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NO. 53694-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

GREGORY SIMON,

Appellant.

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

The Honorable Stephanie Arend & Stanley J. Rumbaugh, Judges

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Appellant was denied his constitutional right to choice of counsel.

2. The requirement that the appellant pay supervision fees is unauthorized by statute. CP 77.

Issues Pertaining to Assignments of Error

1. Under the Sixth Amendment, a criminal defendant enjoys the right to hire counsel he believes to be best for the situation. While a court may balance this right against the demands of its calendar, it may not deny a continuance to obtain private counsel where no such demands exist. Appellant was in the process of securing private counsel for trial and needed as little as the afternoon to complete that process. Where the circumstances revealed no legitimate reason to deny a short continuance, did the trial court err by requiring appellant to proceed with counsel he did not want?

2. Appellant is indigent. Must the requirement that he pay supervision fees, a discretionary LFO, be stricken?

B. STATEMENT OF THE CASE

1. Procedural History.

The Snohomish County prosecutor charged appellant Gregory Simon by amended information with attempting to elude a pursuing police

vehicle, first degree unlawful possession of a firearm, and unlawful possession of both cocaine and methamphetamine, for events alleged to have occurred on January 2, 2019. CP 11-12; 2RP¹ 20. At trial, Simon stipulated that he had previously been convicted of “serious offense” for purposes of the firearm charge. CP 25-25; 2RP 60-61, 309-11.

A jury found Simon not guilty of unlawful possession of a firearm. CP 57. Simon was convicted as charged on the remaining counts. CP 56, 58-59; 2RP 345-48.

Based on an offender score of 9+, the trial court sentenced Simon to concurrent prison sentences totaling 27 months. The trial court also imposed 12 months of community custody. CP 68-83; 2RP 363-64.

The court, finding Simon lacked the ability to pay discretionary legal financial obligations (LFOs), imposed only the \$500 victim penalty assessment.² CP 74; 2RP 363-64. But the judgment and sentence also requires Simon to pay supervision fees as part of his community custody sentence. CP 77.

Simon timely appeals. CP 91.

¹ This brief refers to the verbatim report of proceedings as follows: 1RP – May 14, 2019 (morning session); 2RP – May 14, 2019 (afternoon session), May 15, 16, 21, and June 14, 2019; 3RP – May 20, 2019.

² RCW 7.68.035.

2. Trial Testimony.

In the early morning of January 2, 2019, Milton police officer Patrick Donovan saw a car traveling 63 miles-per-hour on a street with a 45 mile-per-hour speed limit. 2RP 184, 187. Donovan turned on his patrol car's lights and signaled for the car to stop. 2RP 187-89. The car immediately complied and pulled over. 2RP 189, 192. Simon was the driver and sole occupant. 2RP 190.

Donovan noticed clear plastic bags containing a white crystal substance in Simon's lap. Donovan asked Simon to show him the baggies. 2RP 192-93. Simon waived the bags in front of Donovan and said they contained marijuana. Because Donovan did not smell marijuana, he asked Simon to get out the car. 2RP 193. In response, Simon said "no, we don't have to do this, officer." 2RP 193. Simon then put the car in drive and drove off. 2RP 193, 313-14, 319, 338.

Donovan pursued Simon and saw that his car traveled through intersections containing red traffic lights. 2RP 194-95, 244-45, 320. Donovan estimated that he was traveling at 90 miles-per-hour in pursuit of Simon. 2RP 196. Donovan decided to stop chasing Simon and turned off his lights and siren. 2RP 196, 204-05, 245. Donovan nonetheless continued to drive around the area to see if he could locate the car. 2RP 204.

Eventually Donovan noticed two car taillights off the road between two trees. Upon further investigation, Donovan saw the Simon's car had left the road and crashed into a Bank of America building, shattering the window. 2RP 205-06, 210-11. Donovan had not witnessed the accident and was uncertain how fast Simon's car had been traveling at the time. 2RP 245-46.

Simon was still in the car, so Donovan ordered him to get out. Simon complied. 2RP 206-07, 213-14. He did not reach for anything as he exited the car. 2RP 247. No weapons were found on Simon. 2RP 276-78. No other people were inside the car. 2RP 213, 215-16, 242-43, 276, 293. Donovan, however, did not ask Simon whether anyone else had been inside the car at any point or whether the car belonged to him. 2RP 249-50, 294.

Scales, tinfoil, packaged marijuana, and plastic bags labeled "pill pouch" were found inside the car. 2RP 223-24, 227, 232, 253. A cellphone and wallet containing Simon's identification were found on the driver's side floorboard. 2RP 224, 251-52. A bag containing a white crystal substance later tested positive for methamphetamine. 2RP 223, 232-33, 237, 270. A separate bag contained a substance that tested positive for cocaine. 2RP 237, 270.

A backpack was found inside the car on the passenger side floorboard. 2RP 222, 251. It contained a black leather handbag which contained a loaded handgun that was later confirmed to be operational. 2RP 224, 240, 252-53, 282-83. No fingerprints were found on the gun or ammunition. 2RP 304-09. Police also found women's clothing and a purse containing drug paraphernalia inside the car. 2RP 254, 259-61. An access card in the name of Anna Robinson was also located inside the car. 2RP 256-58.

At trial, Simon explained that the purse and clothing belonged to a woman he had dropped off in Fife earlier that day. The backpack and its contents also belonged to the women. 2RP 316-17, 324, 326-29. Simon denied that the gun belonged to him. 2RP 316.

Simon was alone in the car when Donovan signaled for him stop. 2RP 318. He complied, but later drove away because he had purchased drugs earlier that evening and panicked when stopped. 2RP 312-14, 319, 327-29, 338. Simon suffered from a broken hip and the drugs helped ease his pain. 2RP 313-15, 323.

Simon did not know how fast he was driving but acknowledged that he drove through red stop lights. 2RP 320. He eventually drove his car off the road accidentally. 2RP 314, 321-22.

C. ARGUMENT

1. SIMON WAS DENIED HIS SIXTH AMENDMENT RIGHT TO COUNSEL OF CHOICE.

“[T]he Sixth Amendment right to counsel of choice . . . commands . . . that a particular guarantee of fairness be provided – to wit, that the accused be defended by the counsel [s]he believes to be best.” United States v. Gonzalez-Lopez, 548 U.S. 140, 146, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006). This guarantee extends to the hiring of any “qualified attorney whom the defendant can afford to hire, or who is willing to represent the defendant even though [s]he is without funds.” Id. at 144 (quoting Caplin v. Drysdale, Chartered v. United States, 491 U.S. 617, 624-625, 109 S. Ct. 2646, 105 L. Ed. 2d 528 (1989)). The erroneous deprivation of the right to counsel of choice is “structural error” and requires reversal; the defendant need not make any additional showing of prejudice. Id. at 150.

The right to privately retain one’s own counsel derives from the defendant’s right to determine his defense. United States v. Laura, 607 F.2d 52, 56 (3rd Cir. 1979). “Lawyers are not fungible, and often the most important decision a defendant makes in shaping his defense is his selection of an attorney.” United States v. Gonzalez-Lopez, 399 F.3d 924, 928 (8th Cir. 2005) (quoting United States v. Mendoza-Salgado, 964

F.2d 993, 1014 (10th Cir. 1992)), aff'd, 548 U.S. 140, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006)), supra. Within the range of effective advocacy, attorneys will differ as to their trial strategy, oratory style, and the importance they place on certain legal issues, as well as their expertise in certain areas of law and experience or familiarity with opposing counsel and the judge. Gonzalez-Lopez, 399 F.3d at 934. “These differences will impact a trial in every way the presence or absence of counsel impacts a trial.” Id.

Here, the trial court twice denied Simon’s request to retain private counsel. In so doing, the trial court denied Simon his choice of counsel, requiring a new trial.

Kaaren Harvey was appointed to represent Simon on January 4, 2019; just one day after the original information was filed. Supp. CP ____ (Notice of Appearance and Demand for Discovery, dated 1/4/19). Two agreed orders continuing the trial date were entered over the next two months. Supp. CP ____ (Order Continuing Trial Date, dated 1/29/19); Supp. CP ____ (Order Continuing Trial Date, dated 3/12/19).

Simon brought a motion to replace Harvey on May 14, 2019. Simon’s written motion noted a breakdown in communication and irreconcilable differences as to trial strategy between him and Harvey and expressed concerns that Harvey had not interviewed necessary witnesses.

Simon noted that he had retained Kent Underwood to represent him and that he and Underwood had developed a defense strategy. CP 13-17.

In arguing the motion to hire counsel before Judge Stephanie Arend, Simon represented that Harvey had only given him a CD containing discovery about one week earlier, and that he had not had a chance to prepare himself for trial. 1RP 2, 4-7. Harvey represented that except for the CD, she had previously provided Simon with discovery and gone over it with him. Harvey maintained that she was ready to proceed to trial. 1RP 4-7.

Simon explained that he did not want Harvey representing him and had hired Underwood. 1RP 3, 7-8. When questioned by Judge Arend as to why Underwood was not present, Simon explained that his friends had taken time off work and were traveling from Seattle to Underwood's office with the financial retainer. 1RP 3.

Judge Arend denied Simon's request to have Underwood represent him, explaining the case was already 131 days old. 1RP 4, 6, 9. The trial court noted the Hampton³ factors but explained that it could not even address those factors because Underwood was not present to answer questions or indicate an ability to substitute for Harvey. 1RP 3-4, 8.

³ State v. Hampton, 184 Wn.2d 656, 361 P.3d 734 (2015), cert. denied, ___ U.S. ___, 136 S. Ct. 1718, 194 L. Ed. 2d 816 (2016).

Simon renewed his motion to have Underwood represent him that afternoon before Judge Stanley Rumbaugh. 2RP 5-7. Harvey noted that Judge Arend had inquired into the reasons for Simon's dissatisfaction with her but had not actually addressed the Hampton factors. 2RP 6-7. Harvey also noted that neither the prosecutor nor any trial witnesses had objected to a continuance so Simon could hire Underwood. 2RP 7.

Consistent with Harvey's representation, the prosecutor noted no objection to a continuance so Simon could hire Underwood. The prosecutor further explained, "[Simon] hasn't hired Kent Underwood as of this morning, but that was his initial request. The request was denied. Mr. Underwood was in the courtroom to do his motion to substitute and withdraw." 2RP 5.

Judge Rumbaugh explained that Simon's had previously been ruled on and "I'm not going to change Judge Arend's ruling. We are going to proceed with trial." 2RP 7. The case proceeded to trial that afternoon.

Simon should have been provided the opportunity to hire Underwood. A trial court has wide latitude in balancing the right to counsel of choice against the needs of fairness, and against the demands of its calendar. Gonzalez-Lopez, 548 U.S. at 152. But an "unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable

request for delay’ violates the right to the assistance of counsel.” United States v. Nguyen, 262 F.3d 998, 1003 (9th Cir. 2001) (quoting Morris v. Slappy, 461 U.S. 1, 11-12, 103 S. Ct. 1610, 75 L. Ed. 2d 610 (1983) (quoting Ungar v. Sarafite, 376 U.S. 575, 589, 84 S. Ct. 841, 11 L. Ed. 2d 921 (1964)).

In State v. Hampton, 184 Wn.2d 656, 361 P.3d 734 (2015), cert. denied, ___ U.S. ___, 136 S. Ct. 1718, 194 L. Ed. 2d 816 (2016), the Washington Supreme Court held that, when faced with a defendant’s request to substitute current counsel with privately retained counsel, thereby requiring a continuance or delay, trial courts must balance the right to counsel of choice “against the demands of its calendar.” Hampton, 184 Wn.2d at 663 (quoting Gonzalez-Lopez, 548 U.S. at 152).

The denial of a continuance under these circumstances is reviewed for abuse of discretion. Hampton, 184 Wn.2d at 663, 670. A court abuses its discretion “when its decision ‘is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons.’” Id. at 670 (quoting State v. Blackwell, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993); State v. Michielli, 132 Wn.2d 229, 240, 937 P.2d 587 (1997)). “A decision is based ‘on untenable grounds’ or made ‘for untenable reasons’ if it rests on facts unsupported in the record or was reached by applying the wrong legal standard.” State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d

638 (2003) (quoting State v. Rundquist, 79 Wn. App. 786, 793, 905 P.2d 922 (1995), rev. denied, 129 Wn.2d 1003 (1996)).

In assessing whether the Sixth Amendment requires a continuance to accommodate the choice of counsel, the Hampton Court held that trial courts should consider all relevant information, including the following factors:

- (1) whether the request came at a point sufficiently in advance of trial to permit the trial court to readily adjust its calendar;
- (2) the length of the continuance requested;
- (3) whether the continuance would carry the trial date beyond the period specified in the state speedy trial act;
- (4) whether the court had granted previous continuances at the defendant's request;
- (5) whether the continuance would seriously inconvenience the witnesses;
- (6) whether the continuance request was made promptly after the defendant first became aware of the grounds advanced for discharging his or her counsel;
- (7) whether the defendant's own negligence placed him or her in a situation where he or she needed a continuance to obtain new counsel;
- (8) whether the defendant had some legitimate cause for dissatisfaction with counsel, even though it fell short of likely incompetent representation;

- (9) whether there was a “rational basis” for believing that the defendant was seeking to change counsel “primarily for the purpose of delay”;
- (10) whether the current counsel was prepared to go to trial;
- (11) whether denial of the motion was likely to result in identifiable prejudice to the defendant’s case of material or substantial nature.

Hampton, 184 Wn.2d at 669-670 (quoting 2 Wayne R. LeFave et al., Criminal Procedure § 11.4(c) at 718-20 (3d ed. 2007)).

Neither trial judge addressed any of these factors. While Hampton does not require specific findings, this Court must be able to reasonably discern from the record that the trial court made a reasoned decision in weighing a defendant’s choice of counsel against other relevant circumstances. 184 Wn.2d at 69-72. Examining all relevant information surrounding Simon’s request for private counsel, within the framework of the factors listed above, reveals a violation of his right to choice of counsel.

(1) The trial court appeared to conclude that Simon’s request was not sufficiently in advance of trial to permit adjustment of the trial calendar, noting that the case was 131 days old. 1RP 3-4, 6. But Simon made the request before motions in limine, before a CrR 3.5 hearing occurred, and before jury selection. There is nothing in the record

indicating that the trial court could not have adjusted its calendar to accommodate a relatively short delay. See United States v. Brown, 785 F.3d 1337, 1349-1350 (9th Cir. 2015) (court abused its discretion, in part, because record did not demonstrate the demands of the calendar required denial of the defendant's motion to substitute counsel).

(2) Simon's request to have Underwood take over the case did not include a contemporaneous request for a continuance. While a continuance presumably would have been required, the trial court failed to even inquire how much time was needed, despite Underwood being available to answer those questions. 2RP 5. Moreover, no one objected to a continuance so that Underwood could represent Simon. 2RP 7.

(3)-(4) Speedy trial was not a consideration. There had been two prior agreed continuances.

(5) Any continuance would not have seriously inconvenienced the witnesses. As defense counsel properly noted, there were no complaining witnesses in the case. Moreover, all the State witnesses were local and associated with police departments. Again, the State also did not object to a continuance.

(6) The request to have Underwood represent him, appears to have been made promptly once Simon received confirmation that his friends were in route from Seattle to Pierce County with the financial

retainer. All that remained was delivery of a check to Underwood, which appears to have been accomplished by the time Simon renewed his motion. As the prosecutor acknowledged, “Mr. Underwood was in the courtroom to do his motion to substitute and withdraw.” 2RP 5.

(7) There was no indication Simon’s negligence resulted in the need for a continuance to hire Underwood. The trial court however, appeared to fault Simon for not retaining counsel sooner. 1RP 3-4, 8. But there are many reasons that may delay the hiring of private counsel, including insufficient funding. See State v. Hampton, 182 Wn. App. 805, 826-27, 332 P.3d 1020 (2014) (recognizing “It is unsurprising that a defendant who is without sufficient funds to hire a private attorney when he is arraigned could, over a period of several months, acquire such funds[.]”), overruled on other grounds by, 184 Wn.2d 656, 361 P.3d 734 (2015), supra. Indeed, Simon noted as much, explaining that although he had the necessary funds to hire Underwood, he had to arrange for people to travel from Seattle to Pierce County to give Underwood that money. 1RP 3.

(8) Simon most certainly had legitimate cause for dissatisfaction with appointed counsel. As he explained, there were irreconcilable differences between him and Harvey concerning trial strategy. Simon also represented that there had been a breakdown in

communication between him and Harvey. Simon noted that he had also recently received a CD from Harvey containing additional evidence in his case.

(9) There was no basis, much less a rational one, to conclude that Simon was seeking to change counsel “primarily for the purpose of delay.” Simon was going to remain in custody pending trial and possibly for several years thereafter. Simon’s goal in requesting a continuance was to be represented by his attorney of choice.

(10) Harvey indicated she was prepared for trial. As Simon indicated however, there had been a breakdown in communication between him and Harvey. Moreover, Simon represented that there were additional defense witnesses that Harvey had not interviewed.

(11) Denial of the brief continuance prejudiced Simon because he was deprived his attorney of choice and forced to proceed with an attorney that he did not agree with on trial strategy which may have prevented him from presenting all evidence beneficial to his case.

The totality of the circumstances discussed above provided little reason not to grant a continuance to allow Simon’s retained counsel of choice to appear and represent him. As Gonzalez-Lopez and Hampton make clear, a trial court must balance the right to counsel “against the

demands of its calendar.” There simply were no demands of consequence outweighing Simon’s exercise of his right to choose his counsel.

Reversal and remand for a new trial, where Simon is represented by counsel of choice, is the proper remedy.

2. COMMUNITY CUSTODY SUPERVISION FEES ARE DISCRETIONARY LFOs AND MUST BE STRICKEN BECAUSE SIMON IS INDIGENT.

The trial court imposed 12 months of community custody as part of the sentence in this case. CP 76. The judgment and sentence states: “[w]hile on community placement or community custody, the [Simon] shall: . . . (7) pay supervision fees as determined by DOC.” CP 77. But such fees are considered discretionary LFOs, and Simon is indigent. Thus, the order that Simon pay such fees should be stricken.

“Conditions of community custody may be challenged for the first time on appeal and, where the challenge involves a legal question that can be resolved on the existing record, preenforcement.” State v. Wallmuller, 194 Wn.2d 234, 238, 449 P.3d 619 (2019) (citing State v. Padilla, 190 Wn.2d 672, 677, 416 P.3d 712 (2018)).

RCW 9.94A.703(2)(d) states, “[u]nless waived by the court, . . . the court shall order an offender to: . . . [p]ay supervision fees as determined by [DOC]” (emphasis added). Based on the language authorizing courts to waive the fees, this Court has found them to be

discretionary LFOs. State v. Lundstrom, 6 Wn. App. 2d 388, 396 n.3, 429 P.3d 1116 (2018), rev. denied, 193 Wn.2d 1007 (2019).

Recent amendments to the LFO statute prohibit the imposition of certain LFOs on indigent defendants. “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).” RCW 10.01.160(3).

RCW 10.101.010(3) defines “indigent” as a person (a) who receives certain forms of public assistance, (b) is involuntarily committed to a public mental health facility, (c) whose annual after-tax income is 125 per cent or less than the federally established poverty guidelines,⁴ or (d) whose “available funds are insufficient to pay any amount for the retention of counsel” in the matter before the court. RCW 10.101.010(3).

Moreover

[i]n 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).

The trial court specifically inquired into Simon’s financial circumstances and determined that he owned no property, had no bank

⁴ The current federal poverty guideline is \$12,760. See U.S. Dep’t Of Health & Human Servs., Office Of The Asst. Sec’y For Planning & Evaluation, Poverty Guidelines (2019), available at <https://aspe.hhs.gov/poverty-guidelines> (last visited January 22, 2020).

account, and sustained on electronic benefits transfer. 2RP 363-64. Based on a finding of indigency, the trial court imposed only the mandatory \$500 victim penalty assessment. 2RP 364; CP 74. Supervision fees, however, were not mentioned during Simon's sentencing.

The trial court's finding of indigency at the time of sentencing is supported by the record. The court found Simon indigent and allowed this appeal wholly at public expense. CP 89-90. Simon, has a broken hip which necessitates surgery, has substance abuse issues, and was sentenced to 27 months of incarceration, which will prevent him from earning any substantial wages in the foreseeable future. 2RP 313-14, 362-65; CP 70-83. He does not have other financial resources, receives public assistance, and has not been employed since 2017. 2RP 363-64; CP 86-88; see State v. Ramirez, 191 Wn.2d 732, 747, 426 P.3d 714 (2018) (relying on financial statement in declaration of indigency as evidence of indigency at time of sentencing).

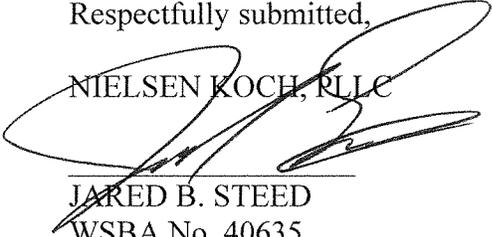
In summary, the requirement that Simon pay for supervision should be stricken from the judgment and sentence because he is indigent.

D. CONCLUSION

For the reasons discussed above, this Court should reverse Simon's convictions and remand for a new trial. Alternatively, this Court should remand with instructions to strike the supervision fees requirement from the judgment and sentence.

DATED this 27th day of January, 2020.

Respectfully submitted,


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