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Court of Appeals
Division II
State of Washington
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NO. 54076-2-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

AARON WARKENTIN,

Appellant.

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

The Honorable David Gregerson, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

The prosecution has three chief criticisms of Warkentin's argument. First, the prosecution contends Warkentin never actually moved for new counsel; instead he only "appeared to try to alert the judge to issues between himself and his attorney." Br. of Resp't, 7. Second, the prosecution asserts Warkentin failed to "make a showing of a conflict of interest, an irreconcilable conflict or a complete breakdown in communication between himself and his attorney." Br. of Resp't, 8.

In other words, the prosecution contends Warkentin was inarticulate. To that, there is no dispute. But inarticulateness does not mean Warkentin's request was invalid. On the contrary, it highlights the need for an adequate inquiry by the trial court into Warkentin's dissatisfaction with his attorney. Warkentin clearly stated, "I don't feel comfortable with him at all . . . We've had a lot of communication gaps." RP 11. This implicates Warkentin's relationship with his attorney and suggests a breakdown in communication. No magic words should be required. Otherwise, why would there be any duty for the court to make a "penetrating and comprehensive examination?" State v.

Dougherty, 33 Wn. App. 466, 471, 655 P.2d 1187 (1982).

Moreover, the fact that Warkentin did not make the requisite showing puts the cart before the horse. The trial court is the one with the duty to inquire. It failed to do so.

Third, and finally, the prosecution contends Warkentin's request for new counsel was untimely because it was not made on the eve of trial, but rather "*at trial.*" Br. of Resp't, 8. The prosecutor accordingly believes "Warkentin simply waited too long." Br. of Resp't, 8. This argument should likewise be rejected because it is contrary to the case law.

In the analogous context of a request to proceed pro se, the trial court's discretion lies along a continuum that corresponds to the timeliness of the request:

- (a) if made well before the trial...and unaccompanied by a motion for continuance, the right of self-representation exists as a matter of law;
- (b) *if made as the trial... is about to commence, or shortly before, the existence of the right depends on the facts of the particular case with a measure of discretion reposing in the trial court in the matter;*
- and (c) if made during the trial...the right to proceed pro se rests largely in the informed discretion of the trial court.

State v. Breedlove, 79 Wn. App. 101, 106-07, 906 P.2d 586 (1995) (emphasis added) (quoting State v. Fritz, 21 Wn. App. 354, 358, 585 P.2d 173 (1978)). A request to proceed pro se made before jury selection begins “falls in the middle of this continuum.” State v. Honton, 85 Wn. App. 415, 420-21, 932 P.2d 1276 (1997) (noting “substantial limitation on the court’s exercise of discretion” at this stage). This case law should be treated as controlling because a breakdown in the attorney-client relationship can occur at any time, not just well before trial.

Warkentin made his request the day trial began but before jury selection. RP 11-12, 17. His motion for new counsel was therefore timely, and the trial court had only a “measure of discretion” in considering and/or denying it. Honton, 85 Wn. App. at 420 (recognizing trial court does not have “unfettered discretion” when the request is made before jury selection); see also State v. Vermillion, 112 Wn. App. 844, 855-56, 51 P.3d 188 (2002) (finding request timely where it was technically made after trial commenced, but before jury selection had begun). What the trial court was not permitted to do was simply dismiss it out of hand without any inquiry.

And, considering the facts of Warkentin's case, appointment of new counsel would not have significantly delayed the trial. Trial lasted a single day, with only two witnesses, both police officers. Defense counsel himself needed to interview the witnesses at lunch on the day of trial. This was a simple case, with a simple defense. There was no compelling need to proceed to trial that day. Indeed, Warkentin was sentenced to only 62 days in confinement, all of which he had already served. RP 233, 235, 238; CP 51-53.

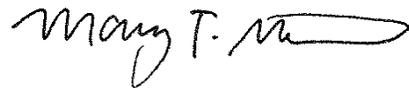
B. CONCLUSION

For the reasons discussed here and in the opening brief, this Court should reverse Warkentin's conviction and remand for a new trial or, alternatively, a hearing on his motion for new counsel. Alternatively, this Court should accept the prosecution's concession that the erroneously ordered legal financial obligations, along with the supervision fees, should be stricken from the judgment and sentence. Br. of Resp't, 9-10.

DATED this 21st day of July, 2020.

Respectfully submitted,

NIELSEN KOCH, PLLC

A handwritten signature in black ink, appearing to read "Mary T. Swift", with a horizontal line extending to the right from the end of the signature.

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