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Court of Appeals
Division I
State of Washington

COA NO. 71856-8-I

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

STATE OF WASHINGTON,

Respondent,

v.

ADRIAN SASSEN VANELSLOO,

Appellant.

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

The Honorable Deborra Garrett, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court violated appellant's Sixth Amendment right to counsel of choice.

2. The trial court erred in imposing community custody on counts I, II and IV. CP 91.

3. The court erred in imposing discretionary legal financial obligations without considering appellant's present or future ability to pay them.

4. The pre-printed finding in the judgment and sentence that appellant has the current or future ability to pay legal financial obligations. is erroneous. CP 89.

Issues Pertaining to Assignments of Error

1. Whether the trial court violated appellant's Sixth Amendment right to counsel of choice in denying private counsel's motion for substitution and in not providing enough time for that counsel to prepare for trial as a condition for future substitution?

2. Whether the trial court lacked statutory authority to order community custody under RCW 9.94A.701?

3. Whether the court erred in imposing discretionary legal financial obligations absent inquiry into appellant's current or future ability to pay them?

B. STATEMENT OF THE CASE

The State charged Adrian Sassen Vanelsloo with attempting to elude a police vehicle (including firearm and actual endangerment enhancements), second degree driving with a suspended license, and two counts of first degree unlawful possession of a firearm. CP 3-5 (original information); CP 8-10 (first amended information); CP 16-18 (second amended information); CP 25-27 (third amended information).

Initially, Sassen Vanelsloo had three different cases going on at the same time, charged in chronological order. 1RP¹ 4; 2RP 3; 4RP 8; 12RP 9-10. The oldest case ("the first case" or "case one") was under cause number 12-1-942-5. 1RP 4. The second case ("case two") was under 12-1-1051-2. 1RP 4; 4RP 8; 12RP 9. The third case ("case three") — the subject of this appeal — was under 12-1-01368-6. 4RP 8.

Ultimately, the trial court denied a motion by private counsel to substitute for assigned counsel in the present case, allowed for a later substitution if private counsel were prepared to try the case by the

¹ The verbatim report of proceedings is referenced as follows: 1RP - 12/12/12; 2RP – one volume consisting of 12/21/12, 11/20/13; 3RP – one volume consisting of 1/24/13, 1/30/13, 1/25/13, 6/26/13; 4RP – one volume consisting of 3/20/13, 3/28/13, 6/27/13; 5RP – 8/29/13; 6RP – 9/5/13; 7RP – 9/19/13; 8RP – 10/3/13; 9RP – 10/10/13; 10RP – 10/24/13; 11RP – one volume consisting of 1/29/14, 2/19/14; 12RP – 2/4/14; 13RP – 3/3/14 (voir dire); 14RP - seven consecutively paginated volumes consisting of 3/3/14, 3/4/14, 3/5/14, 3/7/14, 3/10/14, 4/15/14, 4/18/14.

scheduled trial date, and then set a trial date that did not allow private counsel enough time to prepare. 12RP 35-38; 14RP 30. To provide context for that decision, the procedural history is set forth.

At the December 12, 2012 preliminary appearance, a commissioner informed Sassen Vanelsloo that one attorney from the Public Defender's Office would be assigned to represent him on all three cause numbers. 1RP 7. The commissioner set bail at 10 million dollars. 1RP 15-17.

At the December 21, 2012 arraignment, Sassen Vanelsloo entered not guilty pleas in all three cases. 2RP 3-5. The trial for "case three" (the case now under appeal) was set for February 11, 2013. CP 121.

On January 24, 2013, Ms. Anderson of the Whatcom County Public Defender's Office made her first appearance. 3RP. On January 30, 2013, the parties agreed to continue the trial from February 11 to April 1, 2013. 3RP 7; CP 124, 125.

On March 20, the parties agreed to continue all three cases to May 20. 4RP 3; CP 126. Another attorney from the defender's office appeared for Ms. Anderson that day. 4RP 3. Sassen Vanelsloo was not present. CP 126. According to the clerk's minute sheet, the defense was to get Sassen Vanelsloo's signature on an order setting the new trial date. CP 126.

On March 28, however, Ms. Anderson asked the court to find good cause to continue the trial to May 20 based on the need for trial preparation, without reference to the agreed continuance that took place on March 20. 4RP 4-5. Sassen Vanelsloo refused to sign off on the continuance.² CP 127, 128. The court found good cause and continued the trial from April 1 to May 20, 2013. 4RP 5; CP 128.

On May 9, defense counsel requested more time to prepare and the trial was continued from May 20 to July 8, 2013. CP 129, 157. Sassen Vanelsloo refused to sign the order of continuance. CP 157.

On June 27, defense counsel requested a continuance in cases two and three. 4RP 10-12. Counsel was investigating and interviewing witnesses in chronological order of the cases. 4RP 8. She needed to interview a witness in case two, but that witness was currently on warrant status after the State had promised to facilitate an interview but then declined to do so. 4RP 9-12, 14-15. Counsel said the cases had been proceeding chronologically and she was ready to go on case one. 4RP 12. All three cases were set for July 8. 4RP 11. The prosecutor wanted to maintain that date for all three cases. 4RP 11. The court maintained the

² Defense counsel represented that Sassen Vanelsloo refused to sign but did not have a problem with the continuance. 4RP 4. The judge made no inquiry into why Sassen Vanelsloo would refuse to sign if he was okay with the continuance. 4RP 4-7.

date for case one and granted defense counsel's request for a continuance on cases two and three. 4RP 15. Case three was continued for trial to September 9, 2013. CP 132.

By August 29, the material witness in case two was located. 5RP 6. The trial date for case two (12-1-1051-2) was maintained for September 9 and assigned counsel said she was prepared to go to trial on that date for that case. 5RP 5-7, 9. The prosecutor requested that case three (12-1-01368-6) be continued to September 30, which would give more time to prepare after case two was finished. 5RP 9. Defense counsel asked for a continuance to mid-October. 5RP 9-10. The court continued the trial in case three to October 14, 2013. 5RP 12; CP 136.

At a September 5 bail review hearing, the prosecutor mentioned that case one had been dismissed at some earlier point due to suppression of evidence. 6RP 8. On September 19, the court lowered bail on the remaining cases after a hearing on the matter. 7RP 9-10.

On October 3, defense counsel filed a motion to continue case three (12-1-01368-6) on the ground that she needed more time to prepare. CP 140-41. On October 10, the motion was addressed. 9RP 3-8. Counsel explained case three had become a priority due to a conflict of interest issue arising in case two and she needed more time to prepare for case three. 9RP 4-5. The prosecutor agreed with the continuance request. 9RP

4-5. The court continued the trial in case three to December 2, 2013. 9RP 6; CP 142.

Counsel further requested reinstatement as attorney of record in case two, the conflict of interest case. 9RP 6. The matter was noted for another time, but counsel said she would like the cases to remain in the order they occurred in terms of priority if she were reinstated. 9RP 8.³ On October 24, counsel requested clarification on whether she should stay as counsel or get conflict counsel on case three. CP 158.

On November 20, 2013, defense counsel told the court she was trying to retain an expert and requested case three be set one week after case two. 2RP 5. The trial date for case three was continued to February 10, 2014. CP 144.

On January 29, 2014, defense counsel told the court that her client was planning on hiring Mr. Subin later that day and referenced a request to continue. 11RP 3. The prosecutor objected to any continuance, but the matter was not heard that day. 11RP 3

On February 3, assigned counsel moved to continue based on a discovery issue. CP 147-49. The State objected both to a continuance

³ The court later described the motion to be reinstated as applying to both case two and case three (10RP 6), and that Ms. Anderson was not Sassen Vanelstloo's attorney on case three for a period in September 2013. 14RP 30-31.

based on the discovery issue and a continuance based on substitution of counsel. CP 150-150-53.

On February 4, Judge Garrett considered both private counsel's motion to substitute in as Sassen Vanelsloo's attorney and assigned counsel's motion to continue based on a discovery issue. 12RP 5, 8-9.

Ms. Dellino, the private attorney, told the court that she met with Sassen Vanelsloo last week and he wanted to retain her as counsel for case three. 12RP 11 (nothing was said about Mr. Subin). She was aware that trial was not far away. 12RP 11. After noting she was not entitled to discovery until she became counsel of record, Dellino asked for two weeks to evaluate the case, at the end of which she would ask the court to set a review hearing to determine whether she could adequately prepare to represent Sassen Vanelsloo "on the Court's timeframe." 12RP 12.

The court expressed concern that it would be "a lot of time between now and the case actually being ready for trial if that were to occur." 12RP 12. The court said new counsel wanted two weeks to get up to speed to see what needed to be done in terms of trial preparation, which was "only the beginning of new counsel's coming up to the point of being ready and able to try the case." 12RP 29-30.

The court then addressed assigned counsel's continuance request. Assigned counsel (Ms. Anderson) moved for a continuance due to late

disclosure of police reports and said she would be moving for a continuance based on the discovery issue regardless of Sassen Vanelsloo's request to hire private counsel. 12RP 12, 18-21.

Assigned counsel said case two had been kept one week ahead of case three by defense design; the second case had always been scheduled ahead of the third case. 12RP 23. When counsel learned the State was moving to continue case two, counsel told Sassen Vanelsloo that, if he wanted to hire private counsel, it needed to happen now so that private counsel "would have her two weeks by design just by the chronology." 12RP 24.

Assigned counsel explained: "So that's part of the reason why counsel is coming in at the 11th hour is we assumed that case was going to go on a trial date based on Judge Snyder saying 'this is finally going to go, it has to go, there is no more continuances,' that is part of our assumption why Ms. Dellino, there is some delay in Ms. Dellino coming in." 12RP 24. Assigned counsel was referring to what Judge Snyder said in a November 2013 hearing on case two, in which he ordered a February 10 trial date. 12RP 24, 25.

Up until the previous week, assigned counsel was preparing to try case two first, but Judge Garrett ended up granting the State's request for a continuance in case two to February 24 due to a missing witness. 12RP 22,

24-25, 28. Judge Garrett clarified that she ruled at that time that case three, which was set for February 19, would go forward if the witness in case two was not in custody by February 18. 12RP 30. Case two would go to trial on February 19 if the witness were found. 12RP 35.

The prosecutor objected to the motion to continue case three. 12RP 27. Officer Leake, a witness in cases two and three, was on vacation from February 24 to March 10, so he was unavailable for a February 24 trial date. 12RP 27-28.

The court noted there had been a number of continuance requests, some of which were made by the defense. 12RP 31-32. One of the major problems that kept case three from going to trial in early October was the conflict of interest issue. 12RP 32. It was a valid issue for defense counsel to raise but was not Sassen Vanelstloo's "making or his fault." 12RP 32. The court was concerned that Sassen Vanelstloo, "through no fault of his own but through a series of unfortunate events has experienced a great deal of delay getting his cases to trial." 12RP 32. Given Sassen Vanelstloo's past objections to continuances, the court was reluctant to deny the request for a continuance now. 12RP 32.

The court was less sympathetic to Sassen Vanelstloo's request for private counsel than with the request for a continuance based on the newly discovered police reports. 12RP 35. "In my view, Mr. Sassen [Vanelstloo]

has had a lot of time to consider hiring private counsel, we are on the eve of trial. I wouldn't, I don't find the arguments for a continuance to permit new counsel to come into the case and come up to speed persuasive." 12RP 35.

The court, however, was concerned that the police reports were requested and not received. 12RP 35. The court ordered a short continuance of about two weeks so that assigned counsel could deal with the late discovery. 12RP 36-37. "But I'm not prepared to order a continuance long enough to allow new counsel to step in and take full advantage of all the court rules that permit a two-week evaluation period and then additional time for determining whether experts are necessary, hiring those experts, that should have been done before this if that was the defense plan." 12RP 36. The trial was set for February 24, or as soon after the 24th as the key witnesses would be available. 12RP 37.

The court did not allow Ms. Dellino to substitute as private counsel "at this time" because she was not in a position to represent to the court that she would be prepared to try the case by the 24th "or whatever date it's set for trial." 12RP 37. "If after further investigation Ms. Dellino determines that she is capable of substituting for you, Ms. Anderson, that she can have that preparation done and be fully prepared for trial, I will accept her word on that and permit her to substitute, but not until she had

had the opportunity to review the case fully because taking on a trial like this on an accelerated schedule is a big commitment for counsel and I don't want Ms. Dellino to make that commitment until she has had been fully apprised of the case." 12RP 37-38.

The prosecutor asked that the case be continued for only one week to fit the trial in before Officer Leake went on vacation. 12RP 38, 39-40. The court agreed that was appropriate and set a trial date of Feb. 19. 12RP 38-39. But after further discussion, the court set cases two and three for March 3. 12RP 41; CP 154.

Ms. Dellino informed the court that she had another trial in Grays Harbor beginning the week of March 3 and so would be unavailable to do Sassen Vanelstoo's case that week. 12RP 42. The court stated "If Ms. Dellino upon investigation determines that she can substitute in as counsel in this matter and Mr. Sassen [Vanelstoo] and Ms. Anderson agree that that's what is in Mr. Sassen [Vanelstoo's] best interest, then I'll consider a continuance of both matters to March 10, but quite reluctantly." 12RP 42-43.⁴

⁴ The record reflects an order signed by commissioner David Thorn dated February 3, 2014 (stamped filed January 31, 2014), which authorizes Dellino to substitute as counsel for Anderson. CP 146. Given the argument and trial judge's ruling on February 4, it is clear that neither the parties nor the judge treated the commissioner's order as having any legal effect.

On March 3, 2014, during the course of pre-trial motions, assigned counsel informed the court that Ms. Dellino contacted her and said she was unable to get the case prepared in time for trial and therefore would not be substituting in as Sassen Vanelsloo's counsel.⁵ 14RP 30. Jury selection took place later that day. 13RP.

The jury found Sassen Vanelsloo guilty as charged and returned affirmative special verdicts on the enhancements. CP 67-70. At sentencing, the court imposed 115 months total confinement, several terms of community custody, and discretionary legal financial obligations. CP 89-91. Sassen Vanelsloo appeals. CP 99-116.

C. ARGUMENT

1. THE COURT VIOLATED SASSEN VANELSLOO'S CONSTITUTIONAL RIGHT TO BE REPRESENTED BY COUNSEL OF CHOICE AND THIS STRUCTURAL ERROR REQUIRES REVERSAL OF THE CONVICTIONS.

Defendants have the Sixth Amendment right to counsel of choice. Absent sufficient countervailing considerations, that right must be honored. In this case, the trial court violated Sassen Vanelsloo's right to choose his attorney in denying private counsel's motion to substitute for assigned counsel and in predicating potential future substitution on a schedule that

⁵ The prosecutor told the court that the second case was going to be dismissed. 14RP 24, 36, 46-47.

did not allow private counsel sufficient time to prepare. Under the circumstances, Sassen Vanelsloo's interest in counsel of choice outweighed the public's interest in maintaining the trial date. The trial court abused its discretion due to an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay to allow counsel of choice to prepare for trial. The convictions must be reversed because the deprivation constitutes structural error.

a. The court violated Sassen Vanelsloo's Sixth Amendment right in denying his choice of counsel without sufficient justification.

The Sixth Amendment provides "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. Const. amend. VI.⁶ The right to counsel of choice "guarantees a defendant the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire, or who is willing to represent the defendant even though he is without funds." United States v. Gonzalez-Lopez, 548 U.S. 140, 144, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006) (quoting Caplin & Drysdale, Chartered v. United

⁶ The Washington Constitution similarly provides "In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel[.]" Wash. Const. art. I, § 22. The state and federal constitutions provide the same degree of protection in this regard. State v. Medlock, 86 Wn. App. 89, 97-99, 935 P.2d 693, review denied, 133 Wn.2d 1012, 946 P.2d 402 (1997).

States, 491 U.S. 617, 624-625, 109 S. Ct. 2646, 105 L. Ed. 2d 528 (1989)).

The right to counsel of choice "commands, not that a trial be fair, but that a particular guarantee of fairness be provided — to wit, that the accused be defended by the counsel he believes to be best." Gonzalez-Lopez, 548 U.S. at 146.

The right to privately retain one's own counsel derives from the defendant's right to determine his defense. United States v. Laura, 607 F.2d 52, 56 (3rd Cir. 1979). "Lawyers are not fungible, and often the most important decision a defendant makes in shaping his defense is his selection of an attorney." United States v. Gonzalez-Lopez, 399 F.3d 924, 928 (8th Cir. 2005) (quoting United States v. Mendoza-Salgado, 964 F.2d 993, 1014 (10th Cir. 1992)), aff'd, 548 U.S. 140, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006). Within the range of effective advocacy, attorneys will differ as to their trial strategy, oratory style, and the importance they place on certain legal issues, as well as their expertise in certain areas of law and experience or familiarity with opposing counsel and the judge. Gonzalez-Lopez, 399 F.3d at 934. "These differences will impact a trial in every way the presence or absence of counsel impacts a trial." Id.

"The deprivation of a defendant's right to counsel of choice is 'complete' when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of the

representation he received." State v. Hampton, 182 Wn. App. 805, 818, 332 P.3d 1020 (2014), review granted, 342 P.3d 327 (2015). For this reason, it is improper for the trial court to consider the legitimacy of the defendant's dissatisfaction with appointed counsel and whether a denial is likely to result in identifiable prejudice. Hampton, 182 Wn. App. at 822-23 (disapproving State v. Roth, 75 Wn. App. 808, 825, 881 P.2d 268 (1994) and its progeny on this point in light of Gonzalez-Lopez). "Unless the substitution would cause significant delay or inefficiency or run afoul of . . . other considerations . . . a defendant can fire his retained *or* appointed lawyer and retain a new attorney for any reason or no reason." United States v. Rivera-Corona, 618 F.3d 976, 979-80 (9th Cir. 2010).

When a continuance is sought to obtain chosen counsel, the trial court must balance the defendant's interest in counsel of choice with the public's interest in the prompt and efficient administration of justice. State v. Aguirre, 168 Wn.2d 350, 365, 229 P.3d 669 (2010); State v. Price, 126 Wn. App. 617, 632, 109 P.3d 27, review denied, 155 Wn.2d 1018, 124 P.3d 659 (2005). A trial court's resolution of that balancing exercise is reviewed for abuse of discretion. Aguirre, 168 Wn.2d at 365.

A trial court has wide latitude in balancing the right to counsel of choice against the needs of fairness, and against the demands of its calendar. Gonzalez-Lopez, 548 U.S. at 152. But an "unreasoning and

arbitrary 'insistence upon expeditiousness in the face of a justifiable request for delay' violates the right to the assistance of counsel." United States v. Nguyen, 262 F.3d 998, 1003 (9th Cir. 2001) (quoting Morris v. Slappy, 461 U.S. 1, 11-12, 103 S. Ct. 1610, 75 L. Ed. 2d 610 (1983) (quoting Ungar v. Sarafite, 376 U.S. 575, 589, 84 S. Ct. 841, 11 L. Ed. 2d 921 (1964)). Factors to consider include whether the court had granted previous continuances at the defendant's request and whether available counsel is prepared to go to trial. Hampton, 182 Wn. App. at 821, 825.

In State v. Bolar, for example, the court concluded the defendant was trying to disrupt the administration of justice because of his inconsistent requests to proceed pro se or be appointed counsel, which changed from one day to the next. State v. Bolar, 118 Wn. App. 490, 516, 78 P.3d 1012 (2003), review denied, 151 Wn.2d 1027, 94 P.3d 959 (2004). In contrast, Sassen Vanelstloo did not waver in his request that he be permitted to discharge appointed counsel and have time for new private counsel to prepare and try the case. 12RP 11-12.

In State v. Chase, the court properly exercised its discretion in denying a continuance to seek new counsel where the request was not made until after jury selection on the first day of trial. State v. Chase, 59 Wn. App. 501, 506, 799 P.2d 272 (1990). Sassen Vanelstloo did not wait until after jury selection. His case presents different timing considerations.

On the day it heard the motion for new counsel, the court continued the trial to March 3 based on assigned counsel's discovery issue. 12RP 36-37, 41; CP 154. Ms. Dellino, the private attorney seeking to become Sassen Vanelsloo's counsel, requested two weeks to evaluate the case to see if she could be prepared for trial on the court's "timeframe." 12RP 12. The court denied the motion to substitute in as counsel that day. 12RP 37. It left open the possibility that Dellino could substitute if she were prepared to try the case on the continued date (or possibly the week after). 12RP 37-38, 42-43. When the case went to trial on March 3, assigned counsel informed the court that Dellino was unable to get the case prepared in time and therefore would not be substituting in as Sassen Vanelsloo's counsel. 14RP 30.

The trial court is permitted to consider whether previous continuances were granted at the defendant's request. Hampton, 182 Wn. App. at 821, 825. The record shows a number of continuances, some of which were agreed and some of which were sought by assigned counsel for various reasons. See section B., supra. The trial court, however, did not hold the previous continuances against Sassen Vanelsloo because the latter had objected to the delay in bringing his case to trial. 12RP 32. As described by the trial court, Sassen Vanelsloo, "through no fault of his

own but through a series of unfortunate events has experienced a great deal of delay getting his cases to trial." 12RP 32.

Sassen Vanelsloo did not attempt to use the discharge of his counsel and employment of private counsel as a dilatory tactic to frustrate the progress of the action against him. There is a reasonable explanation for why private counsel was not retained sooner. Case three (the present case on appeal) trailed case two (cause number 12-1-1051-2) in chronology, and there was an expectation that case two would be sent out to trial first based on the Judge Snyder's previous order that no more continuances would be allowed in case two. When Judge Garrett later granted the State's request for a continuance in case two, the present case unexpectedly became ready for trial. 12RP 23-25. The timing of Sassen Vanelsloo's request to retain private counsel was justifiable under these circumstances.

The trial court focused on whether chosen counsel was prepared to try the case on the updated trial schedule. The trial court must balance the defendant's interest in counsel of choice with the public's interest in the prompt and efficient administration of justice. Aguirre, 168 Wn.2d at 365. Up until the point that Sassen Vanelsloo made the request for chosen counsel, the administration of justice in his case had been anything but prompt and efficient. It had lingered for over a year, limping from one

trial date to the next. In striking the balance between chosen counsel and bringing the case to trial sooner rather than later, the long period of time should weigh in favor of chosen counsel because a prompt trial date had long since passed as an option. The right to choose one's counsel does not include the right to unduly delay the proceedings. Id. at 365. But in this case, the proceedings had already been delayed. Giving chosen counsel additional time to prepare would not have made any meaningful difference in the scheme of things.

The trial court suggested Sassen Vanelsloo had plenty of time to retain counsel of choice before the motion for new counsel was made. 12RP 35-36. But "a defendant should be afforded a fair opportunity to secure counsel of his own choice." Powell v. Alabama, 287 U.S. 45, 53, 53 S. Ct. 55, 77 L. Ed. 158 (1932). Defendants may need time to acquire the services of counsel of choice. Hampton, 182 Wn. App. at 827 n.18. The trial court made no inquiry into why Sassen Vanelsloo was unable to retain private counsel earlier.

Sassen Vanelsloo's right to counsel was violated because the court unreasonably denied his request to continue trial to a time that would allow his chosen counsel to be ready for trial. Under the circumstances, the court's decision constituted an unreasoning and arbitrary insistence upon

expeditiousness in the face of a justifiable request for delay. Nguyen, 262 F.3d at 1003; Slappy, 461 U.S. at 11-12.

b. **The Erroneous Deprivation Of Chosen Counsel Is Structural Error Requiring Reversal Of The Convictions.**

Erroneous deprivation of the right to chosen counsel is structural error not subject to harmless error analysis. Gonzalez-Lopez, 548 U.S. at 150, 152. The erroneous denial of chosen counsel is structural error because it bears directly on the framework within which the trial proceeds. Id. at 150. As explained by the United States Supreme Court, "[d]ifferent attorneys will pursue different strategies with regard to investigation and discovery, development of the theory of defense, selection of the jury, presentation of the witnesses, and style of witness examination and jury argument. And the choice of attorney will affect whether and on what terms the defendant cooperates with the prosecution, plea bargains, or decides instead to go to trial." Id.

"A choice-of-counsel violation occurs whenever the defendant's choice is wrongfully denied." Id. The court wrongly denied Sassen Vanelstloo's Sixth Amendment right in denying his chosen counsel without sufficient justification. This structural error requires reversal of the convictions. Id.

2. THE COURT LACKED STATUTORY AUTHORITY TO IMPOSE COMMUNITY CUSTODY FOR THE ELUDING AND FIREARM OFFENSES.

The court imposed community custody terms for counts I (one month for attempting to elude), II (five months for unlawful possession of firearm) and IV (five months for unlawful possession of firearm). CP 91. RCW 9.94A.701 of the Sentencing Reform Act (SRA) does not authorize community custody for these offenses. The community custody terms attached to these offenses must be stricken.

Sentencing errors may be raised for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). Whether a trial court exceeds its statutory authority under the SRA is an issue of law reviewed de novo. State v. Murray, 118 Wn. App. 518, 521, 77 P.3d 1188 (2003).

RCW 9.94A.701 specifies the crimes for which community custody is authorized, including those that qualify as a "serious violent offense," a "violent offense," and a "crime against persons." RCW 9.94A.701(1), (2), (3)(a). First degree unlawful possession of a firearm is not a "serious violent offense" or a "violent offense." RCW 9.94A.030(45), (54)(a). Nor is it a "crime against persons." RCW 9.94A.411(2); see In re Postsentence Review of Leach, 161 Wn.2d 180, 186, 163 P.3d 782 (2007) (crimes listed in RCW 9.94A.411(2) are exhaustive, not illustrative).

RCW 9.94A.701(3)(b) authorizes community custody for "[a]n offense involving the unlawful possession of a firearm under RCW 9.41.040, where the offender is a criminal street gang member or associate." The State did not allege, nor is there a finding, that Sassen Vanelstloo is a criminal street gang member or associate. RCW 9.94A.701(3)(b) is therefore inapplicable.

Further, RCW 9.94A.701 does not authorize community custody for the offense of attempting to elude a pursuing police vehicle under count I. That offense is not a "crime against person," a "violent offense," a "serious violent offense," or any other type of offense that calls for community custody. RCW 9.94A.701; RCW 9.94A.030(45), (54)(a); RCW 9.94A.411(2).

A court may only impose a sentence that is authorized by statute. State v. Barnett, 139 Wn.2d 462, 464, 987 P.2d 626 (1999). "If the trial court exceeds its sentencing authority, its actions are void." State v. Paulson, 131 Wn. App. 579, 588, 128 P.3d 133 (2006). The court here exceeded its statutory authority in imposing community custody on the attempt to elude and firearm possession counts. Because community custody for those counts is not authorized by statute, it must be stricken from Sassen Vanelstloo's sentence. Leach, 161 Wn.2d at 188 (specifying remedy for unauthorized community custody term). This Court should reverse the

unlawful terms of community custody associated with the eluding and firearm counts and remand for correction of the judgment and sentence.

3. THE COURT VIOLATED STATUTORY MANDATE IN FAILING TO CONSIDER SASSEN VANELSLOO'S ABILITY TO PAY DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS.

The court ordered Sassen Vanelstoo to pay the following discretionary legal financial obligations (LFO's): (1) \$250 jury demand fee; (2) \$3000 fee for court appointed attorney; (3) \$500 fine; and (4) \$100 crime lab fee.⁷ CP 92. The court erred in imposing these LFO's because it failed to make an individualized inquiry into Sassen Vanelstoo's current and future ability to pay them.

The court may order a defendant to pay costs pursuant to RCW 10.01.160. However, the statute also provides "[t]he court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose." RCW 10.01.160(3).

A trial court thus has a statutory obligation to make an individualized inquiry into a defendant's current and future ability to pay

⁷ The court also ordered a \$500 victim assessment and a \$200 criminal filing fee. CP 92. Those fees are not at issue on appeal because they are mandatory. State v. Lundy, 176 Wn. App. 96, 102, 308 P.3d 755 (2013).

before the court imposes legal financial obligations. State v. Blazina, __Wn.2d__, __P.3d__, 2015 WL 1086552 *1 (slip op. filed March 12, 2015). The record reflects no such consideration here. 14RP 535-45.

In the judgment and sentence, the following pre-printed, generic language appears:

2.5 Legal Financial Obligations/Restitution. The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. (RCW 10.01.160).

CP 89.

Sassen Vanelsloo challenges this finding on the ground that the court did not actually consider his individual financial resources and the burden of imposing such obligations on him. The boilerplate finding regarding ability to pay lacks support in the record.

Further, "the court must do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry. The record must reflect that the trial court made an individualized inquiry into the defendant's current and future ability to pay. Blazina, 2015 WL 1086552 at *5. The court failed to follow statutory mandate in imposing the legal financial obligations. The remedy is a new sentencing hearing. Id. at *6.

The issue is ripe for review. Id. at *2 n.1. And although defense counsel did not object below, an appellate court has discretion to reach this error consistent with RAP 2.5. Id. at *1. Sassen Vanelstloo requests that this Court reach the merits. The LFO system is broken.⁸ Id. at *3. It will not be fixed until appellate courts reach the merits of these claims and send cases back for resentencing, thereby sending a clear signal to trial judges about the importance of individualized inquiry into ability to pay legal financial obligations.

D. CONCLUSION

For the reasons set forth, Sassen Vanelstloo requests (1) reversal of the conviction; (2) that the community custody terms for the eluding and firearm counts be stricken; and (3) reversal of the discretionary legal financial obligations and remand for resentencing.

⁸ Problems associated with LFOs imposed against indigent defendants include increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration. Blazina, 2015 WL 1086552 at *3-5.

DATED this 31st day of March 2015

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



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Attorneys for Appellant

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 71856-8-I
)	
ADRIAN SASSEN VAN-ELSLOO,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 31ST DAY OF MARCH 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] ADRIAN SASSEN VAN-ELSLOO
DOC NO. 837829
STAFFORD CREEK CORRECTIONS CENTER
191 CONSTANTINE WAY
ABERDEEN, WA 98520

SIGNED IN SEATTLE WASHINGTON, THIS 31ST DAY OF MARCH 2015.

X *Patrick Mayovsky*