, and two counts of unlawful possession of a firearm. CP 30-33.

Sibley's Explorer was searched pursuant to a warrant. RP 1376. The driver's side window was broken, and the interior was cluttered. RP 1376. No weapons or ammunition were found in the vehicle. RP 1376-81. Police thought the window might have been broken by a bullet, but no bullets were found inside the vehicle. RP 2114-15.

Police sent Luyster's clothing to the crime lab for analysis. No blood was found on his shoes or clothes. RP 2207, 2234, 2236, 2237. Swabs of Luyster's face and hands were negative for blood. RP 2238. No blood was found on swabs taken inside the Explorer, either. RP 2212-13.

Law enforcement interviewed Leigh again over the next few days. She was still unable to speak, but she indicated in writing that Luyster shot her. RP 2038-43. She also informed officers that she had seen the gold Explorer on the side of the road as she left Lamar's property. RP 2043, 2045. After Leigh was released from the hospital she directed officers to the location she believed she had seen the Explorer. RP 2069. The area was searched, but no evidence was found. RP 2072.

Officers obtained a warrant to search a storage unit rented by Sibley. RP 1412. Inside the unit they found firearm cleaning materials and the case and documentation for a Kimber .45 caliber pistol. RP 1413-14. Officers also found an identification card in Luyster's name and other items with Sibley's name. RP 1421-22. The gun used in the shooting was never found. RP 890-91, 1425, 2102.

2. Luyster's motion for substitution of counsel

Because the State filed notice it intended to seek the death penalty, two attorneys were appointed to represent Luyster in his defense. Supp. CP (Sub No. 24, minutes 8/1/16). When Luyster was arraigned on an amended information on March 6, 2017, however, the State indicated it was no longer seeking the death penalty. RP 42; CP 30-33. Luyster's attorney moved to continue with co-counsel, informing the court he could not be prepared for trial by the scheduled date with only one attorney. RP 44. The court denied the motion, finding the case was not so complex that continuation of co-counsel at public expense was justified. RP 45-46. Both defense attorneys then withdrew from the case, indicating they could not prepare the case for trial individually. RP 46.

When the court appointed new counsel two days later, Luyster asked it to reconsider allowing his original defense team to remain on the case. They had been working on the case for eight months and were

familiar with it, they could be prepared for trial in a reasonable time working together, and he had confidence in them. He expressed his concern that appointment of new trial counsel would affect his right to a speedy trial. RP 48-49. The court responded that it would have kept either attorney if they were willing, but they did not think they could provide effective assistance individually and the court saw no basis to provide co-counsel. RP 50. The court appointed Charles Buckley to represent Luyster. RP 52.

In June 2017, the court granted the defense motion for appointment of co-counsel, and Steven Rucker was appointed to work with Buckley on Luyster's defense. Supp. CP (Sub No. 253, Motion for Appointment of Co-Counsel, filed 6/9/17); Supp. CP (Sub No. 258, Order Appointing Co-Counsel for Defendant, filed 6/13/17).

On June 27, 2017, Luyster wrote to the court asking to reinstate his original defense team. Supp. CP (Sub No. 268, Declaration of Service, filed 6/30/17). In his letter, Luyster detailed several issues he had been having with attorney Buckley. He told the court he and Buckley had been unable to effectively communicate, which was negatively impacting his case. Buckley and Luyster had agreed that when Buckley moved for appointment of co-counsel, he would ask the court to appoint one of the two original attorneys, Dunkerly or Yoseph, because they were well

acquainted with the case. Luyster stated that Buckley reneged on that agreement and instead had Rucker appointed, because of a personal conflict between Buckley and Yoseph. Luyster also described contradictory instructions Buckley had given regarding the defense investigator and Luyster's access to discovery materials. *Id.*

Luyster further informed the court that Rucker had told him he previously declined appointment to this case because of his workload, and Luyster did not believe Rucker could effectively assist in preparation of the case. Luyster told the court he was not receiving effective assistance of counsel from Buckley and Rucker and asked for substitution of new counsel, even if the court chose not to reinstate Dunkerly and Yoseph. *Id.*

At the next hearing on July 11, 2017, the court addressed Luyster's letter. Luyster explained that he had made multiple attempts to resolve his conflict with counsel, but there had been a complete breakdown of communications which was negatively affecting his case. RP 66. Buckley disagreed. He admitted there were some issues, but he stated they would be ready to proceed with trial as scheduled. RP 67-68. The court found there was no basis for changing counsel and denied Luyster's request. RP 69-70.

On August 29, 2017, Luyster filed a motion for substitution of counsel. Supp. CP (Sub No. 292, Motion and Declaration to Discharge

Counsel and Re-Appoint Prior Defense Team, filed 8/29/17). He informed the court there had been a total breakdown in communication with Buckley, and there had been an irreconcilable breakdown of the attorney/client relationship and trust. This breakdown stemmed from Buckley's failure to follow through with his agreement to request that Dunkerly be appointed as co-counsel. Buckley refused to explain the situation to Luyster, but Luyster learned from another source that Buckley had a personal conflict with the prior defense team, caused by a sexual relationship Yoseph had with Buckley's wife. Luyster's attempt to address the issue with Buckley angered Buckley and resulted in a total lack of communication. *Id.*

In addition, Luyster learned from Rucker that Rucker accepted the appointment in this case, even though his caseload would not support it, because he was a longtime friend of Buckley. According to Luyster, Rucker disclosed the details of another client's case to Luyster, violating his professional obligations of confidentiality. Rucker also told Luyster that he had had the defense investigator removed from the case, and he became hostile when Luyster questioned this action. Luyster represented that there had been a complete breakdown in communication with Rucker as a result. *Id.*

Luyster informed the court he had been stonewalled from assisting in his defense in retaliation for raising complaints about his attorneys. He had only been provided a small fraction of his discovery, and this was preventing him from making informed decisions about his case. He asked that Yoseph and Dunkerly be re-appointed to represent him, or if that was not possible, substitution of other conflict-free counsel. *Id.* At a hearing on his motion, Luyster told the court there was a breakdown in the relationship and trust with his current counsel, and he could not effectively communicate with them. RP 86.

Rucker told the court he could continue to represent Luyster and was engaged in vigorous preparation of the defense. RP 86. He explained that he had discharged one of the two defense investigators at the direction of the Office of Public Defense. RP 87. Buckley told the court he thought the lack of communication could be remedied, but he was concerned that Luyster said he could not trust counsel. RP 88.

Luyster then expanded on the reasons for his distrust. He felt counsel were not telling the whole truth regarding their personal conflicts and the impact on the defense, he had not been provided with a plan for witness interviews, he had not been able to give input, his attorneys had made no attempt to see him in the past six weeks, and he did not even know the defense strategy. RP 90-91.

The court agreed that Luyster needed to be able to actively participate in his defense and surmised that the limited contact was the reason for Luyster's distrust. RP 94. The court denied the motion for substitution of counsel, however, saying there was no indication of a breakdown in communication and no reason for Luyster not to trust his attorneys. RP 94-95.

3. Motion to suppress evidence from the storage unit

Luyster moved to suppress evidence found during the search of a storage unit, arguing that the warrant was not supported by probable cause. CP 80, 96-100. The warrant authorized search of unit 36 of a storage facility in Woodland, Washington. The warrant affidavit states that Paul Sibley told Detective Fred Neiman that about two weeks earlier he had helped his daughter Andrea Sibley and Brent Luyster move to Luyster's brother's house in Woodland. He also helped move some of their belongings to a storage unit roughly across the road from the house. Mr. Sibley stated that the storage unit was rented in Andrea Sibley's name. CP 113.

The affidavit further states that Detective Neil Martin contacted "the owner of the storage unit business" and learned that approximately two weeks earlier Andrea Sibley began renting unit 36 at his facility. *Id.* The affidavit concluded that, based on the proximity of the storage unit to

the house where Luyster and Sibley were staying and the number of items inside the gold Explorer at the time of Luyster's arrest, it was likely Luyster and Sibley accessed the storage unit in preparation to leave the area after the homicides were committed. CP 115.

Luyster argued that the warrant affidavit failed to establish the reliability of Paul Sibley and the unnamed owner of the storage business, and therefore the affidavit failed to establish probable cause to search unit 36. CP 96-100; RP 199-200. The court ruled that since the Sibleys and the business owner were citizen informants who corroborated each other, there was sufficient reliability to support a finding of probable cause. It denied the motion to suppress. RP 205.

4. Trial testimony

At trial the State tried to establish Luyster's activities on the day of the shooting. There was testimony that he learned that day that federal authorities might be charging him based on a Cowlitz County incident for which he was release on bail, and there was concern he would be taken into custody. RP 530, 1020, 1624-25. His friends wanted to spend time with him before that happened. RP 526. So Luyster, Sibley, their 18 month old son Alrick, and Luyster's son Brent Jr. went to the house of Marvin Schram for a get-together. RP 958-60. Leigh and Thompson, who was a close friend of Luyster's, went too. RP 513, 526, 961, 992.

Joe Lamar called sometime during the evening, wanting to see Luyster, so Leigh and Thompson drove him to Lamar's house. RP 532-33.

Sibley arrived some time later with the children to give Luyster a ride home. RP 544-45. Leigh and Knight took Brent Jr. inside the house to give him some dinner. RP 547. While he was eating, Leigh heard two gunshots outside. She went to the door, intending to tell the men to stop shooting, when the door opened. RP 550-51. Leigh testified that Luyster stepped inside and shot her in the face. RP 551. She passed out for a time, and when she woke up she went into the bathroom looking for her phone. RP 553-54. She eventually gave up on finding her phone and decided to drive for help. RP 555. She noticed Knight's body but did not see Thompson or Lamar as she left. RP 555-56. Leigh drove to the nearest store, the AM/PM at the bottom of the hill. She believed she saw Sibley's Explorer on the side of the road as she passed. RP 556-57.

Susan Dvorak testified that Luyster, Sibley, and the children left the house in the afternoon to visit friends, and they returned just before dark. RP 711-13. Luyster was tired and slightly intoxicated, and he asked her to go buy him some more beer. RP 714. Dvorak did not want to go to the store, so she called Michael and asked him to pick up beer on his way home. RP 717. Dvorak ended up going to the store for beer. RP 723.

Michael eventually came home for a few minutes, then left with Brent Jr., heading to Yacolt to visit family. RP 722.

After Michael left, Luyster wanted to go fishing, which he often did at night. Sibley drove, since Luyster had been drinking, and they took their son with them. They left the house between 11:30 and midnight. RP 725-27.

Michael testified that his mother called him at 10:23 and 10:34, asking him to pick up Brent Jr. RP 1027, 1031. When he stopped by the house to pick up the child, he saw nothing out of the ordinary. RP 1033. He drove to his cousin's house in Yacolt. RP 1035. While he was there he spoke to the police, first on the phone and then when they arrived. They were looking for Luyster and said something about a triple homicide. RP 1037. Michael testified he told police that Luyster and Sibley seemed shaken up, like there had been an argument. RP 1043. He wanted to get Brent Jr. out of the house because Luyster had been drinking, and something might happen that the children shouldn't be exposed to. RP 1039.

Luyster's uncle Steven Dvorak testified that Luyster, Sibley, and their child came to visit him in Ocean Park when he was not expecting them. RP 1336-37. He saw something on the news about a manhunt while Luyster was there, but he did not recall Luyster saying anything

about it. He did not remember much about the visit because he had had two strokes. RP 1336, 1339-42. There was testimony that when Dvorak was interviewed by law enforcement, he had said Luyster claimed someone was shooting at him and he shot someone. RP 1453.

Sibley testified she had been in a relationship with Luyster off and on since 2008, and they have a three year old son. RP 1621-22. On July 15, 2016, she was living at Michael Luyster's house with Luyster and their son. Luyster's mother lived there as well. Luyster's son Brent Jr. was with them that day. RP 1623.

Sibley, Luyster, and the children went to Schram's house that afternoon. RP 1627. Thompson and Leigh were there as well. RP 1628. Luyster's mood was fine, but he was getting intoxicated over the course of the visit. RP 1629. At some point Luyster left without telling Sibley he was going. RP 1631. She was told he was with Thompson and Leigh, and when she called she learned they had gone to Lamar's house. RP 1632-33. As Sibley was driving home, Luyster called and asked her to pick him up, so she drove to Lamar's property. RP 1634-35.

When Sibley pulled into the driveway, Luyster, Thompson, Leigh, Lamar and Knight were on the porch. RP 1636. Lamar asked the women to give the men a few minutes to talk, so Sibley waited in the car with her son, while Brent Jr. went inside the house with Leigh and Knight. RP

1637. Sibley could hear the men talking outside the car but couldn't see them. Then she heard several gunshots, and the driver's side window of her car broke. RP 1639-40. There were more gunshots, and then Luyster and Brent Jr. got in the car. RP 1640. Luyster told Sibley to go, and she drove to Michael's house. RP 1642-43.

Sibley testified that Luyster seemed belligerently drunk once they were home, so she tried to avoid him. RP 1645-46. Sometime later Luyster told her to get back in the car. RP 1647. He gave her directions as she drove, and they went to his uncle's house in Ocean Park. RP 1650. They stayed there for a few hours and then headed back to Woodland, stopping at a store along the way for some food. RP 1653-56. They pulled over several times because Sibley was tired, and they ended up at Abernathy Creek. RP 1658-59. Law enforcement arrived and arrested Luyster. RP 1662. Sibley was taken to the precinct and interviewed. RP 1664.

Sibley testified that she never saw Luyster with a gun between July 15 and the time of his arrest. RP 1664. At some point while they were together he said something along the lines of people were shot, but they did not talk about what happened. RP 1664. Sibley pled guilty to rendering criminal assistance for intending to prevent or delay Luyster's

apprehension, although she testified she did not know he was being sought by law enforcement. RP 1665.

Luyster testified that he went to Schram's house on July 15, 2016, to see a friend who had been assaulted. While there, he discussed some problems he was having with law enforcement. His attorney had told him he was potentially facing federal charges. He was on bail at the time, and he didn't know what would happen to the bail if he was rearrested. RP 2289-90.

After a few hours, he left with Thompson and Leigh to go to Lamar's house. RP 2291-92. Knight was there as well, and after a while Sibley arrived with the children. RP 2292. Luyster left with Sibley and the children about 45 minutes later. He did not hear any gunfire before he left. RP 2293.

When they returned to Michael's house, Luyster asked Sibley to go buy him some beer, but she refused because he was intoxicated. After about an hour, his mother went to buy him some beer. RP 2294-95. Luyster then decided he wanted to go fishing, and because he was intoxicated Sibley drove. They ended up going to his uncle's house in Ocean Park instead. RP 2297.

Luyster denied telling his uncle he had shot anyone. RP 2298. While they were there, however, a report came on the news about his

friends being shot, and it said he was involved. RP 2299. That was the first he had heard of the shooting. RP 2300. Luyster decided to head back to town, and he and Sibley left. RP 2300.

They stopped at Abernathy Creek on the way home, and Luyster did some fishing. RP 2303. After a while he heard police calling his name over a loudspeaker, so he followed their commands and was placed under arrest. RP 2305. He was worried when officers pointed a gun at Sibley, and he told them she hadn't done anything. RP 2305.

Luyster testified that he did not shoot Lamar, Thompson, Knight or Leigh. RP 2307-08.

C. ARGUMENT

1. THE TRIAL COURT FAILED TO HONOR LUYSTER'S CONSTITUTIONAL RIGHT TO COUNSEL.

A trial court has discretion to grant or deny a motion for substitution of counsel. *In re Personal Restraint of Stenson*, 142 Wn.2d 710, 733, 16 P.3d 1 (2001). Nonetheless, this discretion is constrained by the accused's constitutional rights. *United States v. Nguyen*, 262 F.3d 998, 1003 (9th Cir. 2002). A claim of denial of counsel is reviewed de novo. *United States v. Moore*, 159 F.3d 1154, 1158 (9th Cir. 1998).

Both the federal and state constitutions guarantee the right to counsel in criminal proceedings. U.S. Const. amend VI; Wash. Const. art.

I, § 22. The right to counsel is violated when a defendant is forced to proceed with an attorney with whom he has an irreconcilable conflict, even if the attorney is competent. *Brown v. Craven*, 424 F.2d 1166, 1170 (9th Cir. 1970); *Nguyen*, 262 F. 3d at 1003-04. An irreconcilable conflict exists where there is a “serious breakdown in communications.” *Nguyen*, 262 F.3d at 1003 (citing *United States v. Musa*, 220 F.3d 1096, 1102 (9th Cir. 2000)). As set forth in *Nguyen*,

A defendant is denied his Sixth Amendment right to counsel when he is “forced into a trial with the assistance of a particular lawyer with whom he [is] dissatisfied, with whom he [will] not cooperate, and with whom he [will] not, in any manner whatsoever, communicate.”

Nguyen, 262 F.3d at 1003 (citing *Craven*, 424 F.2d at 1169). Where “the relationship between lawyer and client completely collapses, the refusal to substitute new counsel violates [the defendant’s] Sixth Amendment right to effective assistance of counsel.” *Moore*, 159 F.3d at 1158.

Substitution of counsel is warranted where the defendant shows good cause, “such as a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication.” *State v. Davis*, 3 Wash.App.2d 763, 790, 418 P.3d 199 (2018) (quoting *State v. Thompson*, 169 Wn. App. 436, 457, 290 P.3d 996 (2012)). When the court is made aware of a conflict between the defendant and counsel, it must thoroughly investigate

the factual basis of the defendant's dissatisfaction so that it can make an informed decision on the motion for substitution. *Id.*

In determining whether a motion for substitution of counsel was improperly denied, a reviewing court considers (1) the extent of the conflict, (2) the adequacy of the court's inquiry, and (3) the timeliness of the motion. *Stenson*, 142 Wn.2d at 724 (citing *Moore*, 159 F.3d at 1158-59). These factors all support the conclusion that the court erred in denying Luyster's motion for substitute counsel.

First, the conflict between Luyster and trial counsel was substantial. Luyster perceived that Buckley was acting in his own interests instead of Luyster's. Although he had agreed to request reappointment of one of the original defense attorneys, Buckley failed to do so, due to a personal conflict which he failed to disclose to Luyster. When Luyster learned about the conflict from another source and confronted Buckley, Buckley stopped communicating with him. It also appeared that Rucker was not able to act professionally in Luyster's defense. He accepted appointment on the case despite his overwhelming caseload, and he disclosed confidential information about another client to Luyster. These actions caused Luyster legitimate concern that Rucker would act unprofessionally in his case.

Luyster informed the court at the July 11, 2017, hearing that he had made multiple attempts to resolve his conflicts with counsel, but communication was impossible. RP 66. The court denied Luyster's request for new counsel at that time. RP 69-70. When Luyster renewed his motion on August 29, 2017, communication had not improved, and in fact Luyster felt his attorneys were purposely avoiding communication with him in retaliation for his complaints about their conduct. Supp. CP (Motion and Declaration to Discharge Counsel); RP 86. The lack of communication was preventing him from making informed decisions about his defense. For all these reasons, Luyster was unable to trust his attorneys or participate in his defense. RP 90-91.

This was not a case in which the defendant created the conflict by refusing to cooperate with his attorneys. *See Thompson*, 169 Wn. App. at 457-58 (defendant not entitled to new counsel simply because he refuses to cooperate with attorney). There was no representation that Luyster refused to communicate with or follow recommendations of counsel. Instead, Luyster was attempting to stay involved in his defense but was being provided conflicting information by counsel and excluded from trial preparation. Supp. CP (Sub No. 268, Declaration of Service); Supp. CP (Sub No. 292, Motion and Declaration to Discharge Counsel); RP 90-91. The breakdown in the attorney-client relationship constituted a substantial

conflict that should have been addressed by granting the motion to discharge counsel. *See Moore*, 159 F.3d at 1160.

Next, the court's inquiry into the conflict was inadequate. The court allowed Luyster to explain the reasons for his motion and the attorneys to respond, but it dismissed Luyster's concerns, saying increased contact should remedy the situation. RP 94-95. The court saw no reason to inquire into Luyster's complaints regarding counsel's personal conflicts, however, discounting the impact those conflicts had on Luyster's ability to trust counsel. RP 95.

As to timeliness, Luyster first requested substitution of counsel in June 2017, and he raised the issue again in July and August 2017. Jury selection did not begin until the end of October. There are no legitimate concerns about the timeliness of Luyster's request, and there was no suggestion by the court that timing factored into its decision.

The trial court violated Luyster's constitutional right to counsel by denying his motion to discharge and substitute counsel, forcing him to work with attorneys with whom he had a serious breakdown in communication. The erroneous denial of his motion requires reversal. *Nguyen*, 262 F.3d at 1005; *Moore*, 159 F.3d at 1161.

2. THE WARRANT AFFIDAVIT FAILED TO DEMONSTRATE THE RELIABILITY OF THE INFORMANTS AND THEREFORE DID NOT ESTABLISH PROBABLE CAUSE. EVIDENCE SEIZED PURSUANT TO THE UNLAWFUL WARRANT SHOULD HAVE BEEN SUPPRESSED.

The state and federal constitutions protect individuals against unreasonable searches and seizures, and warrantless searches are generally condemned as unreasonable. *State v. Hendrickson*, 129 Wn.2d 61, 70, 917 P.2d 563 (1996). A search warrant may only issue on a showing of probable cause. U.S. Const. amend, IV; Wash. Const. art. I, § 7. The warrant must be supported by an affidavit which identifies particularly the place to be searched and the persons or things to be seized. *Id*; *State v. Lyons*, 174 Wn.2d 354, 359, 275 P.3d 314 (2012). On appeal the validity of a search warrant is reviewed de novo. *State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d 658 (2008). Deference is given to the magistrate’s probable cause decision, but that deference is not unlimited. *Lyons*, 174 Wn.2d at 362. The reviewing court “cannot defer to the magistrate where the affidavit does not provide a substantial basis for determining probable cause.” *Id.* at 363.

“To establish probable cause, the affidavit must set forth sufficient facts to convince a reasonable person of the probability the defendant is engaged in criminal activity and that evidence of criminal activity can be

found at the place to be searched.” *Id.* at 359. The affidavit must adequately show circumstances that extend beyond suspicion and personal belief that evidence of a crime will be found on the premises to be searched. *State v. Seagull*, 95 Wn.2d 898, 907, 632 P.2d 44 (1981). Probable cause must be based on facts and not mere conclusions. *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999).

The warrant at issue in this case authorized search of a storage unit based on information from two people, one named and the other unnamed. Paul Sibley, Andrea Sibley’s father, informed law enforcement that he had helped his daughter and Luyster move into Michael Luyster’s house about two weeks earlier, and he moved some of their belongings into a storage facility roughly across the road from Michael’s house. Mr. Sibley said the storage unit was rented in Andrea Sibley’s name. CP 113. The other informant was identified only as “the owner of the storage unit business,” with no other information provided about him or her. *Id.* Apparently this person reported that Andrea Sibley began renting unit 36 in the storage facility about two weeks prior to the warrant affidavit. *Id.*

When, as in this case, the search warrant application is based on an informant’s hearsay, Washington courts evaluate the warrant application

using the two-pronged *Aguilar-Spinelli*¹ test. *State v. Jackson*, 102 Wn.2d 432, 688 P.2d 136 (1984). Under that test, probable cause exists only if the informant's (1) basis of knowledge and (2) veracity have been demonstrated. Both prongs must be satisfied to support probable cause unless the substance of the tip is verified by independent police investigation. *Jackson*, 102 Wn.2d at 436-38.

Here, the affidavit fails to establish the veracity of either informant. The only information provided about Paul Sibley was that he is Andrea Sibley's father. While courts distinguish between "professional" and "citizen" informers, relaxing the necessary showing of reliability for the latter, some showing of reliability is still required. The affidavit must contain some information which would reasonably support an inference that the informant is telling the truth. *State v. Huft*, 106 Wn.2d 206, 211, 720 P.2d 838 (1986); *State v. Chatmon*, 9 Wn. App. 741, 746, 515 P.2d 530 (1973).

If the informant is an ordinary citizen and his identity is revealed to the issuing magistrate, reliability may be found from his detailed description of the crime he observed or about which he had knowledge. *State v. Stock*, 44 Wn. App. 467, 470-71, 722 P.2d 1330 (1986); *State v. Riley*, 34 Wn. App. 529, 663 P.2d 145 (1983). Such detail is lacking here.

¹ *Spinelli v. United States*, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969); *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964).

Paul Sibley did not purport to observe or have knowledge of any criminal activity. He gave no details regarding the contents of the storage unit and did not claim to have been there after the move two weeks earlier. CP 113. The asserted connection to criminal activity came from police speculation that Luyster and Sibley might have accessed the storage unit sometime after the shooting occurred. CP 115. Nothing in the affidavit supports a conclusion that Paul Sibley is sufficiently reliable that his information could be used to establish probable cause for a search.

Even more problematic is the unnamed informant. A heightened showing of credibility is required to establish the credibility of a citizen informant whose identity is known to police but not revealed to the issuing judge. *State v. Ibarra*, 61 Wn. App. 695, 700, 812 P.2d 114 (1991). “There must be enough additional information in the affidavit to support an inference that the unidentified or confidential informant is telling the truth.” *Id.* In *Ibarra*, the affidavit was insufficient to establish the unnamed informant’s credibility, where it stated only that he was acting out of a sense of civic duty, was not seeking monetary compensation or leniency, and had never been arrested. *Id.* at 701; compare *State v. Berlin*, 46 Wn. App. 587, 591, 731 P.2d 548 (1987) (informants’ identities known to police but not revealed to magistrate, but affidavit indicated police checked their background and determined they had no criminal record,

also gave legitimate reason for anonymity). As in *Ibarra*, the affidavit here fails to establish credibility, informing the court only that the unnamed informant owned the storage business in question.

The affidavit in this case does not provide enough details about either informant or any independent police investigation to establish their reliability. As our Supreme Court has recognized,

Const. art. 1, § 7 confers upon the citizenry of this state a right to be free from unreasonable governmental intrusions. This constitutional right can be protected only if the affidavit informs the magistrate of the underlying circumstances which led the officer to conclude that the informant was credible and obtained the information in a reliable way. Only in this way can the magistrate make the properly independent judgment about the persuasiveness of the facts relied upon by the officer to show probable cause.

Jackson, 102 Wn.2d at 443. The issuing judge in this case did not have enough information to determine that Paul Sibley and the unnamed informant were credible. The warrant affidavit thus fails to establish probable cause to believe evidence of criminal activity would be found in unit 36 at the storage facility.

Evidence seized as result of the warrant included a storage case and documents relating to a Kimber .45 semiautomatic pistol. Forensic evidence determined that cartridge casings found at the scene and bullets recovered from the victims were fired from that same type of gun. This was the only evidence showing a connection between Luyster and the type

of weapon used in the charged offenses. Luyster's convictions must be reversed and remanded for a new trial in which this unlawfully obtained evidence is suppressed.

3. STATUTORY AMENDMENTS PROHIBITING IMPOSITION OF CERTAIN LEGAL FINANCIAL OBLIGATIONS APPLY TO LUYSTER'S CASE, AND THOSE LFOS MUST BE STRICKEN.

Luyster was convicted on all counts and the court imposed sentences of life in prison without the possibility of early release on the three murder charges, 471 months on the attempted murder charge, 166 months for the first degree unlawful possession of a firearm conviction, and 60 months for the second degree unlawful possession of a firearm. CP 513-14. The court entered a finding that Luyster was indigent and not anticipated to be able to pay financial obligations in the future. CP 513. Despite his indigency, the court ordered Luyster to pay the \$200 criminal filing fee and \$250 jury demand fee. CP 516. In addition, although Luyster's criminal history includes prior felonies, the court imposed a \$100 DNA collection fee. *Id.*

In March 2018, the Legislature enacted Engrossed Second Substitute House Bill 1783, 65th Leg., Reg. Sess. (Wash. 2018), modifying Washington's system for imposing and collecting LFOs. Under this bill, statutory amendments prohibit the imposition of costs if

the defendant is indigent at the time of sentencing,² prohibit imposition of the \$200 criminal filing fee on an indigent defendant,³ and prohibit imposition of the \$100 DNA fee if the State has previously collected the offender's DNA as a result of a prior conviction.⁴ Laws of 2018, ch. 269 § 6, 17, 18. These amendments went into effect on June 7, 2018. *Id.*

The Washington Supreme Court recently held that the statutory amendments enacted by House Bill 1783 apply to cases pending on direct appeal when the amendments went into effect. *State v. Ramirez*, ___ Wn.2d ___, 426 P.3d 714, 722 (2018). Because these amendments pertain to costs imposed upon conviction, and Luyster's case was not yet final when the amendments were enacted, he is entitled to benefit from this statutory change. *Ramirez*, 426 P.3d at 723.

Luyster was indigent at the time of sentencing. CP 513. Because the statutory amendments expressly prohibit courts from imposing

² “The court shall not order a defendant to pay costs if the defendant at the time of sentencing is indigent as defined in RCW 10.101.010(3) (a) through (c). In determining the amount and method of payment of costs for defendants who are not indigent as defined in RCW 10.101.010(3) (a) through (c), the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.” RCW 10.01.160(3).

³ “Upon conviction or plea of guilty, upon failure to prosecute an appeal from a court of limited jurisdiction as provided by law, or upon affirmance of a conviction by a court of limited jurisdiction, an adult defendant in a criminal case shall be liable for a fee of two hundred dollars, except this fee shall not be imposed on a defendant who is indigent as defined in RCW 10.101.010(3) (a) through (c).” RCW 36.18.202(2)(h).

⁴ “Every sentence imposed for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars unless the state has previously collected the offender's DNA as a result of a prior conviction. The fee is a court-ordered legal financial obligation as defined in RCW 9.94A.030 and other applicable law....” RCW 43.43.7541.

discretionary costs and the criminal filing fee on indigent defendants, both the discretionary jury demand fee⁵ and the filing fee must be stricken from his judgment and sentence. In addition, because Luyster has prior convictions which resulted in the collection of his DNA, the court was prohibited from imposing a DNA collection fee. That fee must be stricken as well. *See Ramirez*, 426 P.3d at 723 (remedy is to remand for trial court to strike improperly imposed LFOs).

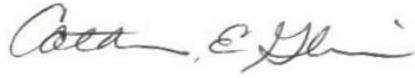
D. CONCLUSION

Denial of Luyster's motion for substitution of counsel when he demonstrated a substantial conflict violated his constitutional right to counsel, and reversal is required. In addition, evidence seized pursuant to the invalid warrant must be suppressed on remand. Finally, legal financial obligations for the criminal filing fee, jury demand fee, and DNA collection fee were improperly imposed and must be stricken.

⁵ The jury demand fee is discretionary. RCW 36.18.016(3)(b); RCW 10.46.190; *State v. Hathaway*, 161 Wn. App. 634, 653, 251 P.3d 253, *review denied*, 172 Wn.2d 1021 (2011).

DATED November 20, 2018.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Catherine E. Glinski".

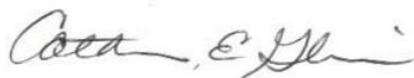
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Certification of Service by Mail

Today I caused to be mailed copies of the Brief of Appellant and Supplemental Designation of Clerk's Papers in *State v. Brent Luyster*, Cause No. 51288-2-II as follows:

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Federal Detention Center
P.O. Box 13900
Seattle, WA 98198-1090

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Catherine E. Glinski
Done in Manchester, WA
November 20, 2018

GLINSKI LAW FIRM PLLC

November 20, 2018 - 2:50 PM

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Appellate Court Case Title: State of Washington, Respondent v. Brent Luyster, Appellant
Superior Court Case Number: 16-1-01503-4

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