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

IN THE COURT OF THE APPEALS  
OF THE STATE OF WASHINGTON

DIVISION III

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THE STATE OF WASHINGTON, Respondent

v.

RUDY E. WILLIAMS, Appellant.

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**BRIEF OF RESPONDENT**

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**I. SUMMARY OF ISSUES**

1. DID MR. WILLIAMS WAIVE ANY ARGUMENT REGARDING COUNSEL OR JUDGE GALLINA BY NOT ADDRESSING THESE ARGUMENTS ON PREVIOUS APPEALS?
  
2. DID MR. WILLIAMS PROPERLY WAIVE COUNSEL PRIOR TO RESENTENCING OR DID THE COURT DENY MR. WILLIAMS HIS RIGHT TO COUNSEL AT RESENTENCING?
  
3. WAS MR. WILLIAMS PREJUDICED BY A BIASED TRIAL JUDGE?

**II. SUMMARY OF ARGUMENT**

1. MR. WILLIAMS' ARGUMENTS HAVE BEEN EITHER ADJUDICATED OR WAIVED; THIS IS HIS FOURTH APPEAL, HIS SECOND REGARDING RESENTENCING, AND THESE ARGUMENTS WERE EITHER ALREADY DECIDED BY THIS COURT, NEVER ADDRESSED IN HIS PREVIOUS APPEALS, OR NEVER ADDRESSED BELOW.

2. MR. WILLIAMS PROPERLY WAIVED HIS RIGHT TO COUNSEL AND, THEREFORE, MR. WILLIAMS WAS NOT DENIED ASSISTANCE OF COUNSEL AT RESENTENCING.
  
3. THE RECORD DOES NOT SUPPORT ANY CLAIM THAT THE TRIAL JUDGE WAS BIASED OR PREJUDICED AGAINST MR. WILLIAMS

### III. STATEMENT OF THE CASE

This is Mr. Williams' fourth appeal and a procedural quagmire. See, *State v. Williams*, 5 Wn.App.2d 1027, 2018 WL 4657665 (unpublished, Sept. 27, 2018) (hereinafter *Williams I*); *State v. Williams*, 6 Wn. App. 2d 1041, 2018 WL 6715530 (unpublished, Dec. 18, 2018) (*Williams II*); *State v. Williams*, 2020 WL 2079272<sup>1</sup>, No. 365476 (unpublished, April 30, 2020) (*Williams III*).

A brief recitation of the procedural history is as follows. Mr. Williams was tried at the bench on November 22, 2016, after waiving both his rights to counsel and jury trial. CP 106, 118-20. Mr. Williams was sentenced to 90 months: 60 months on Count 1; 30 months on Counts 2, 3, 4, and 5, to run consecutive to Count 1, but concurrent with each other. CP 106-15. On September 27, 2018, this Court vacated Counts 2 and 5, see *Williams I*; the State dismissed those counts on December 3, 2018. CP 106-15.

At resentencing on December 3, 2018, where Mr. Williams again appeared pro se, the Superior Court reimposed the same exceptional sentence, based on free crimes, of 60 months on Count 1, and 30 months on Counts 3 and 4, consecutive to Count 1. CP 121-31. Mr. Williams appealed on December 31, 2018. CP 40. This Court subsequently affirmed the sentence in *Williams III*.

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<sup>1</sup> Only the WestLaw citation was available at the time of writing.

After resentencing, the Warrant of Commitment incorrectly reflected the court's consecutive sentence and the State moved to amend it on January 4, 2019. CP 15. Mr. Williams objected to the amendment, but the trial court amended the Warrant of Commitment to conform with the court's oral ruling over Mr. Williams' objection on January 14, 2019. CP 26-27; Verbatim Transcript of Proceedings, 12/03/2018, 1/14/2019, at 18-19 (hereinafter VTP).

On June 13, 2019, while his case was, again, on direct appeal, Mr. Williams filed numerous motions, including a motion for appointment of counsel, to act as co-counsel, and a motion to reconsider his motion to vacate his judgment and sentence CP 68-71, 77-81. All of those motions were denied on July 3, 2019. CP 84. Mr. Williams appealed the denial of his motion to reconsider vacation of his sentence. CP 102-03. The court entered an order of indigency on September 24, 2019. CP 104-05. Mr. Williams filed his brief for this appeal on February 19, 2020.

Mr. Williams has now had four separate opportunities to raise any and all appealable issues. Mr. Williams argued in his first appeal 1) he was denied his right to counsel; 2) inapplication of the forfeiture by wrongdoing doctrine; 3) insufficiency of the evidence regarding witness tampering charges; 4) insufficiency of the evidence regarding the assault in the third degree charge; 5) insufficiency of the charging Information regarding the felony violation of a no contact order

charge. See, *Williams I*, Brief of Appellant. This Court affirmed the convictions on Counts 1, 3, and 4; it reversed on Counts 2 and 5, agreeing in part with Mr. Williams' analysis of the forfeiture by wrongdoing doctrine. It rejected all other arguments, including the alleged deprivation of right to counsel.

In his second appeal, Mr. Williams argued the trial court abused its discretion by not striking Mr. Williams' signature on the findings and conclusions after the bench trial. See, *Williams II*. This Court, again, affirmed.

In Mr. Williams third appeal, he appealed, for the second time, the trial court's reasoning justifying the exceptional sentence it imposed, and the denial of a continuance before amending the warrant of commitment. See, *Williams III*. This Court, again, affirmed.

In this latest appeal, Mr. Williams is arguing, again, he was denied his right to counsel, and the charges against Judge Gallina presume prejudice and indicate a bias from Judge Gallina at trial.

Mr. Williams has already argued he was denied counsel and this Court affirmed his waiver of counsel in *Williams I*. Judge Gallina was arrested on April 10, 2019; Mr. Williams appeal in *Williams III* was filed on August 8, 2019. Mr. Williams' Appellant's Brief in that case neither mentions the Judge's charges nor mentions any presumed prejudice resulting therefrom. These arguments have been

either already argued, and rejected, or waived by failure to bring them in prior appeals.

#### **IV. DISCUSSION**

Mr. Williams' claims are without merit and have been waived by failure to bring them in his previous appeals. Mr. Williams alleges he was denied assistance of counsel at resentencing, but this court has already affirmed that sentence and no claim regarding counsel was raised. *See, Williams III*. As to whether Judge Gallina's alleged misconduct results in extraordinary circumstances justifying relief from the judgment and sentence, the answer is, again, in the negative; Mr. Williams can make no showing justifying the relief he seeks and his argument was waived for failure to bring the argument in his previous appeals.

1. MR. WILLIAMS' ARGUMENTS HAVE BEEN EITHER ADJUDICATED OR WAIVED; THIS IS HIS FOURTH APPEAL, HIS SECOND REGARDING RESENTENCING, AND THESE ARGUMENTS WERE EITHER ALREADY DECIDED OR NEVER ADDRESSED BELOW OR IN HIS PREVIOUS APPEALS.

According to RAP 2.5(a), this Court "may refuse to review any claim of error which was not raised in the trial court." RAP 2.5(a). Errors affecting a constitutional right, however, may be raised for the first time on appeal. RAP 2.5(a)(3). "To establish an error is manifest," for purposes of rule providing that party may raise manifest error

affecting a constitutional right for the first time on appeal, “defendant must show the asserted error had *practical* and *identifiable* consequences in the trial of the case.” *State v. Gregg*, 9 Wn. App. 2d 569, 582, 444 P.3d 1219 (Div. 1, 2019) (emphasis added) (internal quotations omitted). The record on appeal must include facts necessary to highlight the actual prejudice to the defendant, otherwise “the error is not manifest error . . . that can be raised for the first time on appeal.” *State v. Shelton*, 194 Wn. App. 660, 675, 378 P.3d 230 (Div. 1, 2016). Mr. Williams makes no showing of actual prejudice, his claimed errors are therefore not manifest, and his appeal should be denied as waived.

As to his waiver of counsel argument, Mr. Williams waived counsel and jury trial on November 21 and 22, 2016, well before his first appeal. CP 118-20. This argument was first brought this Court’s attention in *Williams I*; this Court rejected that argument. *Williams I* at 5.

Secondly, as noted above, Mr. Williams was on notice of Judge Gallina’s arrest prior to the filing of his last appeal. The State contends Mr. Williams waived the argument by not raising it in his last appeal.

2. ASSUMING MR. WILLIAMS CAN BRING HIS ARGUMENT REGARDING COUNSEL, MR. WILLIAMS PROPERLY WAIVED HIS RIGHT TO COUNSEL, THEREFORE MR. WILLIAMS WAS NOT DENIED ASSISTANCE OF COUNSEL AT RESENTENCING

If this Court finds Mr. Williams arguments not waived, the State contends Mr. Williams properly waived his counsel and jury trial rights. While it is true Mr. Williams would have otherwise been entitled to counsel at resentencing, as sentencing is a critical stage of the proceedings, Mr. Williams previously waived that right on November 18, 2016. CP 118-19.

“The United States Constitution recognizes a constitutional right of criminal defendants to waive assistance of counsel and represent themselves at trial.” *State v. DeWeese*, 117 Wn.2d 369, 375, 816 P.2d 1 (1991) (citing *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975)). To proceed pro se, the defendant must unequivocally waive counsel. *Id.* at 376-77 (*cf. State v. Imus*, 37 Wn. App. 170, 180, 679 P.2d 376 (Div. 1 1984)). “Once an unequivocal waiver of counsel has been made, the defendant may not later demand the assistance of counsel a matter of right since reappointment is ***wholly within the discretion of the trial court.***” *Id.* (emphasis added). “A trial court must establish that a defendant . . . makes a knowing and intelligent waiver of the right to counsel.” *Id.* (citing *State v. Bebb*, 108 Wn.2d 515, 525, 740 P.2d 829 (1987)).

Before accepting a waiver of counsel, the trial court record “must reflect that the defendant understood the seriousness of the charge, the possible maximum penalty involved, and the existence of technical and procedural rules governing the presentation of his defense.” *Id.* at 378 (citing *Bellevue v. Acrey*, 103 Wn.2d 203, 691 P.2d 957 (1984)).

The record in this case provides clear evidence Mr. Williams made an unequivocal waiver of counsel. On November 18, 2016 Mr. Williams filed a two page document outlining his understanding of the charges and maximum punishments, para. 5; sentencing ramifications, para. 6; trial procedure, including rules of evidence and criminal procedure, paras. 8-10; that reappointment of counsel was discretionary, para. 14; and that his decision to proceed pro se was “entirely voluntary,” para. 18. CP 118-19.

Mr. Williams moved for the appointment of counsel and to act as co-counsel on June 13, 2019, almost three years after he originally waived counsel. CP 68-71. First, the decision to reappoint counsel after a valid waiver is within the sole discretion of the trial court. *DeWeese*, 117 Wn.2d at 376. Second, “there is no Sixth Amendment right to ‘hybrid representation’ through which defendants may serve as co-counsel with their attorneys.” *Id.* at 379 (citing *Bebb*, 108 Wn.2d at 524). The decision to deny Mr. Williams’ request for appointed

counsel and to act as co-counsel was within the *sole discretion* of the trial court and cannot now be reversed.

Mr. Williams made a mutually exclusive, equivocal request for appointment of counsel on June 14, 2019, CP 68-71. Mr. Williams' requested counsel to "assist him in arguing attached motions", CP 69, to act as co-counsel, CP 71, and for reconsideration, CP 73. Mr. Williams cannot be pro se and be represented by counsel at the same time. See, *DeWeese*, 117 Wn.2d at 379. These motions were all correctly denied on September 4, 2019. CP 103.

At resentencing on December 3, 2018, Mr. Williams argued vociferously on his own behalf. Mr. Williams cannot point to any part of the record of the resentencing hearing where Mr. Williams asked for, and was denied, counsel. VTP 3-16. Because reappointing counsel is at the trial court's sole discretion, this court cannot reverse on that basis. Mr. Williams waived his right to counsel, and when he equivocally requested an attorney *almost three years* after waiving it, his request was denied.

3. THE RECORD DOES NOT SUPPORT ANY CLAIM THAT THE TRIAL JUDGE WAS BIASED OR PREJUDICED AGAINST THE PETITIONER.

More than half of Mr. Williams' brief is dedicated to arguing that the allegations against Judge Gallina, who presided over Mr. Williams'

trial, necessitate another resentencing hearing. Mr. Williams is incorrect.

First, Mr. Williams argues, again, the court erred by failing to appoint counsel. That argument has already been dispensed with. Second, if the trial court was wrong when it denied Mr. Williams' CrR 7.8 motion to vacate as untimely, the error was harmless. Mr. Williams should have brought the motions as part of his appeal. See, CP 102-05.

Mr. Williams was resentenced on December 3, 2018. VTP 3-16; CP 121-31. Mr. Williams' CrR 7.8 motion was filed on July 26, 2019, well within the one-year time limit of CrR 7.8(b), but *after* he filed his notice of appeal on December 31, 2019. CP 40. Mr. Williams cannot argue for relief from the same issue in both courts simultaneously. See, RAP 7.2(a).

In the alternative, CrR 7.8(b) motions are reviewed for abuse of discretion. *State v. Smith*, 159 Wn. App. 694, 699, 247 P.3d 775 (Div. 3, 2011). "Relief under CrR 7.8(b)(5) is limited to extraordinary circumstances not covered by any other section of the rule" *Id.* If the trial court's denial of Mr. Williams' CrR 7.8 motion was for untenable reason, and the State contends it was *not* error, the error was harmless.

“Some fundamental constitutional errors are so intrinsically harmful as to require automatic reversal, but for all other constitutional errors, we apply harmless-error analysis to determine whether reversal is appropriate. *State v. Coristine*, 177 Wn.2d 370, 379, 300 P.3d 400 (2013) (internal citations omitted). This error is not so fundamental as to require automatic reversal, and Mr. Williams does not advocate for such. In fact, Mr. Williams is only arguing for yet another resentencing hearing.

Instead, Mr. Williams argument focuses largely on the allegations against Judge Gallina. Mr. Williams argues Judge Gallina somehow tainted Mr. Williams’ trial and/or sentencing<sup>2</sup> because the judge has been charged with committing crimes himself. Mr. Williams dedicates over five pages of briefing to this novel argument and, yet, cannot point to any specific rulings highlighting how the judge’s alleged misconduct prejudiced Mr. Williams and justifies a new trial or resentencing.

The State does not disagree that such allegations, if true, are reprehensible and would certainly be cause for Judge Gallina’s removal from office. Mr. Williams’ claim further appears to presuppose that the fact of subsequent charges necessarily results

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<sup>2</sup> The State is assuming counsel is arguing against only the resentencing since no briefing has been filed requesting a new trial.

in his sentence being rendered void. However, Mr. Williams offers no legal authority for this proposition and the State, after diligent search, could not find a single case where a conviction was reversed based upon subsequent criminal behavior of the trial judge.

The State did however discover a few cases involving judges who were involved in criminal activities, but they are all distinguishable. In *In Interest of McFall*, 533 Pa. 24, 617 A.2d 707, 711 (1992), a number of defendants sought new trials based upon allegations that the judge, while working for the F.B.I. as an informant as a result of having been caught committing a criminal act, continued to preside over criminal and juvenile matters during that time. *McFall*, at 32. In *McFall*, a *quid pro quo* bargain existed where the judge's cooperation would be made known to the same authorities who appeared before her to prosecute cases against the appellees therein. There, the Pennsylvania Supreme Court determined that the appearances of fairness mandated new trials, not because of the underlying criminal act, but because the judge's biases and loyalties could reasonably and objectively be questioned. This is because, to a disinterested observer, the judge would likely be viewed as attempting to curry favor with the prosecuting authorities, which necessarily would have included the jurisdiction over whose case she

continued to preside. Therein, the Pennsylvania Supreme Court stated:

One could reasonably conclude that, under the circumstances, Cunningham's cooperation with the United States Attorney's office cast her in the role of a confederate of the prosecutors in the appellees' cases.

*McFall*, 533 Pa. 24 at 35. No such alliance occurred here, where Judge Gallina was not arrested until more than a year after the Mr. Williams' trial and did not preside over any more cases thereafter.

In a more infamous case, a Pennsylvania Juvenile Court Judge received secret payments from the owners of a facility where juveniles were housed, and in those cases, the Court reversed delinquency adjudications. See *In re Bruno*, 627 Pa. 505, 566, 101 A.3d 635, 671–72 (2014) (discussing Former Judge Mark Ciavarella's corruption and the fallout therefrom). However, in the *Bruno* matter, the judge receiving bribes had a clear pecuniary interest which clearly impugned the appearance of his impartiality in the decisions rendered in those cases. It is easy to recognize that the judge had a financial interest in sending adjudicated delinquents to the detention facility that was paying him to do so.

In Mr. Williams' case, no such profit motive or other incentive is alleged or apparent. While the State neither dismisses nor condones the conduct of Judge Gallina, there are no indications or

reasons to speculate that his impartiality in this case was subject to reasonable question.

A judge should not only be impartial, but should appear so. *In re Swenson*, 158 Wn. App. 812, 818, 244 P.3d 959 (2010). "Evidence of a judge's actual or potential bias must be shown before an appearance of fairness claim will succeed." *State v. Chamberlin*, 161 Wn.2d 30, 37, 162 P.3d 389 (2007). If true, the allegations against Judge Gallina seriously impugn his character. However, the allegations fail to demonstrate that his partiality would be questioned; *i.e.* that one side had an advantage going into the case. Frankly, standing alone, the fact that a judge is involved in criminal activities himself would tend to lead an outside observer to believe that a defendant, rather than the State, would have the advantage. Here, the judge was not working with authorities or seeking some benefit from the State in exchange for leniency on pending charges. Nor did the judge have any pecuniary or personal interest in the outcome of Mr. Williams' case. The record neither reflects any bias or appearance thereof, nor has Mr. Williams so demonstrated.

## **V. CONCLUSION**

Mr. Williams' arguments are without merit. First, he waived his right to an attorney and the trial court properly denied his request for

one when he also requested to act as co-counsel. Second, Mr. Williams can point to neither appearance of fairness issue nor biased rulings by Judge Gallina. Mr. Williams' appeal is without merit and this court should affirm the trial court's resentencing of Mr. Williams.

Dated this 20<sup>th</sup> day of May, 2020.

Respectfully submitted,



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**COURT OF APPEALS OF THE STATE OF  
WASHINGTON - DIVISION III**

THE STATE OF WASHINGTON,  
Respondent,

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RUDY E. WILLIAMS,  
Appellant.

Court of Appeals No: 37075-5-III

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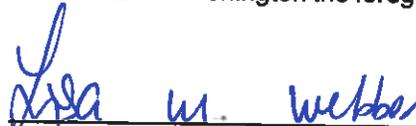
**DECLARATION**

On May 20, 2020 I electronically mailed, through the portal, a copy of the BRIEF OF RESPONDENT in this matter to:

LISE ELLNER  
liseellnerlaw@comcast.net

I declare under penalty of perjury under the laws of the State of Washington the foregoing statement is true and correct.

Signed at Asotin, Washington on May 20, 2020.



LISA M. WEBBER  
Office Manager

**ASOTIN COUNTY PROSECUTOR'S OFFICE**

**May 20, 2020 - 2:09 PM**

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