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Court of Appeals
Division III
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NO. 354849

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

STATE OF WASHINGTON

Respondent

vs.

JOSE PEDRO LINARES,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FROM YAKIMA COUNTY
The Honorable Richard H. Bartheld

AMENDED APPELLANT'S OPENING BRIEF

TANESHA LA'TRELLE CANZATER
Attorney for Appellant
Post Office Box 29737
Bellingham, Washington 98228-1737
(360) 362-2435

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I. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion when it denied repeated motions for new counsel.

2. The trial court exceeded statutory authority when it ordered current offenses to run consecutively.

II. ISSUES PRESENTED

1. Was there enough on the record that established a complete breakdown in communication between attorney and client and in the attorney-client relationship before Mr. Linares kicked his attorney? (Assignment of Error 1)

2. Did the trial court err when it imposed a consecutive sentence in an effort to avoid a sentence it deemed would result in a “free crime”? (Assignment of Error 2)

III. STATEMENT OF THE CASE

Facts in this appeal are relevant to issues raised in court of appeals cause number (CoA #) 354857, which involves the same defendant, Jose Pedro Linares (Mr. Linares). Likewise, some facts in CoA #354857 are relevant here. Moreover, issues we raise below overlap issues we raise in CoA #354857.

Yakima county jail

Mr. Linares was awaiting trial on a second-degree assault charge, at the Yakima county jail when the state charged him third-degree assault, under cause number 16-1-00804-39, for hitting a corrections officer. Officers noticed Mr. Linares fidgeting with his cell door lock with a pair of fingernail clippers.

5/31/17 RP 176-77. By the time officers approached the cell, Mr. Linares had stepped out. They ordered him to the floor. When he refused and took what was described as a “bladed stance”, an officer used a Taser gun to subdue him. 5/31/17 RP 176.

Officers searched the cell and noticed Mr. Linares’s mattress was ripped. 5/31/17 RP 177. They confiscated the fingernail clippers, removed the ripped mattress, and allowed Mr. Linares to return to his cell. 5/31/17 RP 180. Sometime later, when an officer returned to Mr. Linares’s cell with a new mattress, Mr. Linares struck him. 5/31/17 RP 203.

Just days after this exchange, Mr. Linares punched a different corrections officer in the face, and the state charged him with another third-degree assault, under a different cause number 16-1-02276-39. The court appointed the same attorney to represent Mr. Linares on the second-degree assault charge, this third-degree assault, and the third-degree assault charge, under cause number 16-1-02276-39. 12/19/16 RP 6. Weeks before trial commenced here, a jury had already found Mr. Linares guilty on the second-degree assault charge, and the court had already sentenced him. CP 86-93.

Pre-trial proceedings

During pre-trial proceedings, each time Mr. Linares appeared in court, he moved for another attorney. He complained about several continuances his counsel moved for over his objections, multiple court hearings for which he was not present, and the fact he and the attorney did not communicate with each other. 5/30/17 RP 12; CP 9; CP 10; CP 11; CP 12; CP 13; CP 14. The attorney

agreed he and Mr. Linares did not communicate with each other and told the court he moved to withdraw from Mr. Linares's cases before another judge, but his motion was denied. 4/7/17 RP 44.

The court inquired as to the nature of the conflict but ultimately found the attorney-client relationship had not been compromised and would not allow counsel to withdraw. However, the court did allow Mr. Linares time to hire private counsel. 8/10/16 RP 43. But his attempts to do so proved unsuccessful. 8/23/16 RP 47.

Mr. Linares's relationship with his court-appointed attorney had become so toxic that on the first day of trial, he refused to wear civilian clothes and to be transported from the jail to court. 5/30/17 RP 3. His attorney could not say for certain whether Mr. Linares was waiving the right to be present at trial, because he and Mr. Linares did not communicate with each other. The court ordered jail staff to use reasonable force to transport Mr. Linares to court, so it could inquire as to why he was absent. 5/30/16 RP 3.

Mr. Linares arrived at court, and promptly renewed his motion for another attorney and cited the same reasons as before: continuances his counsel moved for over his objections, multiple court hearings for which he was not present, and the fact he and the attorney did not communicate with each other. 5/30/17 RP 12; CP 9; CP 10; CP 11; CP 12; CP 13; CP 14. He pleaded for either another court appointed attorney or for more time to try to hire one. 5/30/17 RP 13.

Because Mr. Linares made the same request, numerous times, before, the court concluded he was attempting to delay proceedings, and denied the motion. 5/30/17 RP 12-13. Mr. Linares continued to ask for another attorney. 5/30/17 RP 16-17. And he continued to cite the same reasons why. 5/30/17 RP 13. Colloquy between the court and Mr. Linares went on for some time until Mr. Linares insisted he would not go to trial unless he had a new attorney. 5/30/17 RP 20-21.

The court reminded Mr. Linares he had several months to secure another attorney but made little to no attempts to do so. It concluded the breakdown in the attorney-client relationship was self-imposed, and found Mr. Linares voluntarily relinquished his right to be present at trial. 8/23/16 RP 47; 5/31/17 RP 140-141. Trial commenced without Mr. Linares and a jury found him guilty. 5/31/17 RP 246; CP 55. A few days later, another jury would return the same verdict for the third-degree assault charge, under cause number 16-1-02276-39. CP 62. The court held sentencing for both third-degree assault convictions on the same day.

Mr. Linares did not appear at either trial for the third-degree assault convictions, but he appeared at sentencing. Frustrated and probably feeling dejected, Mr. Linares lashed out and kicked his attorney. 6/9/17 RP 68-73. The attorney contacted the Washington State Bar Association (Bar). The Bar advised that he should withdraw. It was only then, the trial court appointed new counsel to represent Mr. Linares during sentencing proceedings. 6/14/17 RP 78-79.

Sentencing

Mr. Linares's attorney and the state agreed Mr. Linares's offender score was 9. 7/27/17 RP 127. Mr. Linares's attorney moved the court to impose a standard range sentence. He asked the court to run the two third-degree assault convictions concurrent with each other, as well as concurrent with the second-degree assault conviction, Mr. Linares received earlier this year. 7/13/17 RP 104-105. He argued the second-degree assault conviction should be considered a current offense because it was pending when Mr. Linares committed the two third-degree assaults. 7/13/17 RP 104-105.

The state disagreed. It argued Mr. Linares was on community custody when he committed the second-degree assault, and at the time he committed the two third-degree assaults. The third-degree assault cases involved assaults on Department of Corrections' officers while he was in custody, awaiting trial on the second-degree assault. They involved separate victims. So, based on his offender score, the court had the discretion to impose an exceptional sentence, otherwise the court could potentially risk some of these crimes going unpunished if it imposed concurrent sentences. He would essentially get a "free crime" where one of the assaults on one of the officers would be subsumed in the sentence of the other case. 7/13/17 RP 97.

The court agreed with the state, and in an oral ruling, sentenced Mr. Linares to 15 years imprisonment. It ordered Mr. Linares to serve 60-months imprisonment on each third-degree assault conviction to run concurrently each other. However, the court ordered the third-degree assault sentences to run

consecutively with the second-assault sentence. 8/1/17 RP 153; CP 92-99. Mr. Linares appealed both convictions. CP 98.

IV. ARGUMENT

1. MR. LINARES'S MULTIPLE REQUESTS FOR NEW COUNSEL AND COUNSEL'S REQUESTS TO WITHDRAW WERE ENOUGH FOR THE TRIAL COURT TO APPOINT NEW COUNSEL TO THE CASE, BEFORE MR. LINARES RESORTED TO VIOLENCE.

Standard of review

Whether dissatisfaction with court-appointed counsel justifies the appointment of new counsel is a matter within the trial court's discretion. State v. Varga, 151 Wn.2d, 179, 200, 86 P.3d 139 (2004); State v. Stenson, 132 Wn.2d 668, 733, 940 P.2d 1239 (1997). A court abuses its discretion when its decision adopts a view no reasonable person would take or is based on untenable grounds or untenable reasons. State v. Sisouvanh, 175 Wn.2d 607, 623, 290 P.3d 942 (2012).

Analysis

A defendant has a constitutional right to counsel, which includes a right to be represented by an effective advocate. Wheat v. United States, 486 U.S. 153, 159, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988). However, a defendant does not have an absolute constitutional right to representation by the advocate of his choice. State v. Stenson, 132 Wn.2d at 733. A defendant who wishes to substitute appointed counsel must move before the trial court and show good cause for the substitution, " 'such as a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant.' " State v. Varga, 151 Wn.2d at 200 (quoting Stenson, 132 Wn.2d

at 734). A defendant's general loss of confidence in defense counsel by itself is not sufficient cause for substitution. Stenson, 132 Wn.2d at 733-34. However, if the attorney-client relationship completely collapses, "the refusal to substitute new counsel violates the defendant's Sixth Amendment right to effective assistance of counsel." In re Pers. Restraint of Stenson (Stenson 2), 142 Wn.2d 710, 722, 16 P.3d 1 (2001), citing United States v. Moore, 159 F.3d 1154, 1158 (9th Cir.1998).

To determine whether the trial court erred, and an irreconcilable conflict existed, this court must consider: (i) the extent of any conflict between the defendant and counsel, (ii) the adequacy of the trial court's inquiry into the grounds for the motion, and (iii) the timeliness of the motion and potential effects on the trial schedule. State v. Cross, 156 Wn.2d 580, 607, 132 P.3d 80 (2006). In examining the extent of conflict between a defendant and his attorney, this court will consider the extent and nature of the breakdown in the relationship and its effect on the representation. State v. Schaller, 143 Wn. App. 258, 270, 177 P.3d 1139 (2007).

i. Extent of conflict. Attorney-client conflicts justify the grant of a substitution motion only when counsel and defendant are so at odds as to prevent presentation of an adequate defense." State v. Stenson, 132 Wn.2d 734, 940 P.2d 1239 (1997). A complete breakdown in communication is grounds for substitution of appointed counsel, but a defendant's loss of confidence in his counsel is not. State v. Varga, 151 Wn.2d 200, 86P.3d 139 (2004).

Here, the same court-appointed attorney represented Mr. Linares on the second-degree assault charge, as well as the two third-degree assault charges. By the time the court was ready to sentence him on the latter two convictions, Mr. Linares and his attorney were so at odds, Mr. Linares lashed out and kicked him. 6/9/17 RP 68-70; 1/3/17 RP 15; 5/26/17 RP 60; 3/9/17 RP 31; 4/5/17 RP 35.

Each time Mr. Linares appeared in court, he explained how he missed several court hearings, how his attorney moved for continuances over his objections, and how he and his attorney did not communicate. And each time, he moved the court to either appoint another attorney or to allow him time to hire private counsel. Although his attorney had explanations for the contested continuances and for the missed court hearings, he agreed there was a breakdown in communication, as well as in the attorney-client relationship. He told the court that at least twice, asked the court for permission to withdraw from the cases, but was denied. 5/20/16 RP 23; 6/28/16 RP 26; 7/22/16 RP 37; 8/10/16 RP 41; 10/13/16 RP 58; 10/28/16 RP 70; 11/30/16 RP 76; 2/9/17 RP 86; 3/9/17 RP 91; 4/5/17 RP 96; 4/7/17 RP 104; 5/3/17 RP 110-111; 5/26/17 RP 119-20.

ii. Adequacy of the trial court's inquiry. “[A] trial court conducts adequate inquiry by allowing the defendant and counsel to express their concerns fully.” State v. Schaller, 143 Wn. App. 258, 271, 177 P.3d 1139 (2007); see also In re Pers. Restraint of Stenson, 142 Wn.2d 710, 731, 16 P.3d 1 (2001) (noting that the trial court's inquiry appeared adequate because the defendant's in camera and deposition testimony showed no breakdown in communication).

This may, but need not, be a formal inquiry. Schaller, 143 Wn. App. at 271. However, the defendant must at least state the reasons for his dissatisfaction with counsel, and the record on appeal must show that the trial court had before it the information necessary to assess the merits of the defendant's request. See id.; Varga, 151 Wn.2d at 200-01.

The trial court here inquired as to why Mr. Linares sought another attorney, each time Mr. Linares made the motion. And although Mr. Linares and his attorney made the same assertions, the trial court concluded the breakdown in communication was self-imposed by Mr. Linares. It was only after Mr. Linares kicked his attorney and the Washington State Bar Association advised counsel to withdraw, did the trial court finally grant Mr. Linares's motions. 5/20/16 RP 23; 6/14/17 RP 78-80.

iii. Timeliness of the motion and potential effects on the trial schedule. Each time Mr. Linares appeared in court, from arraignment to the first day of trial, he moved the court for another attorney. He made the requests so early in the life of the case and so often that had the court granted it initially, there would not have been additional significant delay or any potential effects on the trial schedule.

As to the nature and extent of the conflict, it is hard to discern from the transcripts what the nature of the conflict was, but Mr. Linares's requests for new counsel went beyond dissatisfaction about trial strategy. Granted, he and his attorney did not communicate. Even his attorney agreed. But the conflict, whatever it was, between the two became so intense Mr. Linares responded with

violence and kicked his attorney. 6/9/17 RP 68. And the conflict that had carried over from trial to trial could have affected counsel's ability to be effective. For that reason, the court should have erred on the side of caution and appointed new counsel.

2. THE TRIAL COURT VIOLATED STATUTORY AUTHORITY WHEN IT IMPOSED A CONSECUTIVE SENTENCE BASED ON ITS DETERMINATION THAT CONCURRENT SENTENCES WOULD GIVE WAY TO A "FREE CRIME."

Standard of review

This court will review de novo whether a trial court exceeded its statutory authority under the Sentencing Reform Act. State v. Murray, 118 Wn.App. 518, 521, 77 P.3d 1188 (2003); State v. Smith, 159 Wn. App. 694, 699, 247 P.3d 775, 777 (2011).

Analysis

With a few exceptions not applicable here, sentences for two or more current offenses shall be served concurrently and "[c]onsecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535." RCW 9.94A.589(1)(a); In re Pers. Restraint of Finstad, 177 Wn.2d 501, 508, 301 P.3d 450 (2013). Under RCW 9.94A.535, a trial court may impose an exceptional sentence if "there are substantial and compelling reasons justifying an exceptional sentence." In such a case, the trial court must "set forth the reasons for its decision in written findings of fact and conclusions of law." RCW 9.94A.535.

Our Supreme Court has stated that "[w]hile the [sentencing reform act] does not formally define 'current offense,' the term is defined functionally as

convictions entered or sentenced on the same day.” Finstad, 177 Wn.2d at 507 (citing RCW 9.94A.525(1)). Mr. Linares’s third-degree assault offenses fell squarely into this context.

A defendant’s standard range sentence reaches its maximum at an offender score of “9 or more.” RCW 9.94A.510. The result for a defendant being sentenced for multiple current offenses that result in an offender score greater than nine is that further increases in the offender score do not increase the standard sentence range. State v. France, 176 Wn.App. 463, 470, 308 P.3d 812 (2013), review denied, 179 Wn.2d 1015, 318 P.3d 280 (2014). However, a trial court may impose an exceptional sentence if “[t]he defendant has committed multiple current offenses and the defendant’s high offender score results in some of the current offenses going unpunished.” RCW 9.94A.535(2)(c). The shorthand term “free crimes” is commonly used for the “current offenses going unpunished” that might justify an exceptional sentence. State v. Mata, 180 Wn. App. 108, 120, 321 P.3d 291 (2014).

Mr. Linares was charged with the two third-degree assault offenses while he awaited trial on the second-degree assault offense. He was not under community custody as the state seemed to suggest at sentencing, and he was not under sentence for a felony conviction, namely the second-degree assault offense, when he committed the two third-degree assault offenses.

Consequently, these offenses are presumed current. For that reason, the trial court was required to impose concurrent sentences for those convictions unless it followed the exceptional sentence provisions of RCW 9.94A.535. RCW

9.94A.589(1)(a). Under RCW 9.94A.535, the trial court must find “substantial and compelling reasons justifying an exceptional sentence” and “set forth the reasons for its decision in written findings of fact and conclusions of law.” Here, the trial court made no such findings. Thus, the trial court erred when it ordered the two third-degree assault sentences to run consecutively with the second-degree assault sentence under RCW 9.94A.589(1)(a) without resort to the procedures of RCW 9.94A.535. State v. Hughes, 154 Wn.2d 118, 140, 110 P.3d 192 (2005); State v. Jones, 137 Wn. App. 119, 124, 151 P.3d 1056 (2007).

V. CONCLUSION

There had to have been a complete collapse in attorney-client communication and in the attorney-client relationship, early in the life of the representation, for Mr. Linares to kick his attorney. When it continued to deny Linares’s repeated requests for new counsel, the trial court abused its discretion and tainted Mr. Linares’s right to effective counsel. Moreover, the trial court exceeded its statutory authority when it imposed the exceptional sentence.

If this court finds the trial court erred when it denied Mr. Linares’s requests for new counsel and violated its statutory authority, we ask this court to reverse Mr. Linares’s conviction and remand for a new trial. However, if this court only finds the trial court exceeded its statutory authority when it imposed the exceptional sentence, then we ask this court to vacate the consecutive sentence and to remand for resentencing within the standard range.

DECLARATION OF SERVICE

I declare under penalty and perjury of the laws of Washington State that on **Thursday, August 1, 2018**, I filed this **SECOND AMENDED APPELLANT'S OPENING BRIEF** with Division Three Court of Appeals and served copies of the same to the following counsel of record and/or other interested parties:

YAKIMA COUNTY PROSECUTORS OFFICE

David.Trefry@co.yakima.wa.us

joseph.brusic@co.yakima.wa.us

*This office accepts service by email.

JOSE PEDRO LINARES, DOC# 330280

Monroe Correctional Complex, SOU

P.O. Box 514

Monroe, WA 98272

s/Tanesha La'Trelle Canzater

Attorney for Jose Pedro Linares

Tanesha L. Canzater, WSBA# 34341

Post Office Box 29737

Bellingham, WA 98228-1737

(360) 362-2435 (mobile office)

(703) 329-4082 (fax)

Canz2@aol.com

LAW OFFICES OF TANESHA L. CANZATER

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