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

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

STATE OF WASHINGTON, Respondent

v.

AARON FREDERICK WARKENTIN, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.18-1-03486-06

BRIEF OF RESPONDENT

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RESPONSE TO ASSIGNMENTS OF ERROR

I. The trial court did not err in its inquiry into Warkentin's discussion of his potential dissatisfaction with defense counsel.

II. The State Agrees the matter should be remanded to strike several LFOs that appear to have been inadvertently put in the Judgment and Sentence

STATEMENT OF THE CASE

Aaron Frederick Warkentin (hereafter 'Warkentin') was charged by information with Assault in the Third Degree for assaulting a police officer when the officer was investigating him for a possible trespass and disorderly conduct. CP 3-4. Warkentin had indigent counsel appointed for him and who represented him throughout the pendency of his case.

On September 5, 2019, the trial court held what is called a "readiness" hearing; it's a hearing wherein the parties tell the court whether they're ready for trial the following week. Both parties called the case ready for trial. *See* Supp CP (Minutes from 9/5/19 hearing). On September 9, 2019, the Monday after September 5, the parties assembled in court for the trial. *See* RP Vol. I. At the time, both defense and the State told the Court they were ready to proceed to trial. RP 7. The Court and the parties briefly discussed some motions in limine, and the need for a CrR 3.5 hearing, as well as how long the trial would last. RP 7-9. Then,

defense counsel alerted the court that the defendant had something he wanted to say to the court. Defense counsel then read the defendant's statement to the Court and the Court engaged in a discussion with Warkentin. It consisted of the following:

> MR. KURTZ: "Replace Kurtz's bias on his ideas to me. I believe I voiced a concern out loud in court, but not in a particular order, not spending enough time discussing what constitute an assault 3, being flip-flopped on outcome of trial, not spending enough time talking to me about the process of proceedings.
>
> One day, there was an armament while I was in custody. No prosecutor was present. He said, 'I don't know why we are before you.' Something about an assault 2, Your Honor. I was on vacation.
>
> Mostly, no advocating, just installing – instilling a fear of prosecution. He doesn't care when we go to trial, game playing and plan, selling me on the idea of making me lose (inaudible) and thinking being the trial option in this course over my (inaudible) and direction. Once I have presented opinions or ideas like apology – apology" --
>
> THE DEFENDANT: Something to fit the crime.
>
> MR. KURTZ: Something to fit the crime.
>
> THE DEFENDANT: I think this was going along (inaudible) sorry – out of me enough that – showing up 30 times. I'm not a habitual offender. I got the message, but I think it's outlandish to do a trial, spend 30 or 60,000 for – if I would have assaulted a cop, I think I would have been thrown to the ground immediately. Something – they are that smart. I give them all that and then some.

THE COURT: Well, here's – because everything you're saying here is on the record. So, generally, your attorney—as your attorney will tell you, you're best off not speaking and letting your attorney doing your talking for you. What are you specifically asking this Court to do at this time?

THE DEFENDANT: Well, I don't – we're on the same page to go to trial, if that's the course of action that we're going to take. I don't feel comfortable with him at all. I have voiced it twice. Once with an evaluation that I had, just a distrust. We've had a lot of communication gaps. He says that all the time, in fact, that we have – you're not understanding me. 'Do you understand this,' over and over again, even in the hall and separate rooms, and apparently, I don't.

But I thought this assault 3 was a realistic prosecution for a touch, then I would have pleaded – taken a plea deal a long time ago. I just – I don't understand it, apparently. That's why the (inaudible) or pencil in writing is.

THE COURT: All right. Well, the Court doesn't – the Court stands as a neutral referee. If the prosecutor decides to charge a particular case, that's –

THE DEFENDANT: I tried –

THE COURT: -- that's their publicly elected official, and they have their policies and guidelines. Mr. Kurtz, on the other hand, is your attorney. If he thinks that the charge is legally improper, he has the ability to bring an appropriate motion to the Court to ask the Court to address it. We're now here for the day of jury trial.

THE DEFENDANT: Right.

THE COURT: So by that time, the court expects the attorneys to have engaged in motion practice beforehand. So now we're set to go to trial, and that's what we're going to do today. Okay.

MR. KURTZ: Thank you, Your Honor.

RP 10-12.

The case then proceeded to jury trial. The jury returned a verdict of guilty on September 9, 2019. CP 44. Warkentin was sentenced on December 3, 2019 to an exceptional sentence below the standard range. CP 51-52. The trial court found that Warkentin was indigent pursuant to RCW 10.101.010(3)(c) in that he received an annual income of one hundred twenty-five percent or less of the current federally established poverty level. CP 52. Yet despite that finding, the court imposed a $200 filing fee, $1,400 in court appointed counsel fees, and a $250 jury demand fee. CP 54.Warkentin timely filed a notice of appeal in this matter. CP 62.

ARGUMENT

I. The trial court did not err in its inquiry into Warkentin's discussion of his potential dissatisfaction with defense counsel

Warkentin argues the trial court refused to make a proper inquiry into his request for new counsel. However, Warkentin never made a request for new counsel so the trial court could not have erred in failing to inquire into that never-made request. Warkentin was duly represented by competent counsel at trial. His convictions should be affirmed.

To warrant substitution of counsel, a defendant must show "good cause, 'such as a conflict of interest, an irreconcilable conflict, or a

complete breakdown in communication.'" *State v. Thompson*, 169 Wn.App. 436, 457, 290 P.3d 996 (2012) (quoting *State v. Schaller*, 143 Wn.App. 258, 267-68, 177 P.3d 1139 (2007)). These circumstances must reach the point so "'as to prevent presentation of an adequate defense.'" *Id*. at 457 (quoting *Schaller*, 143 Wn.App. at 268). Issues like disagreements over defense theories and trial strategy do not constitute an irreconcilable conflict. *Id*. at 459. "Defense counsel, not the defendant, has authority to decide which theories and strategies to employ." *State v. Davis*, 3 Wn.App.2d 763, 790, 418 P.3d 199 (2018) (citing *Thompson*, 169 Wn.App. at 459). A simple request to dismiss assigned counsel, without more, does not justify the trial court substituting new counsel. *Schaller*, 143 Wn.App. at 260. Further, a "general loss of confidence or trust alone" is not a sufficient basis to appoint new counsel. *Id*. at 268. And "indigent defendants with appointed counsel do not have the right to their counsel of choice." *State v. Hampton*, 184 Wn.2d 656, 662-63, 361 P.3d 734 (2015) (citing *U.S. v. Gonzalez-Lopez*, 548 U.S. 140, 151, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006)).

Appellate courts review a trial court's decision not to appoint new counsel, after a request for new counsel, under the abuse of discretion standard. *Davis*, 3 Wn.App.2d at 791; *In re Stenson*, 42 Wn.2d 710, 723, 16 P.3d 1 (2001). An abuse of discretion occurs when "no reasonable

person would adopt the trial court's view." *State v. Martin*, 169 Wn.App. 620, 628, 281 P.3d 315 (2012) (citations omitted). In reviewing a trial court's refusal to appoint new counsel, this Court considers "'(1) the extent of the conflict, (2) the adequacy of the [trial court's] inquiry, and (3) the timeliness of the motion.'" *State v. Cross*, 156 Wn.2d 580, 607, 132 P.3d 80 (2006) (alteration in original) (quoting *Stenson*, 142 Wn.2d at 724). However, this all applies only after an actual request for new counsel.

In Warkentin's case, the trial court was not faced with a request for new counsel. Warkentin never asked for new counsel; he did, however, let the court know there was some sort of issue between him and counsel, but indicated that if they were on the same page for trial, then all was good. RP 11-12. But even if this court construes Warkentin's broken phrases as a request for counsel, it did not abuse its discretion in failing to appoint new counsel as Warkentin only showed a "general loss of confidence or trust" and not a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication. *See Schaller*, 143 Wn.App. at 260; *Thompson*, 169 Wn.App. at 457.

Though a court has the responsibility to thoroughly inquire into the factual basis that gives rise to the defendant's dissatisfaction with his counsel, upon learning of a conflict between the defendant and counsel,

Warkentin's trial court did attempt to inquire into the factual basis that gave rise to Warkentin's dissatisfaction. *Thompson,* 169 Wn.App. at 462 (citing *Smith v. Lockhart*, 923 F.2d 1314, 1320 (8th Cir. 1991)). Warkentin's "request" for counsel was equivocal. Even when the judge specifically asked him what he was wanting the court to do, RP 11, Warkentin did not say he wanted a new attorney, he said a few statements that did not make sense, but were clearly not a request for new counsel. RP 11-12. Warkentin never requested new counsel; he appeared to try to alert the judge to issues between himself and his attorney, but he did not indicate any basis which would have given the court reason to replace his attorney. Warkentin did not give evidence of conflict of interest, an irreconcilable conflict, or a complete breakdown in communication. *See Thompson*, 169 Wn.App. at 457. At most Warkentin made the court aware that he did not fully trust his attorney. But Warkentin also implied that if he and his attorney were on the same page about going to trial, then everything was ok. RP 11. Warkentin's statements to the court then devolved into complaints about the charge itself. Warkentin never made a motion to substitute counsel, so therefore the trial court had no motion before it to rule upon. But even if this Court considers Warkentin's broken statements regarding his counsel as a request for new counsel, then the trial court did not abuse its discretion in effectively denying that request.

Warkentin did not make a showing of a conflict of interest, an irreconcilable conflict or a complete breakdown in communication between himself and his attorney. *See Thompson*, 169 Wn.App. at 457.

Finally, Warkentin's motion was not timely. He made it the morning of the day of trial, when the jury venire was ready to be brought to the courtroom for voir dire. He did not make this request on the "eve of trial," but rather made the request *at* trial. This is one of the factors this Court considers in determining whether a defendant was entitled to new counsel. Warkentin simply waited too long, especially considering he had an opportunity to ask for new counsel at the readiness hearing a few days prior, and never made any mention of it. *See* Supp. CP (Minutes from 9/5/19 Readiness Hearing). Warkentin was present before the court, the judge who heard his trial, four days prior to the trial, and did not make mention of a conflict with his counsel. That would have been a more appropriate time than making the issue known the morning of trial while a jury panel is waiting.

So not only did Warkentin not make an unequivocal request for new counsel, he did not establish a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication, but he also did so the morning of trial. The trial court did not err in failing to recognize Warkentin's statements as a request for new counsel, especially after the

court specifically asked Warkentin what he was asking the court to do and Warkentin responded that if he and his attorney were on the same page about going to trial then…. RP 11. The trial court appropriately responded to this issue and Warkentin's claim fails.

II. The State Agrees the matter should be remanded to strike several LFOs that appear to have been inadvertently put in the Judgment and Sentence

Warkentin claims several LFOs were inadvertently left on the judgment and sentence because the judge found him to be indigent. The State agrees that the LFOs should not be reflected on the Judgment and Sentence as that was not the court's intent in sentencing Warkentin. Accordingly, remand is necessary to correct the clerical mistake.

The trial court found Warkentin indigent pursuant to RCW 10.101.010(3)(c). CP 52. The trial court intended to waive discretionary LFOs, which is in accord with the law. *See* RCW 10.01.160(3) and *State v. Ramirez*, 191 Wn.2d 732, 749, 426 P.3d 714 (2018). The judgment and sentence, however, left the $200 criminal filing fee, a $250 jury demand fee, and $1,400 in appointed attorney's fees. CP 54. These three fees should not have been included in the judgment and sentence as the trial court found the defendant to be indigent pursuant to RCW 10.101.010(3)(c). The State also has no objection to waiving the supervision fees as determined by DOC since they may be considered a

discretionary LFO. *See State v. Dillon*, ___ Wn.2d ___, 456 P.3d 1199, 1209 (2020).

Accordingly, this Court should remand for the discretionary LFOs to be stricken as Warkentin was found to be indigent.

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CONCLUSION

Warkentin's claim that the trial court erred in failing to address his request for new counsel is without merit; Warkentin never made a specific request for new counsel, and the trial court properly and adequately inquired into the circumstances surrounding Warkentin's concerns. After hearing they were both on the "same page," the trial court properly allowed counsel to remain and for the trial to continue as scheduled. Warkentin was represented by competent counsel and was not denied his right to counsel. Further, the trial court did inadvertently put discretionary LFOs in the judgment and sentence after finding Warkentin indigent and therefore those discretionary LFOs should be stricken from the judgment and sentence.

DATED this 6th day of July, 2020.

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