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FEBRUARY 22, 2017
Court of Appeals
Division III
State of Washington

NO. 34413-4-III

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,
Respondent,

v.

BRITTON HANSON,
Appellant.

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

APPELLANT'S REPLY BRIEF

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A. Summary of Appeal

Mr. Hanson was denied the right to counsel when his appointed attorney moved to withdraw pursuant to Anders v. California,¹ and argued against his client's position. Where the trial court appointed counsel, Mr. Hanson was entitled to the effective assistance of that attorney. The Anders procedure, however, is not permitted in the trial courts and counsel's argument against Mr. Hanson's position was inconsistent with the right to counsel.

B. Argument in Reply

**WHERE HIS APPOINTED ATTORNEY FILED AN
ANDERS BRIEF AND ARGUED AGAINST MR.
HANSON'S MOTION TO WITHDRAW HIS PLEA,
MR. HANSON DID NOT RECEIVE THE
EFFECTIVE ASSISTANCE OF COUNSEL**

1. Mr. Hanson was entitled to counsel.

This constitutional right to counsel extends to all critical stages of a criminal prosecution. State ex rel. Juckett v. Evergreen Dist. Ct., 100 Wn.2d 824, 828, 675 P.2d 599 (1984); U.S. Const. Amend. VI; Const. Art. I, § 22. A motion to withdraw a guilty plea may be such a "critical stage" because of the significant possibility of prejudice. See

¹ Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967).

e.g. State v. Harrell, 80 Wn.App. 802, 804, 911 P.2d 1034 (1996)

(citing “ample authority from other jurisdictions” on the point).

The State argues Mr. Hanson is not entitled to relief because there is not a constitutional right to counsel in post-conviction proceedings other than the first direct appeal as of right. Brief of Respondent at 5 citing State v. Winston, 105 Wn.App. 318, 19 P.3d 495 (2001); State v. Forest, 125 Wn.App. 702, 105 P.3d 1045 (2005). The Washington Supreme Court has found, however, that with regard to proceedings under CrR 7.8, the trial court retains discretion to appoint counsel under the authority of CrR 3.1(b)(2). State v. Robinson, 153 Wn.2d 689, 696, 107 P.3d 90 (2005).

The broad, sweeping language of [CrR 3.1(b)(2)] is not without limit, and must be read in context with related court rules. With respect to the right to counsel for post-conviction review, we have imposed a limitation that requires, in the case of PRPs, for the chief judge of the Court of Appeals, and in the case of CrR 7.8 motions, for the superior court judge, to initially determine whether the petition or motion establishes grounds for relief. If it does establish grounds for relief, counsel may be provided if not already available.

153 Wn.2d at 696. In Robinson, the Supreme Court concluded that defendant was not entitled to counsel for his CrR 7.8 motion because “[b]y not holding a hearing, the trial court effectively determined that Robinson did not establish grounds for relief.” 153 Wn.2d at 696-97.

In Mr. Hanson's case, however, the trial court made a different determination, appointed counsel and set a hearing. CP 116.

Implicit in the trial court's decision to hold a hearing is a finding that sufficient facts were alleged to warrant a hearing.

Harrell, 80 Wn.App. at 804-05. Under the reasoning of Robinson, the trial court determined the rights and interests at stake to be sufficient and substantial enough to warrant the appointment of counsel. This was a "critical stage."

2. Where appointed counsel filed an *Anders* brief in the trial court and argued against the Mr. Hanson's position, the representation was constitutionally deficient.

The right to representation inherently includes the right to effective representation. In re Welfare of J.M., 130 Wn.App. 912, 921, 125 P.3d 249 (2005) (citing Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). The right to effective assistance of counsel in turn includes the right to an attorney who is free from any conflict of interest in the representation. State v. Davis, 141 Wn.2d 798, 860, 10 P.3d 977 (2000); Wood v. Georgia, 450 U.S. 261, 271, 101 S.Ct. 1097, 67 L.Ed.2d 220 (1981). A conflict of interest arises where defense counsel represents an interest that contrary to the

client's interest. In re Richardson, 100 Wn.2d 669, 677, 675 P.2d 209 (1983).

The representation Mr. Hanson received in support of the motion to withdraw his plea was deficient in several respects. First, the Anders brief was an inappropriate trial court procedure. See State v. Chavez, 162 Wn.App. 431, 440, 257 P.3d 1114 (2011). The use of this procedure to address a discrete issue in a trial court is improper and Washington courts have, therefore, determined that a defendant has been denied counsel where their counsel files an Anders brief at the trial court level. Chavez, at 439

Furthermore, the appointed attorney laid out Mr. Chavez's objections in a way that clearly distanced himself from Mr. Chavez and suggested that his client's positions were frivolous and that he did not have a good faith basis for pursuing the matter. 162 Wn.App. at 439-40. At Mr. Hanson's CrR 7.8 hearing, appointed counsel outlined his Anders brief and argued against each one the bases presented in Hanson's pro se motion. 4/5/16RP 26-28, 32-33. As in Harell and Chavez, Mr. Hanson was denied counsel at this critical stage where his appointed attorney filed an Anders brief and argued against his client's position. Harell, 80 Wn.App. at 804-05; Chavez, 162 Wn.App. 438-40.

Mr. Hanson did not, therefore receive the effective assistance of counsel to which he was entitled.

3. Mr. Hanson was prejudiced by the failure to provide counsel to advocate for him.

By permitting appointed counsel to argue against his client's position and granting his motion to withdraw, the trial court left Mr. Hanson without assistance counsel after having determined this was critical stage of the proceedings. The subsequent absence of an attorney representing Mr. Hanson's interests during this critical stage of the proceedings is presumptively prejudicial. See United States v. Cronic, 466 U.S. 648, 659, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984); Chavez, 162 Wn.App. at 439-40. This makes the adversary process itself unreliable, so no specific showing of prejudice is required. Cronic, 466 U.S. at 659; Harell, 80 Wn.App. at 805.

Where the trial court determined Mr. Hanson was entitled to the appointment of counsel, he was entitled to the effective assistance of counsel. An Anders brief in a non-frivolous case it represents *per se* ineffective assistance of counsel. See e.g. Harris v. Day, 226 F.3d 361, 367 (5th Cir. 2000); Davis v. Kramer, 167 F.3d 494 (9th Cir. 1999). Mr. Hanson has, therefore, established the denial of his right to counsel and the prejudice which presumptively follows that violation.

C. Conclusion

Mr. Hanson was denied his right to effective representation of counsel at a critical stage. He is entitled to reversal of the order denying his motion and remand for further proceedings.

Respectfully submitted this 24th day of February, 2017.

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE**

STATE OF WASHINGTON,)	
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RESPONDENT,)	
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v.)	NO. 34413-4-III
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BRITTON HANSON,)	
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APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 22ND DAY OF FEBRUARY, 2017, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] LECH RADZIMSKI STEVENS COUNTY PROSECUTOR'S OFFICE 215 S OAK ST COLVILLE, WA 99114-2862	(X) () ()	U.S. MAIL HAND DELIVERY _____
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SIGNED IN SEATTLE, WASHINGTON THIS 22ND DAY OF FEBRUARY, 2017.

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