

**FILED**

FEB 03, 2014  
Court of Appeals  
Division III  
State of Washington

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

**DIVISION III**

**No. 31168-6-III**

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**STATE OF WASHINGTON, Respondent,**

**v.**

**ELVIS CAMILLO RENTERIA LOPEZ, Appellant.**

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**APPELLANT'S REPLY BRIEF**

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## I. ARGUMENT

The State relies upon *State v. Ollivier*, 178 Wn.2d 813, 312 P.3d 1 (2013), to argue that there was no violation of Lopez's speedy trial rights. *Ollivier* specifically addressed factual circumstances that are distinguishable from these, namely, "when defendant's own counsel requested the continuances causing the delay *and no claim of ineffective counsel is made related to those continuances.*" *Id.* at 820 (emphasis added). Here, the repeated requests for delay on the part of defense counsel gave rise to a conflict of interest requiring withdrawal. RP (McLaughlin) 6/9/10 at 32-33. Moreover, Lopez argues on appeal that his trial counsel rendered ineffective assistance by failing to diligently prepare for trial and sentencing, causing an actual conflict of interest. *Appellant's Brief* at p. 22-23.

Unlike in *Ollivier*, in the present case, Lopez repeatedly objected to the requested continuances and made the court aware at an early stage that his counsel was not abiding by his objectives. RP (Lang) 10/19/11 at 9-10. Lopez suggested to the court that another attorney in Etherton's firm represented him and could conduct the trial. RP (King) 11/19/11 at 7-8. Etherton represented that both he and the other attorney, Kim Ouren, signed the notice of appearance; however, no substitution of counsel was filed until later. RP (King) 11/30/11 at 11-12. Etherton further argued

that although Ouren signed the notice of appearance, she was not qualified to proceed to trial alone. RP (King) 11/30/11 at 12. Notwithstanding Ouren's concerns about her lack of qualifications, the trial court suggested she could associate with another co-counsel and proceed to trial as scheduled. RP (King) 11/30/11 at 15. Despite Ouren's acknowledgment that she appeared in the case, one week later, Etherton then advised the court that because no substitution was actually filed, he was attorney of record and not Ouren, therefore justifying the continuance request. RP (King) 12/7/11 at 6. Etherton was unable to answer the court's question as to who Lopez hired. RP (King) 12/7/11 at 10. Ouren advised the court merely that Lopez hired "us." RP (King) 12/7/11 at 13. After formally entering the substitution, the court then granted Etherton's request for a continuance. RP (King) 12/7/11 at 14.

Unlike *Ollivier*, the present case raises substantial questions of ineffective assistance of counsel because of (1) the lack of clarity in the record and among the parties as to who was actually representing Lopez and whether counsel could be available for trial; (2) the alleged bases for the continuances, including additional mental health investigations, of which no evidence appears in the record or at trial; and (3) Etherton's eventual withdrawal due to difficulties in his personal life creating a conflict of interest with his representation of Lopez. While *Ollivier*

certainly stands for the proposition that a continuance request by a defense attorney who is lacking conflicts and providing effective assistance to the defendant waives the defendant's objection under the speedy trial rule, it certainly does not stretch to cover the facts present here, where the conflict of interest effectively deprives the defendant of his Sixth Amendment right to counsel. *See State v. Regan*, 143 Wn. App. 419, 427, 177 P.3d 783 (2008).

Similarly, the State relies on *Ollivier* to contend that the *Barker* factors weigh in favor of the delays because they were caused by Etherton's requests. But unlike *Ollivier*, where the continuances were sought to "provide professional assistance in the defendant's interests," the continuances here resulted from Etherton's personal medical conflicts and the late decision to absolve Ouren of any responsibility for timely taking the case to trial. 178 Wn.2d at 834.

With respect to speedy sentencing, the State argues that the delay was not purposeful or oppressive because the fault rests with Etherton. But Etherton's personal challenges created a conflict of interest with Lopez. *See* CP 154-55. He failed to appear for sentencing under circumstances the State appropriately concedes were "dubious." *Respondent's Brief* at 19. Furthermore, while the State contends that the

continuances were necessary for counsel to be prepared for sentencing in light of the substantial term of confinement Lopez faced, the State fails to explain how these continuances benefited Lopez when his sentencing counsel had represented him for only two weeks. RP (McLaughlin) 8/15/12 at 32-33; RP (Munoz) 9/4/12 at 495. Contrary to the State's argument, in light of Etherton's declaration of personal conflicts and ongoing continuance requests, Lopez had ample reason to be concerned that his sentencing would not proceed at all without a change of counsel. Instead, the State would ask this court to hold Lopez responsible for his attorney's conflict of interest and exercising his right to obtain effective counsel for sentencing.

## **VI. CONCLUSION**

For the foregoing reasons, Lopez respectfully requests that the court reverse his convictions and vacate his sentence.

RESPECTFULLY SUBMITTED this 3rd day of February, 2014.

  
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**DECLARATION OF SERVICE**

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

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

Signed this 3<sup>rd</sup> day of February, 2014 in Walla Walla,  
Washington.

  
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Kristin McCaffrey