

355438-III
SUPREME COURT NO. 93451-7

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BENJAMIN E. STUTZKE,

Appellant.

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

The Honorable John O. Cooney, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE COURT VIOLATED STUTZKE'S SIXTH AMENDMENT RIGHT TO COUNSEL IN GRANTING ASSIGNED COUNSEL'S MOTION TO WITHDRAW IN THE ABSENCE OF AN ACTUAL CONFLICT OF INTEREST.

Stutzke argues the trial court violated his right to counsel when it granted assigned counsel's motion to withdraw in the absence of an actual conflict of interest. The State does not claim there was an actual conflict of interest that justified withdrawal. Instead, the State claims the trial court properly granted defense counsel's motion to withdraw due to a complete breakdown in communication between counsel and client. Brief of Respondent (BOR) at 18-22.

The State's argument suffers from several flaws. First, the trial court did not grant defense counsel's motion to withdraw on this basis. The court granted the motion to withdraw based on "alleged ethical violations or whatever allegations that are being made that Mr. Charbonneau is not able to represent Mr. Stutzke." 4RP 184-85. Counsel described the problem as "a clear conflict of interest." 4RP 183.

The second problem with the State's argument is that the complete breakdown test is not used to assess the propriety of granting a defense attorney's motion to withdraw as appointed counsel. Rather, as shown by the State's own citations, the test is used to assess whether the court

abused its discretion in refusing to grant a defendant's request for substitute counsel. In re Pers. Restraint of Stenson, 142 Wn.2d 710, 723-24, 16 P.3d 1 (2001) (Stenson II); State v. Varga, 151 Wn.2d 179, 200, 86 P.3d 139 (2004). The test is inapplicable here because Stutzke did not make a motion for substitute counsel. He did not do so at the May 26 hearing at which the trial court granted counsel's motion to withdraw. He did not do so at the previous hearings on May 13 and 19, even though he complained about his attorney.

The third problem with the State's argument is that, even if the test is applicable, the record does not show a complete breakdown in this case. "[T]here is a difference between a complete collapse and mere lack of accord." State v. Cross, 156 Wn.2d 580, 606, 132 P.3d 80 (2006). Disagreement about defense strategy does not establish a complete collapse of communication between counsel and client. Id. at 606-09. Nor is it enough that a defendant has lost confidence or trust in his attorney. State v. Stenson, 132 Wn.2d 668, 734, 940 P.2d 1239 (1997) (Stenson I). A total lack of communication that adversely affects the attorney's performance may justify substitution. Stenson II, 142 Wn.2d at 724-25. The attorney and the defendant must be "so at odds as to prevent presentation of an adequate defense." Stenson I, 132 Wn.2d at 734.

The record shows Stutzke refused to meet with his attorney on the morning of May 19. 4RP 173. At the May 23 hearing, his attorney said he could no longer communicate with Stutzke. 4RP 183-84. His attorney agreed with the State that he could not communicate with Stutzke based on an allegation that Stutzke had made against him, which put them in an adversarial position. 4RP 182-83. The court cited Stutzke's allegation that his attorney was intoxicated in court. 4RP 184. Even assuming this situation qualifies as a complete breakdown in communication, the record does not show that Stutzke was so at odds with his attorney that it prevented the presentation of an adequate defense.

At the May 13 hearing, the trial court said Charbonneau had always provided quality representation and there was no reason to believe he didn't provide the same kind of representation to Stutzke. 4RP 162. The court told Stutzke, with reference to his appointed attorney, "I don't see any reason that he wouldn't be effective in representing you. And he is prepared for trial in a couple weeks." 4RP 163. On May 26, the court said Stutzke refused to meet with his attorney on May 19, which meant the latter wasn't prepared for trial. 4RP 193. The court said this in explaining why it would not appoint new counsel, after it had already granted counsel's request to withdraw. In fact, Stutzke's attorney only said on May 19 that he wasn't sure he could be effective if he could not speak with

Stutzke in preparing for trial. 4RP 173. Not being sure is different than not being able. Defense counsel, in seeking to withdraw on May 26, did not say he could not provide effective representation or that he was unprepared for trial. The record does not show a complete breakdown.

The State asserts the necessity to preserve confidences precluded the trial court from finding out the exact circumstances precipitating a motion to withdraw, although it cites no case in support. BOR at 17, 22-23. Concerns about jeopardizing attorney-client privilege "do not eliminate the trial court's obligation to make an informed decision — it is not sufficient to rely upon defense counsel's assertion that a conflict exists, even if made in good faith." State v. Vicuna, 119 Wn. App. 26, 32-33, 79 P.3d 1 (2003), review denied, 152 Wn.2d 1008 (2004). An *in camera* examination is one option at the trial court's disposal. Id. at 33; see also Cross, 156 Wn.2d at 610 (adequate inquiry "must include a full airing of the concerns (which may be done in camera) and a meaningful inquiry by the trial court."). Despite the trial prosecutor's offer to step out of the courtroom so that the full inquiry could take place, the trial court declined to do an *in camera* examination. 4RP 184.

The fourth problem with the State's argument is that if the State is right, the State loses. "If the relationship between lawyer and client completely collapses, the refusal to substitute new counsel violates the

defendant's Sixth Amendment right to effective assistance of counsel." Stenson II, 142 Wn.2d at 722. It would be ironic if the trial court allowed counsel to withdraw because effective representation could not be provided but then left Stutzke without representation altogether. If there was a complete breakdown justifying substitute counsel, then the trial court's refusal to appoint substitute counsel for Stutzke violated his right to counsel under Stenson II. Reversal is required without any showing of prejudice in this circumstance. Id.

The State also claims Stutzke unequivocally waived his right to counsel in December 2015 and so a second waiver of counsel was unnecessary. BOR at 11-16. The State's argument is misplaced. Stutzke does not argue that the trial court needed to conduct a second Faretta¹ colloquy before removing counsel on May 23, 2016. He does not make that argument because he did not seek to go pro se at that hearing. The court granted defense counsel's motion to withdraw, even though Stutzke did not request that his counsel withdraw. The issue, then, is whether the court denied Stutzke the right to assistance of counsel in so doing.

The State relies on this proposition: "Once an unequivocal waiver of counsel has been made, the defendant may not later demand the

¹ Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975).

assistance of counsel as a matter of right since reappointment is wholly within the discretion of the trial court." State v. DeWeese, 117 Wn.2d 369, 376-77, 816 P.2d 1 (1991). The question posed in that circumstance is whether the court abused its discretion in refusing to reappoint counsel. State v. Fisher, 188 Wn. App. 924, 930-31, 355 P.3d 1188 (2015); State v. Modica, 136 Wn. App. 434, 443-44, 149 P.3d 446, (2006), aff'd, 164 Wn.2d 83, 186 P.3d 1062 (2008); State v. Canedo-Astorga, 79 Wn. App. 518, 526-27, 903 P.2d 500 (1995), review denied, 128 Wn.2d 1025, 913 P.2d 816 (1996). In each of these cases, the trial court refused to appoint a new attorney at the defendant's request after a valid waiver of the right to counsel and the issue on appeal was whether the trial court erred in refusing to appoint a new attorney. DeWeese, 117 Wn.2d at 374, 376, 378-79; Fisher, 188 Wn. App. at 930-31; Modica, 136 Wn. App. at 443-44; Canedo-Astorga, 79 Wn. App. at 526-27.

But that is not what happened here. The trial court exercised its discretion and reappointed counsel for Stutzke in February 2016. 4RP 149-53. Stutzke does not assign error to the reappointment of counsel. Neither does the State. The error is in the subsequent removal of reappointed counsel on May 23, 2016. Once the trial court exercises its discretion and reappoints counsel, the right to counsel reattaches. Neither DeWeese, nor any of the cases that subsequently rely on DeWeese,

involve the situation where, as here, the trial court exercised its discretion and reappointed counsel, but then later removed that attorney without appointing another one.

The foreign cases cited by the State are inapposite. BOR at 15-16. Commonwealth v. Phillips, 2016 Pa. Super 103, 141 A.3d 512, 519-21 (Pa. Super. Ct.), appeal denied, 161 A.3d 796 (2016) and the cases cited therein hold that, absent a change of circumstances, a trial court is not required to conduct a second Faretta inquiry during subsequent proceedings if a previous one had already been conducted. The same goes for State v. Rhoads, 813 N.W.2d 880, 885-87 (Minn. 2012). Again, Stutzke's argument is not that a second Faretta colloquy should have been done to ensure his waiver of counsel was knowing, voluntary and intelligent. He did not seek to waive the counsel that the court reappointed. Rather, the court granted counsel's motion to withdraw without justification under the prevailing legal standard. That is the error.

2. THE COURT VIOLATED STUTZKE'S SIXTH AMENDMENT RIGHT TO COUNSEL IN FORCING HIM TO REPRESENT HIMSELF AT TRIAL AFTER RULING HE "CONSTRUCTIVELY WAIVED" HIS RIGHT TO COUNSEL THROUGH HIS ACTIONS.

Assuming arguendo the trial court did not err in granting defense counsel's motion to withdraw, the question still remains whether the court

erred in refusing to appoint new counsel based on its determination that Stutzke constructively waived his right to counsel.

The State relies on a waiver by conduct theory to justify the denial of counsel. BOR at 30-31. As recognized by the State, waiver by conduct requires the court to first warn the defendant on the record that his dilatory conduct will be deemed a waiver of the right to an attorney and advise him of the dangers and consequences of proceeding without counsel. City of Seattle v. Klein, 161 Wn.2d 554, 562, 166 P.3d 1149 (2007); State ex rel. Schmitz v. Knight, 142 Wn. App. 291, 295, 174 P.3d 1198 (2007); City of Tacoma v. Bishop, 82 Wn. App. 850, 859, 920 P.2d 214 (1996).

The problem with the State's waiver by conduct claim is that the record does not show any such warning was given. The State highlights the court's February 18, 2016 statements made in granting Stutzke's request to reappoint counsel. BOR at 25-26. The court told him that having a public defender is not like a light switch that can be turned on and off. 4RP 144. The court reminded Stutzke that his original request for an attorney was granted, then he was allowed to proceed pro se, and now a week and a half before trial he requested another attorney. 4RP 144-45. "So what I don't want to happen is for you to choose to have an attorney represent you and then choose to waive that again and ask for another continuance. What is your ultimate decision here? Do you want

an attorney or do you not want an attorney?" 4RP 145. Nowhere does the court warn Stutzke that he will lose the right to counsel if he engaged in further dilatory behavior.

The State also relies on this statement given by the trial court on May 19, 2016 in addressing Stutzke's unhappiness with his attorney: "You can't keep turning this on or off. And you chose to have an attorney at that time. So at this point the Court's going to allow Mr. Charbonneau to stay on as your attorney of record." 4RP 177. The court also said "[s]o at this point we'll leave Mr. Charbonneau on as you've already chose[n] to waive your right to an attorney and then ask for an attorney subsequent to that." 4RP 179. The court at no time warned him that he would lose his right to an attorney if he continued to have problems with his attorney or otherwise continued to engage in dilatory conduct. Rather, the court told Stutzke that he was stuck with his attorney. Nor did the court warn Stutzke of the dangers and consequences of proceeding without counsel.

The State cites State v. Afeworki, 189 Wn. App. 327, 358 P.3d 1186 (2015), review denied, 184 Wn.2d 1036, 380 P.3d 407 (2016). BOR at 30. Afeworki does not help the State. In that case, Afeworki threatened his attorney, Mr. Bible, in court. Id. at 348. The warning is worth repeating in full, as it is so wholly dissimilar to anything the trial court ever said to Stutzke:

In response, the court cautioned Afeworki that he would not be allowed to "create a situation where this trial will not go forward, which is what I think that you are intending and trying to do." The court made the consequences of further misconduct clear by warning him as follows:
If you should say or do anything further in this case that makes [Bible] as an officer of the Court feel that he has to withdraw as your attorney, he can do so.

...
If Mr. Bible says that he cannot continue because of what you say or do towards him and the associate counsel is unable to take over as counsel, you will be allowed to go pro se. But, you will step in at that moment with no additional prep time, nothing.

Id.

Thus, the record established that "Afeworki engaged in misconduct that caused the court to warn him that, if he engaged in further misconduct that caused his attorney to seek to withdraw, he would be required to proceed pro se." Id. at 347. "Prior to the misconduct that gave rise to Afeworki's implied waiver of the right to counsel, he was warned of the risks and disadvantages of self-representation." Id. at 347-48.

None of that occurred in Stutzke's case. He was not told he would be forced to go pro se if he continued to cause problems for his assigned attorney or engage in any other dilatory behavior. Without the requisite warning, there is no waiver by conduct. Klein, 161 Wn.2d at 562; Schmitz, 142 Wn. App. at 295; Bishop, 82 Wn. App. at 859. The complete denial of counsel is a structural error requiring automatic

reversal. Schmitz, 142 Wn. App. at 297; United States v. Goldberg, 67 F.3d 1092, 1103 (3rd Cir. 1995).

3. SUFFICIENT EVIDENCE DOES NOT SUPPORT THE VOYEURISM CONVICTION BECAUSE THE STATE FAILED TO PROVE STUTZKE VIEWED TOWNSHEND FOR MORE THAN A BRIEF PERIOD OF TIME WITHOUT HER KNOWLEDGE.

The crux of the disagreement is whether the State needed to prove Stutzke knowingly viewed Townshend without her knowledge for more than a brief period of time. The State says it didn't because the phrase "for more than a brief period of time" only "modifies" the term "views" and does not modify "consent" or "knowledge." BOR at 36.

This interpretation is contrary to the longstanding rule of statutory construction that "[w]e read each provision of a statute in relation to the other provisions and construe a statute as a whole." Hubbard v. Dep't of Labor & Indus., 140 Wn.2d 35, 43, 992 P.2d 1002 (2000). Considering the definition of "views" (RCW 9A.44.115(1)(e)) in relation to the provision defining the crime (RCW 9A.44.115(2)) shows that the viewing of a person must be without that person's knowledge for more than a brief period of time. This is the natural reading of the statutory language. A person commits the crime of voyeurism when he "views . . . (a) Another person without that person's knowledge and consent . . . or (b) The intimate areas of another person without that person's knowledge and

consent." RCW 9A.44.115(2). The meaning of "views" cannot be unlinked from the person being viewed and the circumstances in which the viewing takes place. The word "without" links the action of viewing to that viewing being done without knowledge and consent, and viewing means "for more than a brief moment in time." RCW 9A.44.115(1)(e).

Further, "[s]tatutes which define crimes must be strictly construed according to the plain meaning of their words to assure that citizens have adequate notice of the terms of the law, as required by due process." State v. Shipp, 93 Wn.2d 510, 515-16, 610 P.2d 1322 (1980). "Strict construction requires that, 'given a choice between a narrow, restrictive construction and a broad, more liberal interpretation, we must choose the first option.'" In re Detention of Hawkins, 169 Wn.2d 796, 801, 238 P.3d 1175 (2010) (quoting Pac. Nw. Annual Conference of United Methodist Church v. Walla Walla County, 82 Wn.2d 138, 141, 508 P.2d 1361 (1973)). Strict construction requires that the viewing must be without the observed person's knowledge "for more than a brief moment in time." RCW 9A.44.115(1)(e). Reading the statute strictly and as a whole favors Stutzke's interpretation. Applying that interpretation to the facts of Stutzke's case, the evidence is insufficient to convict.

B. CONCLUSION

For the reasons set forth above and in the opening brief, Stutzke requests reversal of the convictions. In the event this Court declines to reverse, Stutzke requests vacature of the conviction for violating a protection order due to the double jeopardy, correction of the sentencing errors, and correction of the error in the sexual assault protection order.

DATED this 31st day of August 2017

Respectfully Submitted,

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