

COURT OF APPEALS
DIVISION II

2019 FEB 26 AM 11:55

STATE OF WASHINGTON

State of Washington,)
)
 Respondent,)
)
 vs.)
)
 Fernando A. Celaya,)
)
 Appellant.)

No. 52063-0-II

STATEMENT OF ADDITIONAL
GROUNDS FOR REVIEW

I, Fernando A. Celaya, have received and reviewed the opening brief prepared by my attorney, Summarized below are the additional grounds for review that are not addressed in that brief. I understand the Court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits.

ADDITIONAL GROUND ONE

PETITIONER'S 6TH AMEND. TO THE U.S. CONST. AND ART. 1, SEC. 22, OF THE STATE CONST. GUARANTEE THE RIGHT TO EFFECTIVE REPRESENTATION. COUNSEL'S FAILURE TO PRESENT A COMPLETE DEFENSE IN CROSS EXAMINATION OF THE STATE'S ALLEGED VICTIM, CONSTITUTIONAL RIGHT TO SPEEDY SENTENCING, AND INVESTIGATION OF HIS CLIENT'S BACKGROUND DENIED MR. CELAYA HIS RIGHTS TO EFFECTIVE REPRESENTATION.

A claim that counsel was ineffective is a mixed question of law and fact that we review de novo. Strickland, [183 Wn.2d 339] 466 U.S. at 698; In Re Pers. Restraint of Brett, 142 Wn.2d 868,873, 16 P.3d 601 (2001). A defendant is denied effective assistance of counsel if the complained-of attorney conduct (1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is probability that the outcome would be different but for the attorney's conduct. State v. Benn, 120 Wn.2d 631,663, 845 P.2d 289 (1993)(emphasis omitted)(Citing Strickland, 466 U.S. at 687-

88). Thus, to prevail on a claim of ineffective assistance of trial counsel, an appellant must show both deficient performance and prejudice. Strickland, 466 at 687; Hendrickson, 129 Wn.2d at 77-78. To show prejudice, the appellant need not prove that the outcome would have been different but must show only a "reasonable probability"- by less than a more likely than not standard-that, but for counsel's unprofessional errors, the result of the proceedings would have been different. Strickland, 466 U.S. at 694; Hendrickson, 129 Wn.2d at 78.

On February 8, 2018, the Court conducted a Rearraignment/Continuance Hearing. Defendant's trial attorney went on to state in part:

I was prepared to go to trial back in November. I was prepared to go to trial on the 5th. I was prepared to go to trial on the 25th, 24th, whatever the date was. And, again, each time, I'm dealing with the fact that I'm getting new information from the State up until the last minute. Really, when is "enough" enough?

I'm glad the court brought up those text messages that I think are important to note that the State seems to want to use to validate their witness tampering, yet, want to exclude for purposes of the trial. I want to read the court an excerpt, if I may, from those text messages in respects to why I don't believe that the State is being completely-- actually, I don't know--

The Court: You call them text messages. I thought that these were recordings.

Mr. Andrews: No, Your Honor. These are text messages that were provided to defense at the defense interview of the--

The Court: Are you talking about the Mr. Guan Steve text messages?

Mr. Andrews: Yes. These are text messages in which the State's victim advocate found on Facebook, and the State turned over in which, I believe, are relevant at this point and have been mischaracterized by the State. Again, the relevancy is, Your Honor, she makes comments about shooting somebody and lying to the police about it and why she would get away with it.

The Court: That, I don't know about.

Mr. Andrews: I'm just-- I'm letting the court know. She doesn't have to tell to elaborate a story as to "why I shot your bitch ass in the face." Again, if we are going to get into the harassment charge, these are wholly relevant as to her being truly threatened.

Again, now the State is trying to turn these messages around in respects to they are related, but they are not related. Well, they are related for purposes of showing the witness tampering, but we don't want them in trial. I don't know what the State wants anymore, Your Honor. I'm sitting here--

The Court: I think I do.

Mr. Andrews: I appreciate that. I'm strenuously objecting to the amendment of the information. I believe it prejudices my client's ability to go forward on those charges today. RP 28-29.

As stated herein the trial court's arraignment with the State Prosecutor and defense attorney's discussion regarding the State's position to amend defendant's charges to include the witness tampering offense brought to light the State's alleged victim's mentality to commit and promote violence.

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the relevancy is, Your Honor, she makes comments about shooting somebody and lying to the police about it and why she would get away with it.

The Court: That, I don't know about.

Mr. Andrews: I'm just-- I'm letting the court know. She doesn't have to tell to elaborate a story as to "why I shot your bitch ass in the face." Again, if we are going to get into the harassment charge, those are wholly relevant as to her being truly threatened.

Here counsel's approach can not be considered sound trial strategy nor was it tactical to not raise this relevant issue on cross-examination of the State's alleged victim's testimony during the course of Mr. Celaya's trial.

The Sixth Amendment to the United States Constitution provides: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury..., and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Implicit in the Sixth Amendment is the criminal defendant's right to control his defense. See, Faretta v. California, 422 U.S. 806, 819, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975) ("Although not stated in this [Sixth] Amendment in so many words, the right... to make one's own defense personally [] is thus necessarily implied by the structure of the Amendment."); [178 Wn.2d 492] State v. Jones, 99 Wash.2d 735, 740, 664 P.2d 1216 (1983) ("Faretta embodies 'the conviction that a defendant has the right to decide, within limits, the type of defense he wishes to mount.'" (quoting United States v. Laura, 607 F.2d 52, 56 (3rd Cir. 1979))). The defendant's right to control his defense is

necessary "to further the truth-seeking aim of a criminal trial and to respect individual dignity and autonomy." State v. Coristine, 177 Wash.2d 370,376, 300 P.3d 400 (2013).

This right extends to State prosecutions through the Due process Clause of the Fourteenth Amendment to the U.S. Const. Pointer v. Texas, 380 U.S. 400, 403 (1965). The right to cross-examine an adverse witness goes to the weight of credibility presented most especially during a jury trial. Maryland v. Craig, 497 U.S. 836,846 (1990)("[F]ace-to-face confrontation enhances the accuracy of fact finding by reducing the risk that a witness will wrongfully implicate an innocent person.") See also Coy v. Iowa, 487 U.S. 1012, 1019 (1988)("It is always more difficult to tell a lie about a person 'to his face' than 'behind his back'"); See, e.g., U.S. v. Soriano-Jarquín, 492 F.3d 495, 504 (4th Cir. 2007)(Confrontation Clause not violated when potentially adverse witness did not testify at trial and statements by him were not introduced).

The entire transcript reflecting Ms. Jeffries testimony at trial does reveal during direct or cross examination defense counsel's reasoning for not bringing to the Court's attention the damaging evidence with-held for impeachment purposes of the State's alleged victim Ms. Jeffries. RP 7-71. Higgins v. Renico, 470 F.3d 624, 632-33 (6th Cir. 2006)(presumption not applicable when counsel declined to impeach prosecutions key witness through cross-examination)(presumption of reasonableness when counsel pursued viable strategy at expense of different viable strategy) Smith v. Gaetz, 565 F.3d 346, 353-54 (7th Cir. 2009).

The record is clear despite counsel's interviews with Ms. Jeffries that

there was ample evidence to be presented at trial that was not provided or even currently in limbo that appellant has yet to receive to present in this appeal. U.S. v. Collins, 430 F.3d 1260, 1265-66 (10th Cir. 2005) (Counsel's refusal to speak at defendant's competency hearing and failure to introduce previously unavailable mitigating evidence warranted presumption of prejudice).

As our Supreme Court wrote in Lee, prior false accusations "bearing a strong resemblance to the circumstances giving rise to the allegations at issue" are "highly probative." 188 Wn.2d at 497. Evidence of "a witness' dishonesty, including false accusations, may be appropriate and even required in some circumstances." 188 Wn.2d at 496.

ER 404(b) bars certain types of evidence "to prove the character of a person in order to show action in conformity therewith." Such evidence "may, however, be admissible for any other purpose, depending on its relevance and the balancing of its probative value and danger of unfair prejudice; the list of other purposes in the second sentence of ER 404(b) is merely illustrative." State v. Gresham, 173 Wn.2d 405, 420-21, 269 P.3d 207 (2012).

This Court should find that trial counsel's decision to not raise this highly prejudicial evidence against Mr. Celaya during trial would have accounted for what actually transpired with Ms. Jeffries. Both the federal and state constitutions protect a defendant's right to confront an adverse witness. U.S. Const. Amend. VI; Wash. Const. Art. I, § 22; Davis v. Alaska, 415 U.S. 308, 315 (1974); State v. Darden, 145 Wn.2d 612, 41 P.3d 1189 (2002).

"Confrontation" includes more than mere physical confrontation. Davis, 415 U.S. at 315. "The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination." Id. at 315-16. Cross-

examination allows the defendant to "test the perception, memory, and credibility of witnesses." Darden, 145 Wn.2d at 620. "Whenever the right to confront is denied, the ultimate integrity of this fact-finding process is called into question. As such, the right to confront must be zealously guarded." Darden, 145 Wn.2d at 620 (citation omitted).

Trial counsel's failure to present a defense that holds the prosecutor's case to a standard of meeting its burden and the effect it would have had on Mr. Celaya's trial cannot be conclusive to effective representation that has appellant serving a 84 month sentence.

B. APPELLANT'S SPEEDY SENTENCING RIGHTS WERE VIOLATED

Before imposing a sentence upon a defendant, the court shall conduct a sentencing hearing. The sentencing hearing shall be held within forty court days following conviction. Upon the motion of either party for good cause shown, or on its own motion, the court may extend the time period for conducting the sentencing hearing. RCW 9.94A.500. Speedy sentencing rights are required by court rule and statute. State v. Ellis, 76 Wn.App. 391,394, 884 P.2d 1360 (1994). CrR 7.1 requires the court to set a date, time, and place for sentencing in compliance with RCW 9.94A.110. Id.

A number of courts have held or assumed that the constitutional right to a speedy trial encompasses a right to speedy sentencing. See, e.g., Pollard v. U.S., 352 U.S. 354, 77 S.Ct. 481, 1 L.Ed.2d 393 (1957)(assumed speedy trial clause of Sixth Amendment applied to sentencing delays); Juarez-Casares United States, 496 F.2d 190,192 (5th Cir. 1974)(sentencing is part of trial for purposes of Sixth Amendment speedy trial guaranty); State v. Sterling, 23 Wn.App. 171, 596 P.2d 1082 (1979)(sentencing is part of trial for constitutional

rights, although test is standard of reasonableness, not specific standards applied to the adjudicatory phase). Under the Sixth Amendment and the Washington Constitution, if a delay is "purposeful or oppressive", it is also a violation of speedy sentencing rights. Ellis, 76 Wn.App. at 394 (Citing Pollard, 352 U.S. at 361; State v. Johnson, 100 Wn.2d 607,629, 674 P.2d 145 (1983)). In Ellis, the defendant's sentencing date was delayed almost two years without a waiver or good cause listed by the State. The defendant motioned for the court to set aside the judgment pursuant to CrR 7.3, which was granted by the trial court and affirmed on appeal. Ellis, Wn.App. at 395. On April 26, 2018, Mr. Celaya was found guilty of felony harassment, guilty of two counts of assault 4, guilty of a violating a no contact order, guilty of tampering with a witness, and found by special verdict that Celaya and Jeffries were members of the same household for each count. CP 333-346. On May 4, 2018, the State files a motion in support of arrest of judgment. On May 21, 2018, memorandum re sentencing is submitted. On May 23, 2018, an order for hearing is filed. On June 12, 2018, the State files a response. On June 15, 2018, defense counsel filed a response to the State's sentencing memo. On June 19, 2018, appellant is sentenced to prison confinement. About 54 days later without any elaboration or clarity for the continuances Mr. Celaya is finally brought before the Court to be sentenced furthering counsel's lack of compassion for effective representation.

This evidentiary hearing right is rooted in the constitutional right to due process. As such, it cannot be waived by silent acquiescence even when a defendant is represented by counsel. State v. Stegall, 124 Wn.2d 719, 730, 831 P.2d 979 (1994). To prove informed acquiescence, the State would

need to point to evidence in the record that counsel had consulted with the defendant about this hearing rights prior to standing silent. Stegall, 124 Wn.2d at 731. The State has a heavy burden of proving a defendant has intelligently, knowingly, and voluntarily waived the right to a hearing. Townsend, 2 Wn.App. at 436; State v. Iniquez, 167 Wn.2d 273,294 n.11, 217 P.3d 768 (2009) ("the government [must] prove that a waiver of a constitutional right... is knowing and voluntary"). Due process requires the State's proof be presented during an evidentiary hearing, at which the defendant must have the opportunity to call witnesses and contest the State's allegation. James, 96 Wn.2d at 850-51; Roberson, 118 Wn.App. at 158-59.

Mr. Celaya was not timely sentenced within forty court days as required by court rule, statute, and the United States and Washington State Constitution. One remedy for such a violation is the vacation of the judgment and entry of an order of dismissal, pursuant to CrR 7.8, as provided in Ellis, supra.

C. COUNSEL'S DUTY TO PRESENT FAVORABLE EVIDENCE IS VIOLATED

Although Mr. Celaya has had a challenging past due to his struggles with drug addiction and poor decision making. Nothing falls short of an attorney's duty to look into his client's past to determine the truth of those facts and accusations he faces as an accuse during the course leading up to his trial.

Mr. Celaya's attorney had an obligation to investigate his client's background thoroughly. Porter, 558 U.S. at 39. "[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantage background... May be less culpable than defendants who have no

no such excuse." Penny v. Lynaugh, 492 U.S. 302, 319 S.Ct. 2934, 106 L.Ed.2d 256 (1989), abrogated on other grounds by Atkins v. Virginia, 536 U.S. 304, 321, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). In evaluating the reasonableness of the investigation, "a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." Wiggins v. Smith, 539 U.S. 510, 527, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). Failure to develop penalty phase presentation is a deficiency in trial preparation, not trial strategy. Baan v. Calderon, 163 F.3d 1073,1079 (9th Cir. 1998); cf. Matter of Pers. Restraint of Lord, 123 Wn.2d 296,327, 868 P.2d 835 (1994).

This Court should consider counsel's duty to at least make a showing of why it wouldn't be important to research his client's capability to act on the premise of why or why not he would commit the acts he's accused of. Especially in light of the physical evidence photographed and submitted at trial. Both the accuse and allege victim sustained injuries. This act by trial counsel further the damage that could have been cushioned by investigative measures beneficial for appellant's defense of the charges.

This Court should easily conclude counsel's performance fell below a reasonable standard and the outcome of appellant's trial would have been completely altered in revealing the actual facts transpired in appellant's case.

ADDITIONAL GROUND TWO

THE CUMULATIVE EFFECT OF COUNSEL'S FAILURE TO PRESENT A COMPLETE DEFENSE IN CROSS EXAMINATION OF THE STATE'S ALLEGED VICTIM, CONSTITUTIONAL RIGHT TO SPEEDY SENTENCING, INVESTIGATION OF HIS CLIENT'S BACKGROUND, AND CONSTITUTIONAL RIGHT TO SPEEDY TRIAL DENIED APPELLANT HIS CONSTITUTIONAL RIGHT TO A FAIR AND IMPARTIAL TRIAL.

Appellant submits the cumulative effect of his trial counsel's failure to present a complete defense in cross examination of the State's alleged victim, constitutional right to speedy sentencing, investigation of his client's background, and constitutional right to speedy trial denied him his constitutional right to a fair and impartial trial.

Every defendant has the right to a fair trial, guaranteed by the federal and state constitutions. U.S. Const., Amends. 5,6; Wash. Const., Art 1, §§ 3,22. Cumulative trial error may deprive a defendant of his right to a fair trial. State v. Coe, 101 Wn.2d 772,789, 684 P.2d 668 (1984); State v. Johnson, 90 Wn.App. 54,74, 950 P.2d 981 (1998); State v. Perrett, 86 Wn.App. 312, 322-23, 936 P.2d 426, rev.denied, 133 Wn.2d 1019 (1997).

The cumulative error doctrine may warrant reversal of a defendant's conviction if the combined effect of several errors deprived the defendant of a fair trial, even if each error standing alone would not warrant reversal. Greiff, 141 Wash.2d at 929, 10 P.3d 390 (citing State v. Coe, 101 Wash.2d 772, 789, 684 P.2d 668 (1984)). The defendant has not had a fair trial when, considering the trial's scope, the errors' combined effect materially affected its outcome. See, State v. Russell, 125 Wash.2d 24,94, 882 P.2d 747 (1994). However, the cumulative error doctrine does not warrant reversal when a trial has few errors with little or no impact on the outcome. State v. Weber, 159 Wash.2d 252,279, 149 P.3d 646 (2006).

When applying the cumulative error doctrine, we consider errors committed by the trial court as well as instances of misconduct by other participants, such as prosecutors or witnesses. See Greiff, 141 Wash.2d at 929, 10 P.3d 390 (collecting cases); State v. Venegas, 155 Wash.App. 507,520, 228 P.3d 813,

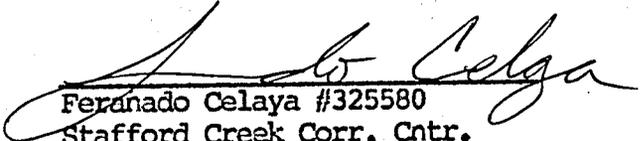
review denied, 170 Wash.2d 1003, 245 P.3d 226 (2010). The cumulative effect of two or more individually harmless errors has the potential to prejudice a defendant to the same extent as a single reversible error. U.S. v. Lindell, 881 F.2d 1313, 28 Fed.R.Evid.Ser. 1164 (5th Cir. 1989); U.S. v. Rivera, 900 F.2d 1462 (10th Cir. 1990).

This Court should consider the prejudice of counsel's refusal to hold the State Prosecutor to its burden of proof to sustain its convictions, speedy trial and sentencing violations, and appellant's rights to present a complete defense combined denied Mr. Celaya his constitutional rights to a fair and impartial trial. This Court should reverse appellant's convictions and remand for dismissal of all charges with prejudice.

CONCLUSION

The Court should reverse Mr. Celaya's convictions and remand to dismiss all charges with prejudice.

Respectfully submitted February 15, 2019.


Fernando Celaya #325580
Stafford Creek Corr. Cntr.
191 Constantine Way
Aberdeen, WA 98520

DECLARATION OF SERVICE BY MAIL
GR 3.1

I, Fernando A. Calaya, declare and say:

That on the 15 day of FEBRUARY, 2019, I deposited the following documents in the Stafford Creek Correction Center Legal Mail system, by ~~First Class~~ Mail pre-paid postage, under cause No. _____:

Appellant's Statement of Additional Grounds

addressed to the following:

Washington State Court of Appeals
Division Two
950 Broadway, Suite 300
Tacoma, WA 98402-4454

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

DATED THIS 15 day of FEBRUARY, 2019, in the City of Aberdeen, County of Grays Harbor, State of Washington.

Fernando Calaya
Signature

Fernando Calaya
Print Name

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