

FILED
Court of Appeals
Division II
State of Washington
11/6/2018 4:38 PM

NO. 51557-1-II

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

IN RE THE DETENTION OF

JOEL REIMER,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. INTRODUCTION TO REPLY

The State makes both incorrect and unpersuasive arguments in its response brief. Mr. Reimer addresses them in turn here. For the reasons set forth here and in his Opening Brief, the Court should hold he was denied the effective assistance of counsel and the due process right to meaningfully assist counsel. The matter should be remanded for a new, fair commitment trial.

B. ARGUMENT IN REPLY

1. Mr. Reimer's post-trial motion is timely.

Mr. Reimer's motions are timely. The initial motion for a new trial was filed by Mr. Reimer's commitment trial counsel on November 4, 2016—within 10 days of the commitment order. CP 1, 5-22. At the December 5, 2016 hearing, the trial court allowed counsel to withdraw, filed Mr. Reimer's pro se motions, and denied the timely initial motion for a new trial without prejudice to renew by new counsel. RP (12/05/16) 1413 (filing pro se motions), 1415 (denying CR 59 motion without prejudice; the "Order of Withdrawal is effective today"). It was clear the court denied the CR 59 motion without prejudice on all issues, including ineffective assistance of counsel. *Compare* RP (12/05/16) 1411-12, 1415 (denying without prejudice because commitment trial

counsel cannot pursue post-trial motion due to conflict of interest) *with* Resp. Br. at 11-12 (claiming motion was not denied without prejudice). The court specifically acknowledged trial counsel's concern that they could not themselves file the ineffective assistance of counsel issue. RP (12/05/16) 1411-12, 1415. Therefore, the trial court filed Mr. Reimer's pro se motions and denied all without prejudice to renew through newly appointed counsel. RP (12/05/16) 1411-12, 1413 1415.

New counsel filed the restated motion for a new trial, alleging ineffective assistance of trial counsel and attaching Mr. Reimer's pro se motions. CP 28-187; RP 4-5 (new counsel discusses decision to raise issues asserted in Reimer's pro se filings). These were the same motions the trial court had filed pro se for Mr. Reimer and denied without prejudice when timely filed in November 2016. RP (12/05/16) 1411-13, 1415. This restated motion for a new trial was timely because the initial motion for a new trial was timely filed and the trial court denied the initial motion without prejudice for newly appointed counsel to renew it. *See* RP (12/05/16) 1413, 1415; CP 194 (arguing restated motion are amendments that relate back to initial filing).¹

¹ While the State may be correct that Mr. Reimer's post-trial counsel filed a notice of appearance in January 2017, the record demonstrates the relationship was not established until October of that year, just days before

Alternatively, the restated motion is timely under CR 60, which provides motions must be made “within a reasonable time” including up to one year following the judgment. CP 193-94 (motion to reconsider discussing application of CR 60); CR 60.² Mr. Reimer’s restated motion for a new trial was filed within one year of the commitment order. *Compare* CP 28 (restated motion filed Oct. 23, 2017) *with* CP 1 (commitment order filed Oct. 27, 2016). The motion was timely under CR 60. Moreover, the State puts forth no prejudice from the delay between the initial CR 59 motion and the restated motion or the CR 60 motion to reconsider. *See Lockett v. Boeing Co.*, 98 Wn. App. 307, 989 P.2d 1144 (1999) (motion filed within a reasonable time when considering factors such as moving party’s good reasons for not filing sooner and lack of prejudice to nonmoving party).

the filing of the restated motion for a new trial. RP (10/11/17) 2 (counsel asserts he is “assigned standby counsel” and the court questions whether Reimer “still” intends to proceed pro se); *see generally id.* at 3-5 (Reimer wants to proceed in whatever fashion results in his pro se motion being considered promptly).

² The State claims the CR 60 motion was not denied as untimely and that the court’s decision on untimeliness pertained only to the CR 59 motion. Resp. Br. at 17 n.8. However, the order denying Mr. Reimer’s CR 60 motion to reconsider and/or to vacate states “I remain persuaded that the original decision was correct. Therefore the motion is denied.” CP 199. The court thereby affirmed it was denying Mr. Reimer’s post-trial motions on the same basis: the trial court found them untimely.

Additionally, the CR 60 motion sufficiently presented Mr. Reimer's claims. CP 193-94; *see* Resp. Br. at 15-16. The motion is clear that it is a motion to reconsider and/or vacate the CR 59 motion and incorporates that motion by reference. *Id.* (for example, "Based on the same 10/23/17 *Restated Motion for a New Trial*"). The motions sufficiently present Mr. Reimer's legal claims, factual record, and argument. For the same reason, Mr. Reimer has not abandoned those claims as to the CR 60 motion on appeal. *See* Resp. Br. at 19. These issues were incorporated from the CR 59 motion into the CR 60 motion and Mr. Reimer deals with them collectively on appeal.

2. The Court should review the substantive claims de novo.

The Court should decline the State's invitation to disregard the merits. Because the evidence below was entirely documentary, this Court "stands in the same position as the trial court in looking at the facts of the case." *State v. Smith*, 75 Wn.2d 715, 718, 453 P.2d 832 (1969). This Court is entitled to make its own examination of the record. *Id.* at 719. Review is de novo. *Id.* at 718; *State v. A.N.J.*, 168 Wn.2d 91, 109, 225 P.3d 956 (2010) (ineffective assistance of counsel claims reviewed de novo).

Even if the Court agrees with the State that it cannot review the substance of the underlying motions, the Court should reverse the trial court's denial of the motions as untimely and remand for the trial court to consider the substantive claims on the merits.

3. The Court should order a new trial based on commitment counsel's ineffective assistance.

a. Commitment trial counsel provided deficient performance.

Mr. Reimer's trial attorneys provided deficient performance on several bases. They failed to maintain open communication, allowed the prosecution to liken Mr. Reimer to a mafia boss, inserted prejudicial misstatements into cross-examination, argued to the jury it would be criticized by the public for finding in favor of Mr. Reimer, failed to call witnesses who could assist in Mr. Reimer's defense, and failed to bring motions supported by the law. Trial counsel moved pretrial to restrict the prosecution from comparing Mr. Reimer to mafia boss John Gotti, which was irrelevant and caused unfair prejudice. CP 32 (citing RP

(10/11/16) 185-89). These grounds are elaborated upon in the Opening Brief and the underlying CR 59 and CR 60 motion.

b. The State misrepresents the trial court's ruling on the John Gotti references.

In this appeal, the State ignores the trial court's ultimate ruling on its attempt to compare Mr. Reimer to John Gotti. The State claims the trial court did not reserve ruling on this issue by citing to the court's interim decision. Resp. Br. at 32. It is true that the trial court momentarily ruled the "language fair game." RP (10/11/16) 188. But, Mr. Reimer's counsel continued to argue the issue and the trial court ultimately ruled, "I think I'll wait for the argument and the objection on that one. I don't want to go too far in stuff that isn't in front of me yet." RP (10/11/16) 188-89. Thus, contrary to the State's brief, Mr. Reimer correctly asserts the trial court reserved ruling after Mr. Reimer's commitment counsel pursued exclusion in a pretrial hearing. Yet, when the prosecution proceeded to liken Mr. Reimer to John Gotti at trial, Mr. Reimer's counsel failed to object on the issue it had successfully persuaded the court to reserve ruling. RP (10/18/16) RP 798-801. The representation was deficient.

- c. Mr. Reimer establishes prejudice by showing a reasonable probability that counsel's deficiencies affected the outcome of the trial.

With regard to prejudice, Mr. Reimer need show only there is a reasonable probability that but for counsel's inadequate performance, the result would have been different. *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). A reasonable probability is lower than 50 percent. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987) (reasonable probability standard is lower than the "more likely than not" standard). It is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694; *Thomas*, 109 Wn.2d at 226.

The effect of these errors on the verdict is especially probable here because the jury was initially deadlocked. The presiding juror reported the discourse was deep and rich, but that votes had not changed for a long time. RP 1390-92. Further, the jury was confronted with disputed expert opinions—in other words, the evidence was on balance. The State's expert diagnosed Mr. Reimer with sexual sadism among other disorders. RP 556-59. But Mr. Reimer's expert, the former head of the SCC, testified Mr. Reimer did not suffer from a condition that made him predisposed to committing sexually violent acts. RP

1095-96, 1114-15, 1192. Even small errors might have changed the outcome. The ineffectiveness asserted in Mr. Reimer's motions were more than enough to call this close verdict into question.

Standing alone or in the aggregate, trial counsel's multitudinous deficiencies undermine confidence in the outcome of Mr. Reimer's commitment trial.

- d. This appeal, and not a personal restraint petition, is the appropriate vehicle to resolve Mr. Reimer's claims.

The State continues to argue that only a personal restraint petition is available to Mr. Reimer. *E.g.*, Resp. Br. at 24-25; *see* CP 189-90. But the State fails to respond to *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995) and the argument addressed in Mr. Reimer's opening brief. Op. Br. at 17. As discussed there, if the record is sufficient to determine the lack of a trial attorney's effectiveness, the claim can be raised and decided in a post-trial motion and reviewed on direct appeal. *See McFarland*, 127 Wn.2d at 335 (review limited to matters contained in the record). The record is sufficient here to determine the issue raised. *See id.*

The State also ignores that Mr. Reimer could be procedurally barred from raising these issues in a personal restraint petition. A personal restraint petition requires the petitioner to have no other

available means for relief. RAP 16.4(d). Because CR 60(b) was available to Mr. Reimer, a personal restraint petition likely would not have been entertained.

The State further ignores the inefficiency of requiring Mr. Reimer to file a personal restraint petition. The record and briefing are complete in this appeal. It would be a waste of judicial and party resources to dismiss the appeal in order to require Mr. Reimer to raise the same issues and record in a personal restraint petition to this Court.

Finally, to the extent the State argues Mr. Reimer should have raised these concerns in his direct appeal from the commitment trial verdict, Mr. Reimer notes that the record for ineffective assistance of counsel was not complete. *See* RP 4 (counsel notes issue could not be raised in direct appeal), 9-10 (counsel notes matters were not in the record until counsel was reassigned, which occurred after the notice of appeal). Moreover, the trial court had denied Mr. Reimer's motion without prejudice to renew. The claim was not exhausted until Mr. Reimer's newly-appointed trial-level counsel renewed and restated the motions.

4. In violation of due process, Mr. Reimer was denied access to materials that deprived him of the ability to meaningfully assist in his defense.

The State claims Mr. Reimer's ability to assist in his own defense is irrelevant because he waived his presence at much of his trial. Resp. Br. at 29, 43. The State's argument misses the mark. Mr. Reimer retained the right to assist counsel, even if he did not attend every day of trial. *See, e.g., Godinez v. Moran*, 509 U.S. 389, 402, 113 S. Ct. 2680, 125 L. Ed. 2d 321 (1993) (defendant must be able "to assist counsel"); *Drope v. Missouri*, 420 U.S. 162, 171, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975) (constitutional trial depends upon defendant being able to "assist in preparing his defense"). A client's due process right to assist counsel is not limited to whispering in counsel's ear during trial. *See Drope*, 420 U.S. at 171 (ability to assist in preparation presentation of defense, and not necessarily its execution, is critical to a fair trial).

Mr. Reimer's ability to assist counsel in trial preparation, pre-trial litigation, pretrial hearings, and remotely during trial was violated by his lack of access to legal files and records. *See CP 53-76; CP 77*. If he had access to withheld materials related to his Native American heritage defense, Mr. Reimer could have assisted his attorneys in their

trial preparation. CP 106-07 (discussing withheld material). With access to records pertaining to claims asserted by the State's expert, Mr. Reimer could have assisted his attorneys in their pretrial litigation and proceedings as well as remotely during trial. CP 100-01 (discussing information contained in withheld records that pertain to claims asserted by prosecution's expert witness).

Even a client who chooses to waive his right to be present at portions (or all) of the trial can assist counsel and must be allowed to under the due process clause. *See, e.g., In re Det. of Stout*, 159 Wn.2d 357, 369, 150 P.3d 86 (2007) (due process protections apply to civil commitment proceedings); *Godinez*, 509 U.S. at 402 (ability "to assist counsel" is a prerequisite to trial); *Drope*, 420 U.S. at 171 (constitutional trial depends upon defendant being able to "assist in preparing his defense").

Moreover, the State's briefing assumes too much by asserting Mr. Reimer waived his presence at trial. Mr. Reimer has challenged the extent of his waiver and his inability to testify in his own defense in the linked direct appeal *In re Det. of Joel Reimer*, No. 49881-2 (oral arg. heard Jun. 26, 2018).

C. CONCLUSION

Because Mr. Reimer was deprived of constitutionally effective counsel and because the trial was unfair due to the withholding of documents critical to his defense, the Court should reverse and remand for a new commitment trial.

DATED this 6th day of November, 2018.

Respectfully submitted,



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)	
JOEL REIMER,)	NO. 51557-1-II
)	
APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

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SIGNED IN SEATTLE, WASHINGTON THIS 6TH DAY OF NOVEMBER, 2018.

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