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Court of Appeals
Division II
State of Washington
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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

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY¹

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

Simon contends, for reasons set forth fully in the opening brief, that he was entitled to retained counsel of his choice, Kent Underwood. Because Simon's repeated requests were denied, he is entitled to a new trial. Brief of Appellant (BOA) at 6-16.

In response, the prosecution maintains that Simon's request was untimely and properly denied because Underwood was not present in court. Brief of Respondent (BOR) at 14-32. The prosecution's argument relies on factually distinguishable authority, misconstrues the record, and further highlights why the trial court's denial of Simon's request for retained counsel was manifestly unreasonable under the circumstances.

Citing to State v. Price,² State v. Chase,³ and State v. Early,⁴ the prosecution first contends that Simon's request was

¹ The State's arguments concerning the improper imposition of supervision fees has been sufficiently addressed in the Brief of Appellant and need not be challenged further on reply.

² 126 Wn. App. 617, 109 P.3d 27, rev. denied, 155 Wn.2d 1018, 124 P.3d 659 (2005), abrogated by 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).

³ 59 Wn. App. 501, 799 P.2d 272 (2002).

untimely. BOR at 15-16. It is difficult however, to find any parallels between these cases and what transpired in Simon's case.

In Price, the request for retained counsel was made *after* the prospective jury had already been sworn. 126 Wn. App. at 629, 633. As this Court also noted, "not only had Price failed to procure the funds necessary to hire an attorney, he had not hired or even contacted a new attorney." Id.

Similarly, in Chase, the request for retained counsel was not made until *after* a jury had already been sworn and impaneled. 59 Wn. App. at 505-06. While Chase represented that he had retained a specific attorney there was no evidence that attorney was even licensed in Washington. Id. at 507.

Finally, in Early, private counsel was retained and filed a notice of appearance and motion to substitute in advance of trial. 70 Wn. App. at 456. But the State objected to the requested contemporaneous motion to continue trial, arguing that delaying trial would prejudice its case against Early. Id. at 456, 458-59.

⁴ 70 Wn. App. 452, 853 P.2d 964 (1993), rev. denied, 123 Wn.2d 1004, 868 P.2d 872 (1994).

Unlike Price and Chase, here Simon made the request to retain private counsel before motions in limine, before a CrR 3.5 hearing occurred, and before jury selection. Moreover, Simon had retained Underwood and was in the process of delivering the required funds at the time the request made. There was no dispute that Underwood was a licensed lawyer in good standing in Washington. Significantly, unlike Early, here the prosecution also did not object to a continuance so Simon could finalize the hiring of Underwood. 2RP 5-7.

Notwithstanding the State's failure to object at the time to a short continuance so Simon could finalize the retention of Underwood to represent him, the prosecution now contends that a continuance was improper because Underwood never appeared in court to indicate a willingness to represent Simon. BOR at 17. This is despite the prosecutor's own acknowledgement at trial that "Mr. Underwood was in the courtroom to do his motion to substitute and withdraw." 2RP 5. The prosecution now speculates this comment was a "misstatement", but it fails to cite to anything in the record which demonstrates as much. See BOR at 7, 14, 25-26.

Rather, as argued fully in the opening brief, what the totality of the circumstances demonstrates is that there was no reason not to grant a continuance to allow Simon to finish retaining Underwood; especially given that neither the prosecutor nor any trial witnesses objected. 2RP 7. In short, 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.

B. CONCLUSION

For the reasons discussed above, and in the opening brief, this Court should reverse Simon's convictions.

DATED this 27th day of July, 2020.

Respectfully submitted,

NIELSEN KOCH, PLLC

A handwritten signature in black ink, appearing to read 'Jared B. Steed', written in a cursive style.

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