

68495-7

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NO. 68495-7-1

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

STATE OF WASHINGTON

Respondent

v.

PHILLIP L. SCHLOREDT,

Appellant

BRIEF OF RESPONDENT

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FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2013 FEB 8 PM 1:46

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I. ISSUES

1. Was the defendant deprived of his right to be represented by an attorney when post conviction he was assigned a new lawyer who represented him through the sentencing hearing, but for ethical reasons did not participate in presenting post trial motions for a new trial?

II. STATEMENT OF THE CASE

Beverly Ellingworth and Jerrel Sidles lived at the Ballenger Court Apartments in Edmonds in April 2011. The apartment complex is next door to Factory Direct Tires located on 226th and Highway 99. On April 8 Ms. Sidles was walking her dog in the early morning hours when she saw a man coming over the fence that separates the apartment complex from the tire store. He had been on the other side of the fence when she first saw him. Around 7 a.m. Ms. Ellingworth looked out her third floor window and saw the defendant, Phillip Schloredt, next to a fence at the edge of the parking lot. He was hefting tires that were at his feet and throwing them in a creek bed near the fence. 1 CP 23-28, 51-53, 55, 80, 107.

Ms. Ellingworth ran downstairs and challenged the defendant. The defendant told Ms. Ellingworth that he was getting

tires out of the water. She told him she saw him throw them in the water. Ms. Ellingworth asked the defendant if he worked next door. The defendant told her "no. I sell them tires." While talking to the defendant Ms. Ellingworth saw a black pick-up truck nearby with the tail gate down and a number of tires in the bed. Ms. Ellingworth started to walk back to the apartment to call the police. She told the defendant to stay put. As she walked to the apartment she heard the truck start and saw the defendant in the truck. Ms. Ellingworth told the defendant that he could not leave before pulling all the tires out of the creek so the defendant got out and started loading the rest of the tires in the truck. When he could not fit all the tires in his truck he stacked some on the hood, and then left. Ms. Ellingworth then called the police. 1 RP 53-64.

Joseph Burch is the manager at Factory Direct Tires. Business hours are from 8 a.m. to 6 p.m. Monday through Friday. On April 8, 2011 he arrived by 7:30 a.m. After unloading some tires he headed toward a nearby minimart when he saw a tire at the end of the driveway out of the corner of his eye. When he looked Mr. Burch saw the defendant in a black pick-up truck loaded with tires. When Mr. Burch called to him the defendant drove up and told Mr. Burch "the lady said I can have these." When Mr. Burch told him

that was not true the defendant said "it's not illegal, what I'm doing. Don't call the cops." The defendant then drove off as Mr. Burch called the police. Mr. Burch did not know the defendant before that date, and had not given the defendant permission to take the tires. 1 RP 80-82, 92-93, 98-99.

Tires from the store are kept in a locked fenced area. The day before coming into contact with the defendant Mr. Burch had been in that area just before closing. The tires had all been stacked, and there was no noticeable damage to the fence. The next day tires that had previously been stacked were lying on the ground. Mr. Burch noticed damage to the fence that was consistent with someone hitting the fence with something while trying to throw it over the fence. 1 RP 84-92.

Officer Morrison was one of the officers responding to the burglary call. He located the defendant at 212th and Highway 99. When Officer Morrison contacted the defendant and told him why he had been pulled over the defendant told the officer that he had found the tires in a creek bed that was next to a tire store in Edmonds. The defendant denied that he had gone inside the fenced area, explaining that he would have taken more valuable tires if he had gone in the fenced area. 1 RP 148-154.

Officer Bower arrived at Factory Direct Tires at 7:43 a.m. where he contacted Mr. Burch. Shortly thereafter Office Bower received information that Officer Morrison had stopped the defendant. Officer Bower drove Mr. Burch to the defendant's location. There Mr. Burch positively identified the defendant as the person he had just seen. He confirmed the tires in the truck had come from Factory Direct Tires. 1 RP 95-96, 107-110.

The defendant was charged with second degree burglary-committed while on community custody. 1 CP 171-172. At trial the defendant was represented by Kevin Tarvin. Prior to trial Mr. Tarvin moved to exclude evidence of a syringe found in the defendant's truck. The Court granted that motion. The defendant stipulated that he was on community custody at the time the crime was alleged to have been committed. 1 RP 1-3, 9-10.

The State presented evidence through civilian and police witnesses as outlined above. Officer Hardwick testified that when he contacted the defendant he noticed the defendant's coat was wet and that he appeared to be unstable. 1 RP 180-182. During cross examination Mr. Tarvin asked the officer if he had an opinion regarding whether the defendant was under the influence of drugs or whether the defendant had a physical disability. When the

officer replied yes, Mr. Tarvin asked the officer what that opinion was. The officer then explained his opinion was based in part on the defendant's behavior, and in part on the defendant's comment about some needles in his bag. He concluded:

But it didn't matter to me much at that point. I had a basic job to do: Walk him up to the car and see if he was identified as the suspect.

1 RP 189.

The defendant was convicted as charged. 1 CP 135. After trial Mr. Tarvin withdrew as the defendant's attorney because the defendant wanted to bring a post trial motion for new trial in part on the basis of ineffective assistance of counsel. 3 CP 180-182.

Ms. Whitney Rivera was assigned to represent the defendant. Ms. Rivera met with the defendant to discuss the merits of his motions for new trial. Ms. Rivera investigated the defendant's claims and did some research into the merits of his motion. After discussing the case with her supervisor Ms. Rivera determined that she could not ethically present the defendant's motion without submitting some authority to the court that would be detrimental to the defendant's motion. She also informed the defendant that she would not be briefing his motion to arrest judgment under CrR 7.4(a) on the basis that there was insufficiency of proof of a

material element of the crime. Ms. Rivera did arrange for a transcript of a portion of the trial to investigate a claim the defense had not been provided complete discovery. 1 CP 15-20; 1-13-12 RP 1-6; 1-31-12 RP 9.

The defendant filed a Motion for Arrest of Judgment and/or New Trial. 1 CP 117-128. Ms. Rivera notified the court that she would not be presenting the defendant's motion, but that she was willing to help the defendant with research and filing any reply to the State's response. 1-13-12 RP 1-2.

The matter was continued to January 31. At that time Ms. Rivera stated that she was appearing on behalf of the defendant, but would not participate in his motion for new trial. The court then heard from the defendant on his motions. Although the defendant requested the motion for arrest of judgment be heard later, he argued both the motion to arrest judgment and motion for new trial based on ineffective assistance of counsel. 1-31-12 RP 2-18. The court addressed both arguments, and then denied the defendant's motions. 1-31-12 RP 18-23.

The sentencing hearing was continued to February 27 at which time the defendant brought another motion to dismiss for insufficiency of the evidence. 1-31-12 RP 29-34; 2-8-12 RP 1-2.

Before discussing the merits of his motion the defendant stated that he did not want to represent himself on the motion. Ms. Rivera clarified that she would represent the defendant for sentencing, but would not represent him on the motions. The court expressed concern that appointing a new attorney would not remedy the conflict between counsel and the defendant given Ms. Rivera's representations. The court gave the defendant the option of proceeding with counsel, knowing that she would present authority that conflicted with his position, or representing himself. After conferring with Ms. Rivera the defendant opted to represent himself on the motions. The court went through a colloquy with the defendant, and then granted his motion to represent himself on the motions, after finding a knowing, intelligent, and voluntary waiver of right to counsel as to the motion only. 2-27-12 RP 6-16, 19-27.

The case was again continued to March 14. At that time the defendant re-argued his motion for arrest of judgment pursuant to CrR 7.4 and CrR 7.5. 3-14-12 RP 2-22, 24-26. The court denied each motion. 3-14-12 RP 27-34.

The case then proceeded to sentencing. Ms. Rivera represented the defendant, arguing for either an exceptional

sentence below the standard range or for a low end sentence. 3-14-12 RP 35-39.

III. ARGUMENT

A. THE DEFENDANT WAS REPRESENTED BY COUNSEL.

The defendant argues that he was denied assistance of counsel under the Sixth Amendment and Article 1, § 22 of the Washington Constitution. The Sixth Amendment guarantees an accused “the Assistance of Counsel for his defense.” Article 1, §22 provides “[i]n criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel...” The right to counsel under the State constitution provides the same amount of protection as that right under the Federal constitution. State v. Corn, 95 Wn. App. 41, 62, 975 P.2d 520 (1999).

A defendant may waive the right to counsel and defend himself. Faretta v. California, 422 U.S. 806, 94 S.Ct. 2525, 45 L.Ed.2d 562 (1975). A defendant who chooses to represent himself must make a knowing and intelligent waiver of his right to counsel. State v. Bebb, 108 Wn.2d 515, 525, 40 P.2d 829 (1987). The request to proceed pro se must be unequivocal. State v. DeWeese, 117 Wn.2d 369, 377, 816 P.2d 1 (1991).

A defendant who chooses to be represented by counsel does not have a constitutional right to personally conduct his defense. State v. Blanche, 75 Wn.2d 926, 938, 454 P.2d 841 (1969), cert. denied, 396 U.S. 1045 (1970). “It is true that when a defendant chooses to have a lawyer manage and present his case, law and tradition may allocate to the counsel the power to make binding decisions of trial strategy in many areas.” Faretta, 422 U.S. at 820. While the right to counsel includes the right to effective assistance of counsel, the court recognizes that includes latitude for counsel to make decisions on behalf of her client based on her skill and knowledge. Strickland v. Washington, 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

No particular set of detailed rules for counsel’s conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions.

Id. at 688-89.

Here the defendant was represented by counsel throughout the proceedings. Ms. Rivera thoroughly investigated the defendant’s arguments for a new trial or dismissal of charges. She

talked to the defendant about his claims, had her investigator contact one of the State's witnesses and did legal research. 1 CP 15-20. Based on her research she determined that it would not be tactically beneficial to the defendant for her to brief and argue the motions he wanted to bring. Authority that she would ethically be required to present to the court did not support his position. 1 CP 15. In choosing not to argue those motions Ms. Rivera exercised the "constitutionally protected independence of counsel." She was not required to raise the issues defendant wanted to present in his motions for new trial and to arrest judgment.

The defendant chose to proceed with the motions despite his attorney's concerns with his position. In doing so the defendant was permitted to have hybrid representation. "Hybrid representation encompasses the situation where both the defendant and an attorney actively participate in the presentation and share the duties of managing a defense." State v. Buelna, 83 Wn. App. 658, 661, 922 P.2d 1371 (1996). There is no Sixth Amendment right to hybrid representation. Bebb, 108 Wn.2d at 524. Nevertheless in what the trial court characterized as "unusual" it permitted the defendant to represent himself on the motions. 2-27-12 RP 22-23.

The defendant contends that Ms. Rivera withdrew from her representation of him, and he was required to represent himself without a knowing and intelligent waiver of right to counsel. BOA at 10. The record does not support this contention. As noted, Ms. Rivera did conduct an investigation into the defendant's bases for his CrR 7.4 and CrR 7.5 motions before concluding that her assistance on those motions would be detrimental to the defendant's case. The defendant cites no authority that requires defense counsel to file and argue every motion the defendant wants argued while counsel represents him. Instead, counsel is not required to do so.

An attorney has no obligation to raise every non-frivolous issue the defendant wishes to pursue. Jones v. Barnes, 463 U.S. 745, 751-752, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). This is true at the trial level as well as on appeal.

Counsel is not, at the risk of being charged with incompetence, obliged to raise every conceivable point, however frivolous, damaging or inconsequential it may appear at the time, or to argue every point to the court and jury which in retrospect may seem important to the defendant nor is he obliged to obtain a written waiver or instructions from the defendant as to each and every turn or direction the accused wants his counsel to take.

State v. Piche, 71 Wn.2d 583, 590, 430 P.2d 522 (1967), cert. denied, 390 U.S. 912 (1968).

Throughout the proceedings the defendant and Ms. Rivera made it clear that she represented him. Ms. Rivera introduced herself as acting on behalf of the defendant. 1-31-12 RP 22-8-12 RP 1; 2-27-12 RP 4; 3-14-12 RP 1. Ms. Rivera challenged the State's calculation of the defendant's offender score. 1-31-12 RP 4. She researched reasons for the court to justify a low end sentence, and presented those reasons to the court. She also advocated for an appeal bond. 3-14-12 RP 36-39. Although Ms. Rivera did not present the defendant's post trial motions, she did assist him with those motions. She provided the defendant with copies of cases, and assisted in getting a court order so the defendant could access the jail law library. 2-27-12 RP 12-13. Ms. Rivera did not withdraw her representation until the sentencing hearing had been completed and she filed a notice of appeal on the defendant's behalf. 1 CP 2; 4 CP __ (sub 109 notice of withdrawal).

Despite this the defendant stated he wanted an attorney to represent him on the motions. 2-27-12 RP 13-14. Based on that the court inquired into the nature of the conflict Ms. Rivera had.

Concluding that problem of presenting authority contrary to the defendant's position would exist regardless of who represented the defendant the court gave the defendant two options; he could have Ms. Rivera represent him and provide the court authority contrary to his position or he could represent himself on the motions. That choice is constitutionally permissible when the defendant has not provided the court with a legitimate ground on which to provide him substitute counsel. State v. Staten, 60 Wn. App. 163, 169, 802 P.2d 1384, review denied, 117 Wn.2d 1011 (1991). Here the defendant did not ask for substitute counsel; he asked for counsel to argue his motions. There was no legitimate basis for that request. Because counsel was not required to argue the motions in the exercise of her professional judgment, the court did not err by giving the defendant the option of representing himself on the motions.

After conferring with Ms. Rivera the defendant opted to represent himself. The court conducted a colloquy to ensure that the defendant's request to represent himself on the motions was knowing, intelligent and voluntary. After finding his request met those criteria it permitted him to represent himself in arguing the motions. 2-27-12 RP 14-27.

The defendant states the court must make a comprehensive inquiry to determine whether the defendant intelligently waived his right to counsel, citing State v. Chavis, 31 Wn. App. 784, 644 P.2d 1202 (1982). He cite no authority for the proposition that such inquiry must be made when the defendant is represented by counsel, but is permitted to present some portion of his defense pro se as occurred here. Nevertheless, since the court did make an adequate inquiry and the defendant validly waived his right to counsel as it related to the motions.

The defendant points to the lack of inquiry at the January 31 hearing when the defendant first presented his motion to arrest judgment and for new trial to support his argument. If an inquiry were required in a circumstance such as this, any error was harmless.

This Court has held that an outright denial of right to counsel is not subject to harmless error. State v. Harell, 80 Wn. App. 802, 805, 911 P.2d 1034 (1996). In Harrell the defendant sought to withdraw his guilty plea on the basis he received ineffective assistance of counsel. The defendant's attorney did not assist the defendant at the hearing, and the court did not appoint the defendant another attorney. The trial court denied the motion.

Under these circumstances this Court held the defendant was entitled to a new hearing. Id. at 805

In contrast where the defendant has not been completely denied his right to counsel, even where he has been unrepresented at a critical stage of the proceedings, the Court has applied a harmless error analysis. State v. Lackey, 153 Wn. App. 791, 223 P.3d 1215 (2009), review denied, 168 Wn.2d 1034 (2010). In Lackey the defendant's original attorney withdrew and he had not been appointed a new attorney at a hearing where he signed a speedy trial waiver. Id. at 794. Although this was a critical stage of the proceeding where the defendant was entitled to counsel, error in proceeding without counsel was harmless, where the defendant later waived his right to speedy trial when new counsel had been appointed for him. Id. at 802-803.

This case is similar to Lackey. The defendant was represented by counsel who appeared in court with him. Although the court did not originally go through a colloquy with the defendant the first time he argued his post trial motions, it did so before the second time he argued those motions. The basis for each motion was substantially the same each time the defendant argued them. The defendant did add a prosecutor misconduct argument based

on an alleged discovery violation the second time he argued his motion. 3-14-12 RP 10-16. Despite having earlier ruled on the motion the court thoroughly addressed the defendant's arguments the second time he argued the motions. Under these circumstances, if it was error to allow the defendant to argue his motions pursuant to CrR 7.4 and CrR 7.5 pro se, without first securing a valid waiver of his right to counsel as to those motions, the error was harmless.

B. COUNSEL DID NOT UNDERMINE HER REPRESENTATION OF THE DEFENDANT.

The defendant claims Ms. Rivera refused to assist him in preparation for his motion for new trial. BOA at 12. As noted above the record does not support that contention.

The defendant further claims that Ms. Rivera actively worked against him when "she essentially informed the court that she believed his motions were frivolous." BOA at 12. To support this claim the defendant points to letters Ms. Rivera sent to him. However it was the defendant that filed those letters with the court, not Ms. Rivera. 2-27-12 RP 5-8. Had the defendant not submitted those letters to the court it would never have known the substance of those communications between the defendant and his attorney.

The defendant's claim Ms. Rivera committed any wrongdoing is specious.

The defendant also misrepresents Ms. Rivera's statements to the court when he says that she told the court the authority she had found did not support his motion for a new trial. BOA at 12. Ms. Rivera was at all times circumspect regarding the reasons she would not bring the motions the defendant wanted heard. Her responses to the court satisfied both her duty of candor to the court and her duty to the defendant. RPC 1.6, RPC 3.1, RPC 3.3. Ms. Rivera limited her response by stating that she could not ethically participate in the motions. 2-27-12 RP 9. When the court inquired further about her reasons for not bringing the defendant's motions Ms. Rivera referred the court to statements already made public when the defendant filed copies of her letters to him with the court. 2-27-12 RP 15-16, 19.

The defendant quibbles about the authority Ms. Rivera relied on to determine she would not argue the post trial motions he wanted to bring. He argues that it is unlikely that the prosecutor would not have disclosed the authority Ms. Rivera was concerned about. In any event he argues she should have forged ahead and

disclosed the authority while still maintaining the defendant had a legitimate basis for a new trial. BOA at 15-16.

This argument completely ignores the constitutionally guaranteed independence counsel are afforded in deciding how best to represent their clients. Strickland, 466 U.S. at 669. It also ignores counsel's ethical duty to refrain from bringing a frivolous proceeding. RPC 3.1. Because Ms. Rivera honored both of the competing ethical obligations she had to the defendant and the court, the authority she relied on is not in the record. Whatever it was however, is of no moment. Because the defendant exercised his right to have her represent him, she had the authority to make decisions to bring or not bring motions on his behalf. Because the court took the extraordinary measure of permitting the defendant to represent himself on those motions, and found a knowing intelligent, and voluntary waiver of right to be represented by counsel on those motions, the defendant's rights under article 1, §22 and the Sixth Amendment were fully respected.

IV. CONCLUSION

For the foregoing reasons the State asks the Court to affirm the trial court's decision denying the motion for new trial and motion to arrest judgment.

Respectfully submitted on February 7, 2013.

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