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Court of Appeals
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NO. 354857

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

FOURTH AMENDED APPELLANT'S OPENING BRIEF

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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 erred 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 that 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 354849, which involves the same defendant, Jose Pedro Linares (Mr. Linares). Likewise, some facts in CoA #354849 are relevant here. Moreover, the issues we raise below overlap with issues we raise in CoA #354849.

Mr. Linares was awaiting trial in the Yakima county jail, on a second-degree assault charge, when he was charged with third-degree assault, under cause number 16-1-02276-39, for punching a corrections officer in the face.

6/1/17 RP 131-132. This was Mr. Linares's second third-degree assault charge against corrections staff. The state had already charged him with third-degree assault, under cause number 16-1-00804-39, for a separate instance that occurred at the Yakima county jail with another corrections officer.

Mr. Linares pleaded not guilty to the charge, just as he had on cause number 16-1-00804-39. The court appointed the same attorney to represent him on all three charges: the pending second-degree assault charge, this third-degree assault charge, as well as the other third-degree assault charge, under cause number 16-1-00804-39.

By the time Mr. Linares pleaded guilty on this charge, the court had already sentenced him on the second-degree assault charge, after a jury found him guilty. Another jury had found him guilty on the third-degree assault charge under cause number 16-1-00804-39, and he was awaiting sentencing. 6/1/17 RP 6; CP 92-99.

Pre-trial proceedings

Almost immediately after he entered his plea here, Mr. Linares moved the court for another attorney. 1/3/17 RP 14. Mr. Linares cited instances where his attorney moved the court for multiple continuances over his objections, when his attorney neglected to have him transported from jail to court to attend hearings, and a lack of communication. 4/7/17 RP 43-44; 5/3/17 RP 49; 5/26/17 RP 58-60; CP 6; CP 7.

Mr. Linares's attorney explained why he moved for continuances over Mr. Linares's objections and how he reset the hearings Mr. Linares could attend

because of jail transportation issues. 1/3/17 RP 15; 5/26/17 RP 60; 3/9/17 RP 31; 4/5/17 RP 35. He agreed, however, that he and Mr. Linares did not communicate. Their attorney-client relationship had deteriorated to such a degree, he joined Mr. Linares's standard motion and asked to be removed from his cases, at least twice, before another judge. But, the motions were denied. 1/3/17 RP 15; 4/7/17 RP 44.

The relationship between Mr. Linares and his attorney had become so strained he refused to go to trial with the attorney on the other third-degree assault case, cause number 16-1-00804-39. He refused to wear civilian clothes and rejected transport from jail to court. The court ordered jail staff to use reasonable force to transport Mr. Linares to court so it could inquire as to whether he intended to waive his right to be present at trial. His attorney could not say for certain whether Mr. Linares had waived his right, because they did not communicate with each other. CP 67.

Mr. Linares arrived at court with jail staff and promptly moved for another attorney. He made this motion countless times before during pre-trial proceedings on the other third-degree assault case and he cited the same reasons why: several continuances his counsel moved for over his objections, multiple court hearings for which he was not present, and the fact he just could not communicate with his counsel. 5/30/17 RP 12. He continued to insist on either another court appointed attorney or more time to try to hire one. 5/30/17 RP 13.

The court reminded Mr. Linares he had “ample opportunities because of previous motions that denied his request for a new court-appointed attorney to have secured private counsel (emphasis added).” 6/1/17 RP 3-14; 1/3/17 RP 15-16; 2/9/17 RP 25-27; 4/7/17 RP 43-46; 5/3/17 RP 49-51; 5/26/17 RP 58-63. Mr. Linares recounted for the court his attempts to secure private counsel. 6/1/17 RP 10-13. And although his attempts proved fruitless, he insisted he did not want to go to trial with this attorney and continued to ask for more time to hire private counsel. 5/26/17 RP 58-60.

The court, once again, denied Mr. Linares’s request. It found he had not made any reasonable efforts to try to hire an attorney and his request for a continuance was simply a request to delay trial in this particular matter, which would prejudice the state. 6/1/17 RP 14-15. Mr. Linares insisted he would not go to trial with his attorney. After some colloquy, the court found Mr. Linares voluntarily waived his right to be present at trial, and the state tried him in absentia. 6/1/17 RP 18-20.

The jury found Mr. Linares guilty. 6/2/17 RP 200; CP 62; CP 66. Just days before, another jury had returned the same verdict for the other third-degree assault charge, cause number 16-1-00804-39. The court scheduled sentencing for both third-degree assault convictions on the same day. Although Mr. Linares did not appear at either trial for the third-degree assault convictions, he appeared for sentencing. Frustrated and probably feeling dejected, Mr. Linares lashed out at his attorney and kicked him. 6/9/17 RP 68- 73. 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.

At sentencing, the state and Mr. Linares's new court-appointed attorney 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 sentences concurrently with each other, as well as concurrently with the second-degree assault sentence, Mr. Linares received weeks before. 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 104-108.

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 an exceptional sentence of 15 years imprisonment. It ordered Mr.

Linares to serve 60-months imprisonment on each third-degree assault conviction. But those sentences would 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 104; CP 105-106.

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 Wash.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 extent of Mr. Linares conflict with his attorney carried over from one trial to the other, and ultimately ended in violence. Mr. Linares insisted throughout both third-degree assault cases that he and his attorney did not communicate. And each time he appeared in court, Mr. Linares moved the court to either appoint another attorney or to allow him time to hire private counsel. His attorney agreed that there was a breakdown in communication and at least twice, joined Mr. Linares's motion and asked to withdraw. 1/3/17 RP 15.

In addition to a complete breakdown in communication, Mr. Linares explained how he missed several court hearings and how his attorney moved for continuances over his objections. Although counsel explained why he moved for continuances over Mr. Linares's objections and how he reset hearings Mr. Linares could not attend because of jail transportation issues, the extent of their conflict culminated to such a degree, Mr. Linares refused to go to trial with him. The conflict continued at sentencing when Mr. Linares lashed out and kicked his attorney. 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.

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 Bar 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. However, the trial court had more than enough information necessary to assess the merits of Mr. Linares's request for new counsel before the matter escalated.

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, Mr. Linares's requests for new counsel went beyond dissatisfaction about trial strategy. It is difficult to discern from the transcripts what the exact nature of the conflict was, but whatever it was

the extent of it caused Mr. Linares to act out and kick his attorney. 6/9/17 RP 68. And what is more, the conflict spanned over at least two of three trials on which counsel represented Mr. Linares and 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'S IMPOSITION OF A CONSECUTIVE SENTENCE BASED ON ITS DETERMINATION THAT CONCURRENT SENTENCES WOULD GIVE WAY TO A "FREE CRIME" VIOLATED STATUTORY AUTHORITY.

Standard of review

This court will review de novo whether a trial court exceeded its statutory authority under the Sentencing Reform Act (SRA). State v. Murray, 118 Wash.App. 518, 521, 77 P.3d 1188 (2003); State v. Smith, 159 Wash. 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). "[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)). 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.

The “free crime” doctrine comes into play when a defendant has an offender score of 9 or more. 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).

Here, Mr. Linares offender score was 9. 7/27/17 RP 127. Based on that score, he reached the maximum for a standard range sentence, which the court agreed with the state would result in one of the assault offenses going unpunished. 7/13/17 RP 97. However, 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. 7/13/17 RP 97.

Because these offenses were current offenses, 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), which includes “setting forth the reasons for its decision in written findings of fact and conclusions of law.” RCW 9.94A.535. Consequently, 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.

Dated this 12th day of October.

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DECLARATION OF SERVICE

I declare under penalty and perjury of the laws of Washington State that on **Friday, October 12, 2018**, I filed this **FOURTH 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:

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Comments:

Attached is the fourth and hopefully final amended brief under this cause number. I have cross checked the clerks papers with the index and I believe these are correct.

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