

63036-9

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NO. 63036-9-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent

v.

VERNON MARK CALHOUN,

Appellant.

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

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APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

Vernon Calhoun attended seven court hearings prior to his trial for a malicious mischief charge. Before a hearing on August 1, 2008, Mr. Calhoun telephoned his attorney to confirm the hearing date and time, and received erroneous information from his attorney's paralegal. Mr. Calhoun's attorney then filed a motion to withdraw as counsel under the lawyer-as-witness rule, which the trial court denied. Mr. Calhoun's desire to call his defense counsel's paralegal and counsel's unwillingness to call her or testify himself presented a clear and direct conflict of interest. Knowing that his attorneys were unable to testify on his behalf while at the same time providing competent representation to Mr. Calhoun, the trial court erred in denying defense counsel's motion to withdraw as counsel. The order must be reversed.

B. ASSIGNMENT OF ERROR

The trial court erroneously denied defense counsel's motion to withdraw due to conflict of interest which violated Mr. Calhoun his Sixth Amendment right to conflict free counsel.

C. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

The federal and state constitutions guarantee the accused in all criminal proceedings the right to assistance of counsel free from conflict of interest. The Lawyer-as-Witness Rule, RPC 3.7, provides that an attorney may not represent a client in a trial where he is likely to be a necessary witness. Where defense counsel and his paralegal were necessary witnesses in support of Mr. Calhoun's case on the bail jumping charge against him, did the trial court err in failing to grant defense counsel's motion to withdraw?

D. STATEMENT OF THE CASE

On February 27, 2008, Mr. Calhoun was charged with one count of malicious mischief in the first degree. CP 1.<sup>1</sup> After his arraignment, Mr. Calhoun was released on personal recognizance, and successfully attended seven pre-trial hearings regarding the charge against him. 11/13/08 RP 4. After these pre-trial hearings, the trial court scheduled an omnibus hearing for August 1, 2008. Mr. Calhoun signed the order setting the hearing date but did not receive a copy from his attorney. 01/06/09 RP 71.

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<sup>1</sup> Mr. Calhoun was convicted as charged and does not appeal his conviction on Count 1, malicious mischief in the first degree.

On August 1, 2008, Mr. Calhoun called the office of the Northwest Defender's Association (NDA) in an attempt to reach his attorney, Justin Wolfe and confirm the time of his hearing. 01/06/09 RP 68. Mr. Calhoun was unable to reach Mr. Wolfe and followed the voicemail instructions directing him to Mr. Wolfe's paralegal, Wendy Livesley. 11/13/08 RP 4-5; 01/06/09 RP 68. After speaking with Ms. Livesley on August 1, 2008, Mr. Calhoun did not show up for his omnibus hearing later that day. The prosecution subsequently amended the information, adding a second count for bail jumping. CP 12-13.

Mr. Calhoun's defense counsel filed a motion to withdraw counsel due to conflict of interest. 11/13/08 RP 5. Mr. Calhoun wished to call Ms. Livesley as a defense witness. 11/13/08 RP 5. Mr. Wolfe was strongly disinclined to call his paralegal to testify because she was an extension of his representation which presented a conflict of interest. 11/13/08 RP 5.

The trial court denied defense counsel's motion. CP 7. Mr. Wolfe later left the NDA's felony division and Marcel Green, another NDA attorney, was substituted to handle Mr. Calhoun's case. 01/05/09 RP 6. Mr. Green did not call Ms. Livesley as a witness. Mr. Calhoun appeals. CP 42-48.

## E. ARGUMENT

THE TRIAL COURT'S DECISION DENYING DEFENSE COUNSEL'S MOTION TO WITHDRAW AS COUNSEL VIOLATED MR. CALHOUN'S CONSTITUTIONAL RIGHT TO CONFLICT-FREE ASSISTANCE OF COUNSEL AND WAS INCONSISTENT WITH THE LAWYER-AS-WITNESS RULE, REQUIRING REVERSAL.

1. The order denying defense counsel's motion to withdraw as counsel violated Mr. Calhoun's Sixth Amendment right to conflict-free assistance of counsel. The Sixth Amendment to the United States Constitution guarantees that in all criminal proceedings, the accused shall have the right to assistance of counsel for his defense. This constitutional right is guaranteed in state courts through the Due Process Clause of the Fourteenth Amendment, and in Washington through Article I, § 22 of the Washington Constitution. The constitutional right to counsel includes the right to the assistance of counsel free from conflict of interest. Wood v. Georgia, 450 U.S. 261, 271, 101 S.Ct. 1097, 67 L.Ed.2d 220 (1981); State v. Davis, 141 Wn.2d 798, 860, 10 P.3d 977 (2000).

In order to establish any violation of the Sixth Amendment based on a conflict of interest, a defendant must demonstrate that an actual conflict of interest adversely affected his lawyer's

performance. State v. Regan, 143 Wn.App. 419, 427, 177 P.3d 783,, rev. denied, 165 Wn.2d 1012 (2008) (citing Cuyler v. Sullivan, 446 U.S. 335, 348, 64 L. Ed. 2d 333, 100 S. Ct. 1708 (1980)). In order to show adverse effect, a defendant “need not demonstrate prejudice—that the outcome of his trial would have been different but for the conflict.” Regan, 143 Wn.App at 428. Rather, the defendant only has to show that a plausible alternative defense strategy could have been pursued, but was not, and that the alternative defense was inherently in conflict with or not undertaken due to the attorney’s other loyalties or interests. Id. Thus, the conflict “must cause some lapse in representation contrary to the defendant’s interests,” or “‘likely’ affect[] particular aspects of counsel’s advocacy on behalf of the defendant.” Regan, 143 Wn.App at 428 (quoting State v. Robinson, 79 Wn.App. 386, 395, 902 P.2d 652 (1995) and United States v. Miskinis, 966 F.2d 1263, 1268 (9th Cir. 1992)).

Mr. Calhoun’s desire to call Mr. Wolfe’s paralegal and Mr. Wolfe’s unwillingness to call her or testify himself presented a clear conflict of interest. Neither Mr. Wolfe nor Mr. Green, the NDA attorney who replaced Mr. Wolfe, could provide effective, conflict free assistance because, as in Regan, the alternate defense

strategy they could and should have pursued was not undertaken due to their interest in protecting Ms. Livesley and not testifying themselves.

In addition to calling Ms. Livesley to testify, there were several other defense strategies that could have been employed, but were not because they interfered with defense counsel's other interests. For example, had Mr. Calhoun been appointed new counsel, he or she could have subpoenaed both Mr. Calhoun and NDA's phone records to confirm that Mr. Calhoun had, indeed, called on August 1, 2008, to confirm his court appointment. Thus, by forcing NDA attorneys to continue as counsel, the trial court violated Mr. Calhoun's constitutional right to conflict free assistance of counsel.

2. The order denying defense counsel's motion to withdraw violated RPC 3.7, the lawyer-as-witness rule. In addition to the Sixth Amendment and Article I, §22, RPC 3.7 also protects the constitutional right to conflict free counsel. The rule provides:

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case;

(3) disqualification of the lawyer would work substantial hardship on the client; or

(4) the lawyer has been called by the opposing party and the court rules that the lawyer may continue to act as an advocate.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

RPC 3.7. A necessary witness is someone who will provide material evidence not obtainable elsewhere. State v. Schmitt, 124 Wn.App 662, 666-67, 102 P.3d 856 (2004). On the other hand, the mere possibility of a lawyer being a witness is not sufficient grounds for disqualification. Barbee v. The Luong Firm, P.L.L.C., 126 Wn.App. 148, 159-60, 107 P.3d 762 (2005).

Appellate courts review a trial court's decision whether to disqualify an attorney under the abuse of discretion standard. Pub. Util. Dist. No. 1 of Klickitat County v. Int'l Ins. Co., 124 Wn.2d 789, 812, 881 P.2d 1020 (1994) (PUD). A trial court abuses its discretion when it bases its decision on untenable grounds or untenable reasons. State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998).

Mr. Wolfe and NDA should have been disqualified as counsel because Mr. Wolfe and his paralegal were necessary witnesses who would have provided material evidence not available elsewhere. While there are several exceptions to RPC 3.7(a), none of them are applicable or relevant in this case. The testimony of either Mr. Wolfe or Ms. Livesley would have spoken directly to a contested issue with regard to the bail jumping charge. RPC 3.7(a)(1). The testimony would not have related to the nature and value of legal services rendered by NDA, RPC 3.7(a)(2), nor would NDA's disqualification have worked a substantial hardship on Mr. Calhoun. RPC 3.7(a)(3). Additionally, RPC 3.7(a)(4) is irrelevant here as it is unlikely that the State would have called defense counsel to provide testimony in support of the defense's case.

While RPC 3.7 does not absolutely preclude a lawyer from representing a client in a trial where another lawyer from his firm is a necessary witness, based on subsection (b), the trial court should have disqualified NDA, and therefore Mr. Green, as Mr. Calhoun's counsel. Mr. Green's effective representation was limited by the same conflict of interest as Mr. Wolfe, and by extension, Ms. Livesley.

The trial judge appeared to deny defense counsel's motion based on her belief that Ms. Livesley's testimony would not be relevant. 11/13/08 RP 7. The relevance of Ms. Livesley's testimony in casting doubt on whether Mr. Calhoun had actual knowledge of his hearing date should have been for the jury to decide. Thus, the trial court's decision was based on untenable grounds and constitutes abuse of discretion. Stenson, 132 Wn.2d at 701.

RCW 9A.76.170 provides:

(1) Any person having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before any court of this state, or of the requirement to report to a correctional facility for service of sentence, and who fails to appear or who fails to surrender for service of sentence as required is guilty of bail jumping.

RCW 9A.76.170(1).

The statute defining the crime of bail jumping provides that the only affirmative defense is absence due to "uncontrollable circumstances." RCW 9A.76.170(2). The legislature has defined "uncontrollable circumstances" as:

An act of nature such as a flood, earthquake, or fire, or a medical condition that requires immediate hospitalization or treatment, or an act of a human being such as an automobile accident or threats of death, forcible sexual attack, or substantial bodily injury in the immediate future for which there is no

time for a complaint to the authorities and no time or opportunity to resort to the courts.

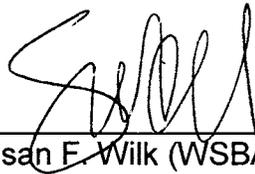
RCW 9A.76.010(4). While Mr. Calhoun was not physically restrained or injured on the day of his scheduled court appearance, the State still must prove that he knew about the hearing. It is not only reasonable, but a constitutionally defined right and expectation for criminal defendants to be able to rely on their counsel to provide effective representation that maintains the guarantee of a fair trial. Strickland v. Washington, 466 U.S. 668, 692, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Trusting in one's legal counsel should not be outside the purview of the statute.

“Government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense.” Id. By denying defense counsel's motion to withdraw as counsel, the trial court forced defense counsel to proceed under a significant conflict of interest, thereby interfering with his ability to make independent decisions about how to conduct Mr. Calhoun's defense. The trial court's erroneous decision must be reversed.

F. CONCLUSION

For the foregoing reasons, Vernon Calhoun respectfully requests this Court to reverse the decision denying defense counsel's motion to withdraw counsel and remand for a new trial with instructions to appoint counsel other than Northwest Defenders Association.

Respectfully submitted this 24<sup>th</sup> day of September, 2009.



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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	NO. 63036-9-I
	)	
VERNON CALHOUN,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 24<sup>TH</sup> DAY OF SEPTEMBER, 2009, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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<input checked="" type="checkbox"/> VERNON CALHOUN PO BOX 1525 BELLINGHAM, WA 98227-1525	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

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**SIGNED** IN SEATTLE, WASHINGTON THIS 24<sup>TH</sup> DAY OF SEPTEMBER, 2009.

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