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Court of Appeals
Division III
State of Washington
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NO. 37075-5-III

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

STATE OF WASHINGTON,
Respondent,

v.

RUDY WILLIAMS,
Appellant.

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

The Honorable Tina L. Kernan (Pro Tem), Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Mr. Williams was denied his right to counsel at his resentencing hearing.
2. Mr. Williams did not make a knowing, voluntary and intelligent waiver of his right to counsel at his resentencing hearing.
3. The trial court erred by denying Mr. Williams's motion to vacate his judgment and sentence based on the trial judge facing multiple rape and sexual assault charges involving court staff.

Issues Presented on Appeal

1. Was Mr. Williams denied his right to counsel at his resentencing hearing?
2. Did Mr. Williams make a knowing, voluntary and intelligent waiver of his right to counsel at his resentencing hearing?
3. Did the trial court err by denying Mr. Williams's motion to vacate his judgment and sentence based on the trial judge facing multiple rape and sexual assault charges involving court staff?

B. STATEMENT OF THE CASE

Mr. Williams was originally sentenced in 2016 to 30 months on counts 2, 3, 4, 5, to run consecutive to count 1. Supp. CP, Felony Judgment and Sentence 12/5/16. On September 27, 2018, the Court of Appeals remanded to vacate two of the five counts. RP 8-9. The relevant portion of the remand is as follows:

We affirm Mr. Williams's convictions for count 1 (felony violation of a court order), and counts 3 and 4 (witness tampering). We reverse his convictions for count 2 (assault in the third degree) and count 5 (witness tampering), and remand for further proceedings consistent with this opinion.

State v. Williams, 5 Wn. App. 2d 1027 (2018) (Unpublished).

The trial court originally imposed an exceptional sentence based on the free-crimes aggravating factor. RP 27. On resentencing the court re-imposed the same exceptional sentence, but without discussion, other than the prosecutor's comment: "you could potentially say that 30 months for four crimes was too lenient in the past and that 30 months for two crimes is closer to the mark in this case." RP 8-9, 27.

On January 4, 2019, the state moved to amend the warrant of commitment to reflect the "consecutive" sentence in the judgment and sentence. CP 15. On January 9, 2019, Mr. Williams

filed a motion objecting to this motion. Over, Mr. Williams's objections, the trial court amended the motions. CP 26. On January 14, 2019 the trial court signed an order of indigency for Mr. Williams's Notice of Appeal. CP 26-27.

Mr. Williams also unsuccessfully moved for a bond pending appeal, and filed an appeal of the trial court's denial of that motion. CP 58-59, 66.

On June 13, 2019 Mr. Williams moved for appointment of counsel, to act as co-counsel, and for an order of indigency to address in relevant part, his motion for reconsideration to vacate his judgment and sentence based on Judge Gallina's facing multiple charges of rape and sexual misconduct against court staff; and the court's jurisdiction to amend the warrant of commitment. CP 68-71, 77-81. The court denied the motions on July 3, 2019. CP 84.

On July 26, 2019, Mr. Williams moved for reconsideration. CP 90. On September 4, 2019, the Court again denied all of Mr. Williams's motions. CP 101. On September 23, 2019, Mr. Williams filed a notice of appeal challenging the trial court's denial of his December 3, 2018 motion to vacate the re-imposition of a 90 month

exceptional sentence. (The order inadvertently provided December 2019). CP 102-03. On September 24, 2019, the trial court entered an order of indigency. CP 104-05.

Mr. Williams was never appointed counsel or engaged in any discussion or colloquy to waive his right to counsel beginning with the resentencing on December 3, 2018, through September 23, 2019. Mr. Williams testified that he filed declarations in support of his motions. RP 27. Judge Gallina presided over all of the hearings, with the exception of the September 3, 2019 hearing.

C. ARGUMENTS

1. MR. WILLIAMS WAS DENIED HIS RIGHT TO COUNSEL AT THE RESENTENCING HEARING

a. Right to Counsel at Sentencing

Mr. Williams was entitled to counsel at his December 3, 2018 sentencing hearing on remand from the Court of Appeals.

Under the Sixth Amendment to the United States Constitution and art. I, § 22 of the Washington State Constitution, “a criminal defendant is entitled to the assistance of counsel at critical stages in the litigation.” *State v. Heddrick*, 166 Wn.2d 898, 909–10, 215 P.3d 201 (2009); *State v. Robinson*, 153

Wn.2d 689, 694, 107 P.3d 90 (2005). A “critical stage” in the right to counsel context is when “a defendant's rights may be lost, defenses waived, privileges claimed or waived, or in which the outcome of the case is otherwise substantially affected.” *Heddrick*, 166 Wn.2d at 910 (quoting *State v. Agtuca*, 12 Wn. App. 402, 404, 529 P.2d 1159 (1974)).

Sentencing is a critical stage of the proceedings, at which a defendant is constitutionally entitled to be represented by counsel. *State v. Hawkins*, 164 Wn. App. 705, 715, 265 P.3d 185 (2011), *review denied*, 173 Wn.2d 1025, 272 P.3d 851 (2012). A criminal defendant also has a statutory right to counsel under CrR 3.1(b)(2), which expressly includes sentencing and post-conviction review. *Robinson*, 153 Wn.2d at 694 (citing and quoting *State v. Rupe*, 108 Wn.2d 734, 741, 743 P.2d 210 (1987)).

Mr. Williams had both a constitutional and statutory right to counsel at the December 3, 2018 sentencing hearing because it is expressly considered a critical stage of a criminal proceeding. *Robinson*, 153 Wn.2d at 694; *Rupe*, 108 Wn.2d at 741; *Hawkins*, 164 Wn. App. at 715; CrR 3.1(b)(2). This Court must reverse and remand for a new sentencing hearing because Mr.

Williams was denied his constitutional and statutory right to counsel at his resentencing hearing. U.S. Const. Sixth Amend; Wash.; *Robinson*, 153 Wn.2d at 694.

b. No Waiver of Right To Counsel

The only manner in which a defendant may proceed without counsel at a critical stage of a criminal proceeding is if he makes a knowing, voluntary and intelligent waiver of his right to counsel. Art. I, § 22 of the Washington Constitution and the Sixth Amendment to the United States Constitution guarantee a criminal defendant the right to assistance of counsel.

The same constitutional provisions also provide a criminal defendant with a right to self-representation. *State v. Madsen*, 168 Wn.2d 496, 503, 229 P.3d 714 (2010). “*If counsel is properly waived*, a criminal defendant has a right to self-representation.” *City of Bellevue v. Acrey*, 103 Wn.2d 203, 209, 691 P.2d 957 (1984) (emphasis added).

The preferred method for determining the validity of a waiver of the right to counsel is through a colloquy on the record between the trial court and the defendant, but this is not required if the record supports the waiver as knowing, voluntary and intelligent.

State v. Curry, 191 Wn.2d 475, 483-84, 423 P.3d 179 (2018). The “trial court must establish that a defendant, in choosing to proceed pro se, makes a knowing and intelligent waiver of the right to counsel.” *Curry*, 191 Wn.2d at 483 (quoting *State v. Deweese*, 117 Wn.2d 369, 377, 816 P.2d 1 (1991)).

To ensure a valid waiver, the trial court must make the defendant aware of the dangers and disadvantages of self-representation to ensure that the defendant “knows what he is doing and his choice is made with eyes open.” *In re Rhome*, 172 Wn.2d 654, 659 (2011) (quoting *Faretta v. California*, 422 U.S. 806, 835, 95 S.Ct. 2525, 45 L.Ed. 2d 562 (1975)). During this colloquy, the trial court must indulge every reasonable presumption against waiver of the right to counsel. *Madsen*, 168 Wn.2d at 504.

In Mr. Williams’s case, the trial court did not engage in any colloquy on or off the record, or provide Mr. Williams with written or verbal notice of his right to counsel, or of the risks and disadvantages of proceeding without counsel. Based on the lack of evidence of any sort of a valid waiver of the right to counsel, this Court must remand for a new sentencing hearing with the appointment of counsel.

2. THE JUDGE ON RECONSIDERATION ERRED BY DENYING MR. WILLIAMS'S MOTION FOR A NEW TRIAL BASED ON JUDGE GALLINA, THE PRESIDING JUDGE'S PENDING CRIMINAL TRIAL ON MULTIPLE COUNTS OF RAPE AND SEXUAL MISCONDUCT AGAINST COURT STAFF

Since Mr. Williams was not appointed counsel for resentencing, he was left to his own devices to raise all his concerns to the best of his ability; this he did sequentially to his resentencing hearing in the manner of motions for reconsideration.

a. Motions to Vacate Timely

The motions for reconsideration were noted within the one year time frame set forth in CrR 7.8. *State v. Smith*, 144 Wn. App. 860, 863, 184 P.3d 666 (2008). The basis for the motions to vacate is two-fold: (1) based on the newly discovered evidence, or fraud involving the sentencing judge Gallina, who was removed from his judicial duties do to multiple pending charges of rape and sexual assault against court staff; and (2) for failure to appoint counsel for resentencing. CP 77-81, 86-89.

CrR 7.8(b) provides that a defendant may obtain relief from judgment based on the following:

(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.

Id. To obtain relief, the defendant must file a motion and supporting affidavit. CrR 7.8(c)(1). Mr. Williams filed very detailed motions, which he signed and dated. He did not use the term "affidavit" in his motions, and the trial court did not reject the motions due to a lack of affidavit, rather the trial court denied the motions as "untimely". CP 84. The trial court was incorrect, but forwarded the motion to this Court for consideration as a personal restraint petition.

A visual of the time frame for each hearing is useful.

Court of Appeals Decision Mandate	November 6, 2018
Resentencing on Remand	December 3, 2018
State Motion and Order to Amend Sentence	December 18, 2018
Defense Notice of Appeal Motion for Reconsideration	December 31, 2018
Defense Motion to Amend Warrant of Commitment and Judgment and Sentence	January 4, 2019
Hearing Order Denying	January 14, 2019
Defense Motion to Amend counts 1, 3,4	January 17, 2019
Hearing	February 25, 2019
Order Denying Motion	February 27, 2019
Motion for Appeal Bond	May 17, 2019
Order Denying Appeal Bond	May 30, 2019
Motion for Appointment of Counsel, to act as co-counsel for reconsideration of motions to vacate	June 14, 2019 July 26, 2019
Order Denying motions	July 3, 2019; September 30, 2019
Notice of Appeal Order of Indigency	September 23, 2019 September 23, 2019

This Court reviews a CrR 7.8(b) motion for abuse of discretion. *State v. Smith*, 159 Wn. App. 694, 699-700, 247 P.3d 775 (2011) (Smith II). A trial court abuses its discretion when it exercises its discretion in a manifestly unreasonable manner, or when the exercise of discretion is based on untenable grounds or

reasons. *State v. Aguirre*, 73 Wn. App. 682, 686, 871 P.2d 616 (1994).

b. Abuse, Fraud, Extraordinary Circumstances - Valid Grounds for Relief

A defendant may also obtain relief from final judgment under CrR 7.8(b)(5), for “[a]ny other reason justifying relief from the operation of the judgment.” Relief under CrR 7.8(b)(5) is confined to extraordinary circumstances that are not covered by the other sections of the rule. *Smith II*, 159 Wn. App. at 700.

“Extraordinary circumstances include fundamental and substantial irregularities in the court's proceedings or irregularities extraneous to the court's action.” *Id.* A final judgment should only be vacated in those limited circumstances “ ‘where the interests of justice most urgently require.’ ” *Id.* (quoting *State v. Shove*, 113 Wn.2d 83, 88, 776 P.2d 132 (1989)).

In *Smith II*, the court properly exercised its authority to modify the sentences downward as an extraordinary circumstance to satisfy the interests of justice. *Smith II*, 159 Wn. App. at 699. The Court held that the county's elimination of the partial confinement programs that existed at the time of original sentencing and ended

prior to completion of those sentences, was an extraordinary circumstance. *Smith II*, 159 Wn. App. at 700.

The Court based its decision in large part on the fact that at the time of sentencing, Smith could not have known that the law on partial confinement would change during the period in which he would otherwise become eligible for partial confinement. *Smith II*, 159 Wn. App. at 700-01. Here, similar to *Smith II*, it is inconceivable that anyone could have anticipated the charges against Judge Gallina. This situation, as in *Smith II*, creates an extraordinary circumstance for relief under CrR 7.5. This situation also fits the criteria under CrR 7.8 for newly discovered evidence or fraud because judges are expected to comply with the law. Code of Judicial Conduct (CJC) 1.1 CJC RULE 1.1 provides in part:

Compliance with the Law

A judge shall comply with the law,* including the Code of Judicial Conduct.

Id. CJC 1.2 provides:

Promoting Confidence in the Judiciary

A judge shall act at all times in a manner that promotes public confidence in the independence,*

integrity,* and impartiality* of the judiciary, and shall avoid impropriety and the appearance of impropriety.

Id. Relatedly, CJC 2.3 provides:

Bias, Prejudice, and Harassment

(A) A judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice.

(B) A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, and shall not permit court staff, court officials, or others subject to the judge's direction and control to do so.

Id. The comments to this rule explain that

[3] Harassment, as referred to in paragraphs (B) and (C), is verbal or physical conduct that denigrates or shows hostility or aversion toward a person on bases such as race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation.

[4] Sexual harassment includes but is not limited to sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature that is unwelcome.

Id.

CJC 2.3 also requires a judge act impartially and fair. This means”

A judge shall uphold and apply the law,* and shall perform all duties of judicial office fairly and impartially.

Id. In this case, Judge Gallina who presided over the trial, resentencing and all of the motions for reconsideration except the September 3, 2019 hearing, violated these canons. The allegations of rape and sexual misconduct raise the real concern that the judge did not abide by the law.

c. Violation Appearance of Fairness

In addition to abiding by the CJC, the judge must also appear fair. Our Courts have consistently held that the appearance of fairness in judicial proceedings is important in the context of criminal proceedings. *State v. Chambers*, 176 Wn.2d 573, 293 P.3d 1185 (2013); *State v. Finch*, 326 P.3d 148 (2014); *State v. Gamble*, 168 Wn.2d 161, 187, 225 P.3d 973 (2010); *State v. Ra*, 144 Wn. App. 688, 175 P.3d 609 (2008); *State v. Bilal*, 11 Wn. App. 720, 722, 893 P.2d 674 (1995).

In *Bilal*, this Court stated, “a judicial proceeding is valid only if a reasonably prudent, disinterested observer would conclude that the parties received a fair, impartial, and neutral hearing.” *Bilal*, 11

Wn. App. at 722 (quoting *State v. Ladenberg*, 61 Wn. App. 749, 754-55, 840 P.3d 228 (1992)). In *Finch* this court held that a trial judge, who was presiding over two separate cases involving a minor child, violated the appearance of fairness doctrine because the judge was unable to separate the two roles, and had attempted to investigate the truth of the minor child's allegations in the criminal proceeding by ordering a polygraph in the juvenile proceeding. *Id.*

In *Ra*, this Court noted that the trial court's comments on the defendant's character and scolding the defendant were inappropriate, and "did not show proper restraint, and should not have been made." 144 Wn. App. 705. The *Ra* court did not, however, decide whether the appearance of partiality warranted reversal, because it had reversed on another issue, but it did order that the new sentencing hearing be held before a different judge. *Id.* Although not dispositive, *Ra* is nevertheless instructive of what this Court has previously noted as inappropriate judicial behavior during sentencing.

Far worse than in *Bilal* and *Ra*, here, judge Gallina is accused of raping and sexually assaulting his staff. He was removed from his duties pending trial. The allegations alone go to

the heart of the notion of fairness and impartiality because a judge accused of violent crimes does not appear able to behave in a fair and impartial manner. The message from Judge Gallina's alleged behavior, brought to light by multiple victims, demonstrates Gallina's contempt for the law and his colleagues. Regardless of whether he is convicted, pending such charges, the appearance of fairness is destroyed because a reasonably prudent, disinterested observer would be unable to conclude that the parties received a fair, impartial, and neutral hearing.

This Court should reverse the re-sentencing hearing and remand for a new sentencing with a different judge.

D. CONCLUSION

For the reasons discussed herein, this Court should reverse Mr. Williams' judgment and sentence and warrant of commitment and remand for resentencing before a different judge.

DATED this 19th day of February 2020.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Lise Ellner", is written over a light green rectangular background.

LISE ELLNER, WSBA No. 20955
Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Asotin County Prosecutor's Office bnichols@co.asotin.wa.us and Rudy Williams/DOC#761174, Airway Heights Corrections Center, PO Box 2049, Airway Heights, WA 99001 a true copy of the document to which this certificate is affixed on February 19, 2020. Service was made by electronically to the prosecutor and Rudy Williams by depositing in the mails of the United States of America, properly stamped and addressed.

A handwritten signature in blue ink that reads "Lise Ellner". The signature is written in a cursive style with a long horizontal stroke at the end.

Signature

LAW OFFICES OF LISE ELLNER

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