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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 OPENING BRIEF

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A. Summary of Appeal

Mr. Hanson was denied his constitutional right to counsel when the trial court granted his appointed attorney's motion to withdraw, pursuant to Anders v. California,[1] as counsel at a critical stage. Mr. Hanson's motion to withdraw his guilty plea was a critical stage in a criminal proceeding and as such he was entitled to be represented. The Anders procedure employed here, however, is not one permitted in the trial courts and counsel's argument against Mr. Hanson's position was in conflict with the right to counsel.

B. Assignments of Errors

1. Mr. Hanson was denied his Sixth Amendment and Article 1, section 22 right to counsel when his appointed attorney filed an Anders brief in support of his own motion to withdraw as counsel and advocated against Mr. Hanson's call for relief at a critical stage in these criminal proceedings.

2. The trial court erred in granting appointed counsel's motion to withdraw and then denying appellant's request to appoint new counsel to assist him in presenting his claims for relief.

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

C. Issues Pertaining to Assignments

Where an indigent defendant moves to withdraw his guilty plea in accordance with CrR 7.8,[2] and the trial court appoints counsel, the defendant is entitled to the effective assistance of counsel. Where that indigent defendant's appointed attorney files an Anders brief and argues

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[2] CrR 7.8 provides in pertinent part:

> **(a) Clerical Mistakes.** Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. Such mistakes may be so corrected before review is accepted by an appellate court, and thereafter may be corrected pursuant to RAP 7.2(e).
>
> **(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc.** On motion and upon such terms as are just, the court may relieve a party from a final judgment, order, or proceeding for the following reasons:
>
> (1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;
>
> (2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 7.5;
>
> (3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
>
> (4) The judgment is void; or
>
> (5) Any other reason justifying relief from the operation of the judgment.
>
> The motion shall be made within a reasonable time and for reasons (1) and (2) not more than 1 year after the judgment, order, or proceeding was entered or taken, and is further subject to RCW 10.73.090, .100, .130, and .140. A motion under section (b) does not affect the finality of the judgment or suspend its operation.

against his client's position, is the defendant denied counsel at a critical stage of the proceedings?

D. <u>Statement of the Case</u>

Britton Hanson was charged by information in Stevens County Superior Court with unlawful possession of a weapon in the second degree, second degree assault, and attempted murder in the first degree. CP 1-4. Pursuant to a plea agreement, the information was amended to allege only unlawful possession of a firearm (RCW 9.41.040(a)(i)), second degree assault (RCW 9A.36.021), and.leading organized crime by inciting criminal profiteering (RCW 9A.82.060(1)(b)). CP 47-50. In exchange for Mr. Hanson's guilty plea, the State dismissed the firearm enhancements and all other pending charges, as well as pending charges against Mr. Hanson's former girlfriend. 11/19/14RP 4-13; CP 55-65. Immediately following his change of plea, Mr. Hanson was sentenced to 75 months confinement. 11/19/14RP 14-25.

Within a month, Mr. Hanson sought to set aside his guilty plea. Initially, he filed a pro se notice of appeal and request for an attorney in order to pursue his claims that his plea was involuntary and that he did not receive constitutional adequate representation. CP 79-80. Counsel was never provided to Mr. Hanson and the Court of Appeals

commissioner dismissed the case when he failed to pay the filing fee or provide an *in forma pauperis* order. CP 81-83.

Thereafter Mr. Hanson filed a pro se motion in the trial court to withdraw his plea citing CrR 7.8. CP 84-115. Mr. Hanson alleged his attorney failed to properly advise him regarding his offender score and he was misinformed about the resulting sentencing ranges. CP 85-86, 91-93.[3] Mr. Hanson further argued the failure challenge the facial invalidity of the judgment and sentence which included prior offenses which should have "washed out" was ineffective. CP 93-94.

The superior court appointed counsel and set the matter for a hearing. CP 116. At the subsequent hearing, the appointed attorney advised the court he would not pursue the motion and intended to withdraw. 4/5/16RP 26-27.[4] Appointed counsel suggested he file an Anders brief in support of his motion to withdraw. 4/5/16RP 28. The matter was then set over before the judge who took the plea in order for Mr. Hanson to appear telephonically. 4/5/16RP 30-31.

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[3] Mr. Hanson also identified a scrivener's error

[4] Appointed counsel stated he was "unable to find a good faith basis for pursuing the matter as a ineffective assistance of counsel claim towards [Mr. Hanson's] trial attorney." RP 26-27.

Appointed counsel, Mr. Morgan, filed the Anders brief and at the subsequent hearing notified the judge that Mr. Hanson disagreed and wished to proceed. CP 117-24; 4/26/16RP 32. Mr. Morgan then outlined the substance of his Anders brief for the court. He started by stating "after looking at [that] case law, the only thing that I found that had any merit was the scrivener's error, which is an easy thing to correct." 4/26/16RP 33. He then proceeded to argue against each part of Mr. Hanson's pro se motion in an attempt to justify his own motion to withdraw. Id.

This left Mr. Hanson on his own, without counsel, to make a record and argue the motion to the judge. 4/26/16RP 35-37. In addition to the problems outlined in his motion, Mr. Hanson argued his actions were not sufficient to constitute "leading organized crime." 4/26/16RP 35. Mr. Hanson specifically noted that he had legitimate medical marijuana authorization pursuant to RCW 69.51A.025 and .040 for his enterprise. 4/26/16RP 38. Mr. Hanson requested the court deny his appointed attorney's motion to withdraw or appoint new counsel and conduct the necessary fact finding hearing. 4/26/15RP 35-36

Judge Neilson decided that he "will agree with – Mr. Morgan and – as he spells out in his Anders brief…." 4/26/16RP 36. Instead the

court found the trial attorney effective based on Mr. Morgan's representations. 4/26/16RP 37 ("But, you know, when it's looked over by Mr. Morgan and he comes to this court as an experienced appellate court attorney, appeals attorney, so he has looked at this carefully and that's his conclusion."). Ultimately then, the trial judge denied Mr. Hanson's motion to his withdraw his plea. 4/26/16RP 39.

E. Argument

MR. HANSON WAS ENTITLED TO COUNSEL AND WHERE HIS APPOINTED ATTORNEY FILED AN ANDERS BRIEF AND ARGUED AGAINST MR. HANSON'S MOTION TO WITHDRAW HIS PLEA, MR. HANSON WAS DENIED THE RIGHT TO COUNSEL

1. Mr. Hanson was entitled to counsel at this critical stage.

In all criminal prosecutions, the Sixth Amendment of the United States Constitution guarantees "the right to the assistance of counsel." U.S. Const. Amend. VI. This right applies to criminal proceedings in state courts through the Fourteenth Amendment. Anders v. California, 386 U.S. 738, 742, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). Furthermore, under the first article of the Washington Constitution, all accused persons have the right to "appear and defend in person or by counsel." Const. Art. I, § 22.

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). A stage is critical if it present a possibility of prejudice to the defendant. State v. Harrell, 80 Wn.App. 802, 804, 911 P.2d 1034 (1996). The Harell court concluded a plea withdrawal hearing is a critical stage. Id. (citing "ample authority from other jurisdictions" on the point); *see also* State v. Chavez, 162 Wn.App 431, 439, 257 P.3d 1114 (2001); United States v. Davis, 239 F.3d 283, 285-86 (2d Cir. 2001); State v. Pugh, 153 Wn.App. 569, 579, 222 P.3d 821 (2009) (a "motion to withdraw a guilty plea is a critical stage of a criminal proceeding for which a defendant has a constitutional right to be assisted by counsel."). State v. Davis, 125 Wn.App. 59, 63-64, 104 P.3d 11 (2004).

With regard to the right to counsel for proceedings under CrR 7.8, the trial court retains discretion to appoint counsel under the specific authority of CrR 3.1(b)(2).[5] State v. Robinson, 153 Wn.2d 689,

[5] CrR 4.2(f) governs prejudgment motions for withdrawal of guilty pleas and requires that the trial court allow a defendant to withdraw his guilty plea "whenever it appears that the withdrawal is necessary to correct a manifest injustice."

693-96, 107 P.3d 90 (2005). In Mr. Hanson's case, the trial court made such a determination and appointed counsel. 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. Therefore, we need not determine the degree of specificity required to shown by a defendant who seeks to withdraw his plea based upon alleged ineffectiveness of counsel, before the right to counsel attaches and a hearing is required.

Harell, 80 Wn.App. at 804-05. Judge Nielson's decision to appoint counsel and set a hearing answers the same question and leads to the next, whether the counsel Mr. Hanson received was adequate.

2. Mr. Hanson did not received constitutionally guaranteed counsel where his appointed attorney filed and *Anders* brief and argued against his client's position.

The appointment of counsel would be illusory without competent representation. Therefore, in criminal proceedings, where the right to representation arises, it 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)). A criminal defendant receives ineffective assistance of counsel where the attorney's representation (1) "fell below an objective standard of reasonableness" and (2) "that the deficient performance prejudiced the defendant." Strickland, 466 U.S.

at 687. State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 180 (2009). Prejudice is established if "but for counsel's deficient performance, the outcome of the proceedings would have been different." Id.

The right to the assistance of counsel also includes the right to the assistance of an attorney who is free from any conflict of interest in the representation. Wood v. Georgia, 450 U.S. 261, 271, 101 S.Ct. 1097, 67 L.Ed.2d 220 (1981); State v. Davis, 141 Wn.2d 798, 860, 10 P.3d 977 (2000). While there are numerous situations in which a conflict of interest can arise, of particular significance here is that anytime defense counsel represents an interest that contrary to the client's interest, counsel has a conflict 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 each of these respects. First, the *Anders* brief is an appellate procedure that covers an appellate situation where an attorney feels an entire appeal is without merit and therefore must withdraw. Chavez, 162 Wn.App at 439-40. Anders briefs are not an appropriate trial court procedure. Chavez, at 440. The use of this procedure to address a discrete issue in a trial court is improper, no matter how an attorney characterizes the motion. Id.

Washington courts have, therefore, determined that a defendant has been denied council where their council files an Anders brief at the trial court level. Chavez, at 439

This case presents near identical circumstances to Chavez. There, Mr. Chavez's attorney read his motion and decided that the objections Chavez was advancing had no merit.162 Wn.App. at 434-37. That conclusion was conveyed at the motion hearing where the attorney laid out Mr. Chavez's objections in a way that clearly distanced himself from Chavez and suggested that his client's positions were frivolous. Id.

Here, before the hearing, appointed counsel moved to withdraw from the case. 4/5/16RP 26. He stated that he did not have a good faith basis for pursuing the matter as an ineffective assistance of counsel claim. 4/5/16RP 26-28. The judge, not knowing the correct procedure to follow, took Mr. Morgan's suggestion that he file an Anders brief. 4/5/16RP 28-31.

At the CrR 7.8 hearing, Mr. Morgan outlined the substance of his Anders brief. 4/26/16RP 32-33. He stated that "the only thing I have found that had any merit was the scrivener's error, which is an easy thing to correct." 4/26/16RP 33. He then continued to argue against each one the bases presented in Hanson's pro se motion. Morgan then

concluded by asking the court "when somebody files an Anders brief, that the court independently determine whether or not there's any basis." 4/26/16RP 33. Mr. Hanson, left on his own, endeavored to argue his motion to the court. 4/26/16RP 35.

As in Harell and Chavez, Mr. Hanson was denied counsel at a critical stage of these criminal proceedings because Mr. Morgan 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 is entitled to relief.

3. Mr. Hanson was prejudiced by the failure to provide counsel to advocate for him, not against him.

By granting appointed counsel's motion to withdraw, the trial court left Mr. Hanson without counsel at this critical stage. The denial of counsel during a critical stage of proceedings is presumptively prejudicial. 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. Violations of this magnitude makes the adversary process itself unreliable; and as such, no specific showing of prejudice is required on appeal. Cronic, 466 U.S. at 659. Therefore, denial of counsel at this critical stage of the proceedings is presumptively prejudicial. Chavez, 162 Wn.App. at 439-

40; Harell, 80 Wn.App. at 805 ("Outright denial of the right to counsel is presumed prejudicial and warrants reversal without harmless error analysis.").

Furthermore, even in the appellate courts, an Anders brief that is filed despite the existence of potentially valid issues is presumptively prejudicial because it denies a client of representation. See Penson v. Ohio, 488 U.S. 75, 85, 109 S. Ct. 346, 102 L. Ed. 2d 300 (1988). The federal circuits that have examined the issue agree that when an Anders brief is filed in non-frivolous case it represents *per se* ineffective assistance of counsel. Harris v. Day, 226 F.3d 361, 367 (5th Cir. 2000); Davis v. Kramer, 167 F.3d 494 (9th Cir. 1999); Freels v. Hills, 843 F.2d 958 (6th Cir. 1998); Evans v. Clarke, 868 F.2d 267 (8th Cir. 1988); Cannon v. Berry, 727 F.2d 1020 (11th Cir. 1984). Mr. Hanson received similarly deficient assistance from his appointed counsel.

Having determined that Mr. Hanson was entitled to the appointment of counsel, he was thereafter entitled to the effective assistance of counsel. Where his appointed attorney moved to withdraw pursuant to Anders and argued against Mr. Hanson's position, he was substantially prejudiced and seeks relief in this Court.

F. <u>Conclusion</u>

Because Mr. Hanson was denied his right to counsel at a critical stage under the Sixth Amendment and Art 1, sec. 22, he is entitled to reversal of the order denying his motion and remand for further proceedings.

Respectfully submitted this 18th day of November, 2016

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DIVISION THREE

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

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 18TH DAY OF NOVEMBER, 2016, I CAUSED THE ORIGINAL **OPENING 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] TIMOTHY RASMUSSEN STEVENS COUNTY PROSECUTOR'S OFFICE 215 S OAK ST COLVILLE, WA 99114-2862	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] BRITTON HANSON 874961 WASHINGTON STATE PENITENTIARY 1313 N 13TH AVE WALLA WALLA, WA 99362	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 18TH DAY OF NOVEMBER, 2016.

X_____

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