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Court of Appeals
Division I
State of Washington

No. 90950-4

(Court of Appeals No. 70337-4-1)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CHARLES ALAN CHAPPELLE, Jr.,

Petitioner.

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STATE OF WASHINGTON
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PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Charles Alan Chappelle, Jr., defendant and appellant below, seeks review of the Court of Appeals decision terminating review designated in Part B.

B. COURT OF APPEALS DECISION

Mr. Chappelle seeks review of the Court of Appeals decision affirming his King County Superior Court conviction for second degree assault, State v. Charles Alan Chappelle, Jr., No. 70337-4-I. A copy of the Court of Appeals decision, dated September 22, 2013, is attached.

C. ISSUES PRESENTED FOR REVIEW

1. In order to exercise his constitutional right to represent himself, the accused must knowingly, intelligently, and voluntarily waive his constitutional right to counsel. U.S. Const. amends. VI, XIV; Const. art. I § 22. Mr. Chappelle wanted the court to appoint new counsel, but the judge only questioned him about self-representation. Mr. Chappelle said he could represent himself with the assistance of an intern or co-counsel and requested counsel immediately after the court granted him pro se status. In addition, the court did not ensure that Mr. Chappelle understood the elements of the charged offense and the standard sentence range if convicted, and the court did not warn Mr. Chappelle that defending himself required more than simply telling the jury his story. Should this

Court grant review because the circumstances do not demonstrate that Mr. Chappelle knowingly, intelligently, and voluntarily waived his constitutional right to counsel?

2. When an incarcerated defendant represents himself at trial, article I, section 22 requires that the State provide him with meaningful access to the materials he needs to defend himself. Mr. Chappelle was provided with witness statements and reports over the course of the trial, sometimes shortly before the relevant witness's testimony. In addition, Mr. Chappelle lacked the means to contact defense witnesses by telephone, he was not provided with legal materials, and he was not appointed standby counsel. Should this Court accept review because Mr. Chappelle's article I, section 22 right to the materials he needed to conduct his defense was violated and the Court of Appeals decision affirming his conviction is in conflict with State v. Silva, 107 Wn. App. 605 (2001)?

3. The federal constitution guarantees a criminal defendant the rights to due process, to compulsory process, and to present a complete defense. Const. amends. VI, XIV; Holmes v. South Carolina, 547 U.S. 319 (2006). Mr. Chappelle argued that his Sixth Amendment right to present a complete defense was violated when the trial court ordered him to represent himself pro se midtrial without the time or materials he needed to present his defense. The Court of Appeals did not address the

Sixth Amendment issue raised in Mr. Chappelle's Statement of Additional Grounds for Review. Should this Court accept review to determine if Mr. Chappelle's federal rights to due process and to present a complete defense violated?

4. The accused's constitutional right to effective assistance of counsel includes conflict-free counsel. U.S. Const. amends. VI, XIV; Const. art. I, § 22. At his motion for a new trial, Mr. Chappelle was represented by an attorney from the same office as his original counsel. In arguing for a new trial, the new attorney did not point out her colleague's failure to provide Mr. Chappelle with his file materials when Mr. Chappelle took over his own defense, a violation of RPC 1.16(d). Mr. Chappelle demonstrated on appeal that the second counsel had a conflict of interest that constrained her representation of him at his motion for a new trial, the showing required by Strickland v. Washington, 466 U.S. 668 (1984). The Court of Appeals, however, held that Mr. Chappelle did not demonstrate that the first counsel was ineffective. Should this Court accept review where the Court of Appeals used the incorrect standard of review in reviewing Mr. Chappelle's argument that his constitutional right to effective assistance of counsel was violated?

5. The Sixth Amendment guarantees the accused the right to counsel, and a defendant is entitled to retain any counsel he can afford.

U.S. Const. amends. VI, XIV; United States v. Gonzalez-Lopez, 548 U.S. 140 (2006). Mr. Chappelle asked the trial court to delay his trial long enough to retain a private attorney. Should this Court accept review because Mr. Chappelle's constitutional right to retain counsel of choice was violated?

D. STATEMENT OF THE CASE¹

Charles Chappelle was convicted by a jury of second degree assault after representing himself at trial in King County Superior Court.² CP 126-27, 346; 11/13/14 RP 18-19. The incident occurred in an alley in Seattle's Belltown neighborhood after the bars had closed. Amr Elshahawany and his friends had been partying, and Mr. Elshahawany ducked into the alley to urinate. 11/14/12 RP 9-14, 16-17. Mr. Elshahawany was stabbed in the face by a stranger and emerged from the alley covered with blood. 11/14/12 RP 16-17, 19-21, 64, 95.

Mr. Elshahawany identified the stranger as Mr. Chappelle. 11/14/12 RP 27-29. Mr. Chappelle, however, testified that he had not assaulted anyone, but a crowd of men assaulted him. 11/14/12 RP 70, 80-82, 98-98, 107; 11/15/12 RP 102-04; 11/19/12 RP 78-81, 85-85, 94-95.

¹ A more complete statement of the facts of the case is found at the Brief of Appellant, pages 4-9, 12-17, 25-27.

² The jury did not find a charged deadly weapon enhancement. CP 60, 126-27.

Prior to trial, the presiding judge summarily denied Mr. Chappelle's request for substitute counsel. 10/26/12 RP 4-5. On the second day of trial, Mr. Chappelle again sought to have new counsel appointed. 11/13/12 RP 4, 6-10. The court interpreted Mr. Chappelle's motion as a motion to waive his right to counsel and represent himself. 11/13/12 RP 10-11. After a colloquy, Mr. Chappelle's attorney was discharged. Id. at 18-19; CP 346.

The trial proceeded without a break for defense counsel to give Mr. Chappelle the relevant information from his file. 11/13/12 RP 17-19, 50; 11/15/12 RP 6-7; 4/30/13 RP 13. The State provided Mr. Chappelle with discovery materials as the trial proceeded. 11/13/12 RP 48-50; 11/15/12 RP 9-11, 13-14; 11/19/12 RP 21-22. At several points, Mr. Chappelle voiced objections because he did not have witness statements, police reports, or other information he needed and he was unable to reach defense witnesses. 11/13/12 RP 46-51; 11/15/12 RP 5-13, 20, 116-17, 153-54.

After conviction, the court granted Mr. Chappelle's motion for the appointment of counsel for post-conviction motions and sentencing. CP 347; 2/1/13 RP 5-7. His new attorney moved for a new trial on the grounds that Mr. Chappelle did not validly waive his constitutional right to counsel and the State did not timely provide him with the materials he

needed to represent himself. CP 131-71, 243-71. The motion was denied. CP 291-92.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. Mr. Chappelle did know knowingly, intelligently, and voluntarily waive his constitutional right to counsel.

Mr. Chappelle did not believe that his court-appointed attorney was zealously advocating for him, but his pretrial oral motion for substitute counsel was denied and his written motions were never addressed. When Mr. Chappelle asked the trial court for a new attorney, the court questioned Mr. Chappelle about whether he wanted to represent himself and eventually ordered Mr. Chappelle to proceed pro se.

Mr. Chappelle's requests for an intern, co-counsel, or a new attorney demonstrate that Mr. Chappelle did not knowingly, intelligently, and voluntarily waive his constitutional right to counsel. In addition, the court did not ensure that Mr. Chappelle understood the elements of the crime, the sentence he faced, or the dangers of self-representation. This Court should grant review of the Court of Appeals decision finding Mr. Chappelle's waiver of his constitutional right to counsel was knowing, intelligent, and voluntary. RAP 13.4(b)(3).

The federal and state constitutions guarantee a criminal defendant the right to counsel and the right to represent himself. U.S. Const.

amends. VI, XIV; Const. art. I, § 22; Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); State v. Madsen, 168 Wn.2d 496, 503, 229 P.3d 714 (2010). Given the tension between the two constitutional rights, a defendant's waiver of his right to counsel must be "unequivocal." State v. DeWeese, 117 Wn.2d 369, 377, 816 P.2d 1 (1991). Courts are required to indulge in "every reasonable presumption against a defendant's waiver of his or her right to counsel." Madsen, 168 Wn.2d at 504 (quoting In re Detention of Turay, 139 Wn.2d 379, 396, 986 P.2d 790 (1990), cert. denied, 531 U.S. 1125 (2001), in turn quoting Brewer v. Williams, 430 U.S. 387, 404, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977)).

A waiver of the right to counsel must be knowing, intelligent, and voluntarily. Faretta, 422 U.S. at 835; Johnson v. Zerbst, 304 U.S. 458, 464-65, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938); Bellevue v. Acrey, 103 Wn.2d 203, 208-09, 691 P.2d 957 (1984). Thus, the court should engage in a colloquy with the defendant to ensure that, at a minimum, he understands the nature of the charge against him, the possible maximum penalty, and the requirement that he comply with technical procedural and evidence rules. Acrey, 103 Wn.2d at 211. The defendant must waive his right to counsel with "eyes open, which includes an awareness of the

dangers and disadvantages of the decision.” State v. Hahn, 106 Wn.2d 885, 895, 726 P.2d 25 (1986); see Faretta, 422 U.S. at 835.

The Court of Appeals decision should be reviewed because (1) the facts surrounding Mr. Chappelle’s waiver of his right to counsel demonstrate that it was now knowing and intelligent, and (2) the trial court’s colloquy with Mr. Chappelle did not ensure that he understood the “dangers and disadvantages” of self-representation. Faretta, 422 U.S. at 835.

First, Mr. Chappelle did not understand that he was waiving his right to counsel. It is clear that Mr. Chappelle was dissatisfied with his counsel and wanted a new attorney. CP 15-31, 32-52, 296-314; 10/26/12 RP 3-5; 11/13/12 RP 4, 6-10. The trial court, however, never expressly denied Mr. Chappelle’s request for substitute counsel, but instead questioned Mr. Chappelle about self- representation. 11/13/12 RP 5-10. The court thus never made it clear to Mr. Chappelle that his only choices were continuing the trial with his current attorney or continuing the trial pro se. Mr. Chappelle thus may have understood that waiving his right to counsel was simply a step in the process of obtaining new counsel.

Mr. Chappelle’s waiver was also accompanied with requests for an intern or co-counsel to assist him, and it was immediately followed by a motion for a new attorney. These requests show that he did not

understand that he could not have a new attorney or other assistance, and his waiver of counsel was not knowing and intelligent.

Second, when a defendant wishes to waive his constitutional right to counsel and represent himself, the court should engage in a colloquy with the defendant to ensure that he understands the nature of the charged crime, the maximum penalty he faces, and the dangers of self-representation. Acrey, 103 Wn.2d at 211. In addition to warning the defendant that he must follow technical rules, the court must inform him “that presenting a defense is not just a matter of telling one’s story.” Acrey, 103 Wn.2d at 211.

The trial court’s colloquy with Mr. Chappelle did not ensure that he understood the dangers and disadvantages of appearing pro se. The trial court never determined if Mr. Chappelle was aware of the elements of second degree assault or the required proof for the charged deadly weapon enhancement. 11/13/12 RP 4-20. While the trial court mentioned the standard sentence range and maximum term for second degree assault, it never informed Mr. Chappelle of the added penalty that would result if the jury found the sentence enhancement. 11/13/12 RP 13. In addition, the court did not sufficiently warn Mr. Chappelle “that presenting a defense is not just a matter of telling one’s story.” Acrey, 103 Wn.2d at 211.

Counsel is so fundamental to the right to a fair trial that the erroneous deprivation of that right is not subject to a harmless error analysis. Strickland v. Washington, 466 U.S. 668, 692, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Here, Mr. Chappelle's waiver of his constitutional right to counsel was not knowing and intelligent, as he did not understand that he would not be assisted by standby counsel and asked for a new attorney shortly after his counsel was discharged. In addition, the trial court did adequately inform Mr. Chappelle of the nature of the crime, the possible punishment, and the dangers he faced prior to accepting his waiver. This Court should accept review of these important constitution issues. RAP 13.4(b)(3).

2. Mr. Chappelle was forced to go to trial without the materials he needed for his defense as required by the Washington Constitution.

The federal constitutional guarantees the accused the “a meaningful opportunity to present a complete defense.” Holmes v. South Carolina, 547 U.S. 319, 324, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006) (quoting Crane v. Kentucky, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986)). In order to protect a defendant's ability to present his defense, the Washington Constitution guarantees an incarcerated pro se defendant “a right of reasonable access to state provided resources that

will enable him to prepare a meaningful pro se defense.” State v. Silva, 107 Wn. App. 605, 622, 27 P.3d 663 (2001); Const. art. I, § 22.

Mr. Chappelle was incarcerated and began representing himself immediately prior to jury selection. He did not receive the witness statements, police reports, or expert’s reports until shortly before the witnesses testified. He did not have access to an investigator or even a telephone for locating defense witnesses and arranging for their appearance in court. Mr. Chappelle did not have legal materials. And he was not provided with standby counsel for advice or assistance. This Court should accept review of the Court of Appeals decision holding that Mr. Chappelle’s state constitutional right to access to the resources he needed to represent himself was not violated. RAP 13.4(b)(3).

An incarcerated pro se defendant has the right to state-provided materials necessary to prepare a meaningful defense. Silva, 107 Wn. App. at 622.

The right of self-representation guaranteed in our state constitution is a substantive right, not a mere formality. Just as the right to appointed counsel is not satisfied unless the representation is meaningful, the right to represent oneself cannot be satisfied unless it is made meaningful by providing the accused the resources necessary to prepare an adequate pro se defense.

Id. at 620-21. The trial court has the discretion to determine how to ensure this right is honored based upon the circumstances of the case. Id. at 622-23.

In Silva, the Court of Appeals concluded that the defendant was provided the material he needed for his defense. Silva, 107 Wn. App. at 626. Not only was Silva provided with standby-counsel and an investigator, he also had access to legal materials, paper and pencil, copying services, inmates' telephone, blank subpoenas, postage, a notary, and was able to conduct witness interviews in the prosecutor's office. Id. at 609, 611, 625. In contrast, Mr. Chappelle was not provided any of those resources.

Mr. Chappelle was not provided with the unredacted discovery materials until after the first witness began his testimony. 1/13/12 RP 32, 46, 49. His attorney did not give Mr. Chappelle the results of his investigator's reports or efforts to locate potential defense witnesses. 11/13/12 RP 17-19, 50; 11/15/12 RP 6-7; 4/30/RP 13. Mr. Chappelle received those witness statements from the prosecutor on the morning of November 14. Three critical witnesses testified that day – the crime victim and two friends who saw Mr. Chappelle emerge from the alley at the same time as the victim. 11/14/12 RP 16-30, 63-69, 95-98. Yet Mr. Chappelle had not time to prepare for their testimony.

In addition, Mr. Chappelle had no way to do his own investigation. He was unable to pay to use the inmates' telephone, whereas Silva had access to the inmate telephone and standby counsel who supplemented Silva's efforts. Silva, 107 Wn. App. at 625. Mr. Chappelle was not provided with any legal materials, whereas the defendant in Silva was provided with the court rules, relevant titles of the Revised Code of Washington Annotated, relevant volumes of the Washington Practice Manual, and copies of cases that he requested. Id. at 623

When Mr. Chappelle began representing himself on the second day of trial, he had none of the resources he needed to present a defense. While the trial court ordered the prosecutor to give Mr. Chappelle witness statements and other discovery materials, they were provided as the trial progressed and Mr. Chappelle was sometimes in the position of viewing them as the witness testified. 11/15/12 RP 5-11, 13-14, 138; 11/19/12 RP 21-22. This Court should accept review because Mr. Chappelle's constitutional right to meaningful access to the material he needed to defend himself was violated, and the Court of Appeals decision is in conflict with Silva. RAP 13.4(b)(2), (3).

3. The Court of Appeals did not address Mr. Chappelle's argument that his Sixth Amendment rights to present a defense and to a fair trial were violated.

The Sixth Amendment provides the accused the rights to counsel, to compel the production of witnesses, and the right to confront his accusers. U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 22. Together, these rights guarantee “a meaningful opportunity to present a complete defense.” Holmes, 547 U.S. at 324; Crane, 476 U.S. at 690.

In his Statement of Additional Grounds for Review, Mr. Chappelle argued that the trial court's decision to reduce him to pro se status midtrial prohibited him from properly raising self-defense. Statement of Additional Grounds for Review (SAG) at 3-4. The Court of Appeals declined to address Mr. Chappelle's federal constitutional claim on the grounds that it was “adequately addressed in his appellate counsel's brief.” Slip Op. at 22 n.51. In fact, appellate counsel addressed only the right to adequate resources to prepare a defense under article 1, section 22 of the Washington Constitution, not the Sixth Amendment. Brief of Appellant at 1 (Assignment of Error 4), 2-3 (Issue 3), 24-30 (Argument 2).

This Court should accept review to address whether Mr. Chappelle's Sixth Amendment rights to due process and to present a complete defense were violated when he was order to proceed pro se

midtrial without the time or resources needed to present his defense. RAP 13.4(b)(3).

4. The Court of Appeals utilized the wrong test in evaluating whether Mr. Chappelle's constitutional right to effective assistance of counsel was violated because the attorney representing him for his motion for a new trial had a conflict of interest that hampered her representation.

When Mr. Chappelle's attorney was discharged midtrial, the attorney left without giving Mr. Chappelle the file materials he needed to present his defense, thus violating RPC 1.16(d). A different attorney from the same office was appointed to represent Mr. Chappelle after trial.

When the second attorney filed a motion for a new trial, however, she did not argue that Mr. Chappelle was prejudiced by the first attorney's unethical action. The Court of Appeals utilized the wrong standard of review in holding that Mr. Chappelle's constitutional right to effective assistance of counsel was not violated by the second attorney's conflict of interest. This Court should accept review. RAP 13.4(b)(3).

Defense counsel's critical role in the adversarial system protects the defendant's fundamental right to a fair trial. Strickland, 466 U.S. at 684-85; United States v. Cronin, 466 U.S. 648, 656, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984). The right to counsel therefore necessarily includes the right to effective assistance of counsel. Strickland, 466 U.S. at 686; State

v. A.N.I., 168 Wn.2d 91, 96-98, 225 P.3d 956 (2010). This right may be violated when defense counsel is encumbered with a conflict of interest that impacts her representation. Strickland, 466 U.S. at 692; State v. Dhaliwal, 150 Wn.2d 559, 566, 79 P.3d 432 (2003).

Defense counsel's ethical duty of loyalty to her client includes a duty to avoid conflicts of interest. Strickland, 466 U.S. at 688; Cuyler v. Sullivan, 446 U.S. 335, 346, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980); State v. McDonald, 143 Wn.2d 506, 511, 22 P.3d 791 (2001). The defendant also has the constitutional right to counsel who is free from conflicts of interest. Wood v. Georgia, 450 U.S. 261, 271, 101 S. Ct. 1097, 67 L. Ed. 2d 220 (1981). Representation by an attorney with a conflict of interest is presumed to be prejudicial if the defendant demonstrates "that an actual conflict of interest adversely affected his lawyer's performance." Strickland, 466 U.S. at 692 (quoting Sullivan, 446 U.S. at 345-50); accord Dhaliwal, 150 Wn.2d at 571. Mr. Chappelle made this showing.

When an attorney-client relationship ends, the attorney has a continuing ethical obligation to protect the client's interests by ensuring a smooth transfer of the case, including providing new counsel with the case

file and surrendering papers and property to the client. RPC 1.16(d);³ In re Disciplinary Proceedings Against Eugster, 166 Wn.2d 293, 302, 310, 314, 318, 209 P.3d 435 (2009) (conduct of attorney in refusing to turn over client file to the new attorney and failing to turn over papers and property to the client violated Former RPC 1.15(d)). In this case, Mr. Chappelle's first attorney violated his duty to ensure a smooth transition of the case to Mr. Chappelle. In his hurried departure from the court room, the lawyer did not provide Mr. Chappelle with his file or the materials he had prepared to defend the case. Mr. Chappelle was thus left to represent himself without materials from his own file that he needed.

Mr. Chappelle's second attorney filed a motion for a new trial based in part upon the denial of his right to the materials needed for his defense. She did not, however, include her coworker's ethical violation in her argument.

Mr. Chappelle therefore argued on appeal that his second attorney had a conflict of interest that prevented her from raising the first attorney's ethical failure in the motion for a new trial. The Court of Appeals,

³ The rule reads in relevant part:

Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as . . . surrendering papers and property to which the client is entitled . . . The lawyer may retain papers relating to the client to the extent permitted by other law.

however, held that Mr. Chappelle did not show that the first attorney was ineffective. Slip Op. at 20-21.

The Court of Appeals addressed the issue using the traditional analysis for most forms of ineffective assistance of counsel. Slip Op. at 20 (requiring the defendant to show that (1) his attorney's performance was deficient and (2) but for counsel's deficient performance, the outcome of the proceeding would have been different; citing State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995)). This is not the test when counsel is ineffective due to a conflict of interest. Strickland, 466 U.S. at 692. Instead, prejudice is presumed if the defendant shows his attorney had a conflict of interest and it prejudiced her performance, not the ultimate outcome of the case. Id.

[I]t is difficult to measure the precise effect on the defense of representation corrupted by conflicting influences. Given the obligation of counsel to avoid conflicts of interest and the ability of trial courts to make early inquiry in certain situations likely to give rise to conflicts, see e.g. Fed. Rule Crim. Proc. 44(c), it is reasonable for the criminal justice system to maintain a fairly rigid rule for conflicts of interest. Even so, the rule is not quite the per se rule of prejudice that exists for the Sixth Amendment claims mentioned above. Prejudice is presumed only if the defendant demonstrates that "counsel actively represented conflicting interests" and that "an actual conflict of interest adversely affected his lawyer's performance."

Id. (quoting Sullivan, 446 U.S. at 350) (internal citations omitted).

Mr. Chappelle's second lawyer knew that her co-worker had not providing Mr. Chappelle with his file when needed, but raising that issue would leave her office open to an ethics complaint. She thus had a conflict of interest that impacted performance. The Court of Appeals did not utilize the standard of review for ineffective assistance of counsel due to conflicts of interest. This Court should grant review to correctly address Mr. Chappelle's constitutional claim. RAP 13.4(b)(3).

5. The denial of Mr. Chappelle's constitutional right to counsel of choice is a federal constitutional issue that should be addressed by this Court.

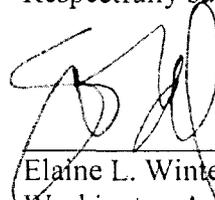
The Sixth Amendment guarantees an accused the right to be represented by any qualified attorney he can afford to retain. U.S. Const. amends. VI, XIV; United States v. Gonzalez-Lopez, 548 U.S. 140, 144, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006). In his Statement of Additional Grounds for Review, Mr. Chappelle argued that his constitutional right to counsel of choice was violated. SAG at 2-3. The Court of Appeals, however, determined that the trial court did not abuse its discretion in denying Mr. Chappelle's request because Mr. Chappelle did not identify a particular lawyer by name. Slip Op. at 21-22. This Court should accept review of this important constitutional issue. RAP 13.4(b)(3.)

F. CONCLUSION

Charles Chappelle Jr. asks this Court to accept review of the Court of Appeals decision affirming his second degree assault conviction.

DATED this 20th day of October 2014.

Respectfully submitted,

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

STATE OF WASHINGTON,)	No. 70337-4-I
)	
Respondent,)	
)	
v.)	
)	
CHARLES ALAN CHAPPELLE, JR.,)	UNPUBLISHED OPINION
)	
Appellant.)	FILED: September 22, 2014

2014 SEP 22 11:05:50
CLERK OF COURT
JANIS L. HARRIS

VERELLEN, A.C.J. — Charles Chappelle appeals his conviction for second degree assault, claiming that the trial court erred when it discharged defense counsel and permitted him to represent himself on the second day of trial and that he lacked the necessary materials to conduct an adequate pro se defense. He additionally argues that he was denied his right to effective, conflict-free counsel at his motion for a new trial. Viewing the record as a whole, Chappelle knowingly, intelligently and voluntarily waived his right to counsel. He was also provided with reasonable accommodations given the late date at which he requested to represent himself. Furthermore, Chappelle fails to show that defense counsel appointed to represent him in his motion for a new trial possessed an actual conflict of interest affecting her performance. Finally, the argument in Chappelle's statement of additional grounds lacks merit. Accordingly, we affirm.

FACTS

On June 9, 2012, Amr Elshahawany and several friends were celebrating a birthday at a nightclub in downtown Seattle. The group left the nightclub when it closed, and Elshahawany entered a nearby alley to urinate. Elshahawany noticed Chappelle standing nearby and staring at him. The two men exchanged words. Elshahawany then saw something come out of Chappelle's hand and felt Chappelle hit him in the face. Elshahawany suffered a deep laceration that went all the way through his cheek. He lost three liters of blood before medical personnel were able to stop the bleeding and repair the wound. The State charged Chappelle with second degree assault with a deadly weapon.

Carlos Gonzales of Northwest Defenders Association was assigned to represent Chappelle. At the omnibus hearing on October 26, 2012, Chappelle filed a pro se motion to dismiss and motion for change of counsel. The court informed Chappelle that it would not hear his motion to dismiss because Chappelle was represented by counsel but would hear his motion for change of counsel. Chappelle argued:

I'd like to change counsel because my witnesses haven't been seen, um, I haven't, um, had any real representation, I've been working on another case the whole time, a higher profile case, and I'm just now at trial. And also the State wants to amend the charges, and I was being forced to go to trial first on the assault two with a deadly weapon. Now the State wants to amend the charges, and like I said, I have -- witnesses haven't even been called upon, I haven't been given fair representation.⁽¹⁾

Gonzales responded that he had attempted to contact Chappelle's proposed witnesses multiple times but was unsuccessful. The court denied Chappelle's motion.

¹ Report of Proceedings (RP) (Oct. 26, 2012) at 4.

On November 8, 2012, the first day of trial, the State and Gonzales argued pretrial motions. Chappelle did not express any dissatisfaction with Gonzales. However, on November 13, 2012, the second day of trial, Chappelle attempted to file another pro se motion prior to jury selection. Though it was not clear what relief he was seeking, Chappelle's motion contained the phrases "council [sic] refused to call witness," "affidavit of prejudice" and "to change council [sic]."² Gonzales stated,

So I don't feel comfortable handing this up, your Honor. But it just seems unclear what . . . he wants to do is discharge counsel or to go pro se. That's what I'm unclear about, because even after being told by the court [not] to file motions he's still trying to file motions.^[3]

The following exchange occurred:

GONZALES: Well, do you want to make a motion to discharge me or make a motion to go pro se?

DEFENDANT: Yes. I make a motion to discharge counsel. This is affidavit of prejudice. I have been trying to --

THE COURT: Excuse me. Just a second. An affidavit of prejudice? Against who? Me?

DEFENDANT: Affidavit of the prejudice against Court. Period. Out of the interests for --^[4]

The trial court attempted to ascertain Chappelle's intentions, explaining that Chappelle could not file an affidavit of prejudice because it had already made discretionary rulings.

Chappelle clarified his intention:

² Clerk's Papers at 61-69.

³ RP (Nov. 13, 2012) at 5.

⁴ Id. at 5-6.

This affidavit is, yes, to take you off the case. To take my counsel off the case. I haven't been getting a fair representation, I don't feel, the whole time. The motions that I want to have filed from the beginning when I was injured . . . haven't been filed. There are no witnesses that's the -- I never went to sign continuance in any speedy rights, and none of that, all this whole time they try force me to go to trial without seeing police reports, and no witness there first. And another judge overturned that. So the whole time I had -- I haven't been represented all the issues that's really been going on with me.^{5]}

Chappelle then proceeded to complain about his health problems and his treatment by jail staff. The trial court continued to attempt to ascertain what Chappelle wanted:

GONZALES: I think the only timely motion in front of this Court is questionable. Timely is the motion to discharge counsel, but other than that an affidavit of prejudice, I think, is, since you made rulings already, it's too late for an affidavit.

[PROSECUTOR]: Correct. I think the only motion he's close to making at this point is a motion to discharge counsel, and I don't know if that's really what he wants to do or not.

THE COURT: You want to be without counsel? You want to represent yourself?

DEFENDANT: No. I have actually had several lawyers that try to take my case. I try to change counsel, and motion to deny -- was denied. All my motion to dismiss was denied. All my motions are never heard. Not given a chance to speak. No. No, you can't speak. They never address any of my issues. Oh, no. No. No. Because we don't want this on the record. The whole time. No, you can't speak. Oh, you can't speak on any issues. When these are actually issues that's going on. Ongoing with me.

THE COURT: If that's a motion to go pro se, it is very equivocal.

GONZALES: Well, pro se means do you want to represent yourself?

THE COURT: Are you asking to represent yourself?

DEFENDANT: Yes.

⁵ RP (Nov. 13, 2012) at 7.

THE COURT: You -- yes. You want to go without counsel?

DEFENDANT: If I have to go with an intern, whatever I have to do. I'm trying here.

THE COURT: A what?

DEFENDANT: If I have to get help, yes, I represent myself too. I have been representing myself the whole time basically.

COURT: I wouldn't say, that's still a pretty equivocal statement, counsel. Are you attempting to discharge --

DEFENDANT: Yes.

COURT: -- Mr. Gonzales, and to represent yourself pro se in this case?

DEFENDANT: Yes.

COURT: You understand that if I allow Mr. Gonzales to be discharged, you will be by yourself through the entire case representing yourself?

DEFENDANT: Yes.

COURT: You will be required to follow appropriate --

DEFENDANT: Yes.

COURT: And when I make motions and in limine rulings you will be required to abide by them.

DEFENDANT: Yes.^[6]

After briefly involving Chappelle's uncle in the inquiry, the colloquy continued.

DEFENDANT: Okay. Yes, sir. I want to go forward. I want to go pro se. I do want co-counsel.

THE COURT: There is no co-counsel.

DEFENDANT: No co-counsel?

⁶ RP (Nov. 13, 2012) at 10-12.

THE COURT: You go pro se, you represent yourself.

DEFENDANT: Okay. Well, that's fine.

THE COURT: You represent yourself, you are up here, you make all your own decisions. You have no lawyer.

DEFENDANT: Okay.

THE COURT: You understand that? You are facing a -- I'm told that if convicted you will have an offender score of a seven. You will have a standard range of 43 to 57 months, plus enhancement for the deadly weapon.

DEFENDANT: That's fine. I never had a deadly weapon.

THE COURT: Let me finish. So you are looking at a range of 55 to 69 months and a \$10,000 fine.

DEFENDANT: Okay.

THE COURT: With maximum sentence of 120 months.

DEFENDANT: Okay.

THE COURT: You ever study anything about the law?

DEFENDANT: Just incarcerated.

THE COURT: You have been incarcerated, but never formally studied the law?

DEFENDANT: No.

THE COURT: Have you ever represented yourself in the past?

DEFENDANT: No, I have not.

THE COURT: Have you ever attempted to represent anyone in a court of law?

DEFENDANT: I have not. I have attempted but --

THE COURT: You know you are charged with assault in the second degree, which is a more serious offense, which is also a strike offense?

DEFENDANT: Yes.

THE COURT: I already told you what the potential sentences are; do you understand that?

DEFENDANT: Yes, I do.

THE COURT: You understand you represent yourself[,] I will not tell you how to try the case or involve in any way, give you legal advice?

DEFENDANT: Yes.^[7]

The trial court briefly quizzed Chappelle on his knowledge of the rules of evidence and criminal procedure, with which Chappelle demonstrated some familiarity.

THE COURT: Anyone put any pressure on you to waive right to counsel?

DEFENDANT: No.

THE COURT: So this is all your decision?

DEFENDANT: Yes.

THE COURT: Finally, is it your desire to be without an attorney in this case?

DEFENDANT: Yes.

THE COURT: You understand we are going to immediately start picking a jury?

DEFENDANT: Yes.

THE COURT: There are no continuances.^[8]

Chappelle requested the trial court file the motion he had previously handed up, to which the trial court agreed.

⁷ Id. at 13-14.

⁸ Id. at 16.

THE COURT: Are you ready to start picking a jury?

DEFENDANT: Yeah. Start picking a jury today?

THE COURT: Yeah.

DEFENDANT: Okay.

THE COURT: As soon as we have got jurors. I don't know if we have jurors down there or not. Do we have enough jurors?

GONZALES: And, Your Honor, am I excused? This is the question I have for, your Honor. I'm on standby on another case, I don't know if you wanted me to --

THE COURT: I'm not having standby.

GONZALES: So inform 1201 I'm ready for my next trial?

THE COURT: You're ready for your next trial if his ultimate decision is unequivocal that he intends to represent himself, and he intends to stick by that decision throughout the whole trial and abide by my rulings. We are not going to hear anything about your claims against the police department and some other incidents.

DEFENDANT: No. It's not about claiming. I'm going to court for assault two, right? That's what I'm charged with?

THE COURT: That's right. Assault two with --

[PROSECUTOR]: Deadly weapon.

THE COURT: Deadly weapon.

DEFENDANT: Okay. Yup.

THE COURT: I will tell you it is a -- you may be very bright. You may think you are doing the right thing. I would strongly advise against what you are doing. I think any judge who heard you would strongly advise against what you are doing, but you have a constitutional right to do it. And so long as you make the unequivocal decision to proceed pro se I am required to allow it. Now, is that your decision?

DEFENDANT: That's my decision.

THE COURT: Mr. Gonzales, you are hereby discharged.^[9]

The deputy prosecutor clarified:

[PROSECUTOR]: Right. And I wanted to also make it clear that he is not seeking a continuance even though Your Honor said you wouldn't give one, but I want to make it clear that he is not seeking a continuance and he is prepared to go today. That's the only thing I wanted to clear up.

DEFENDANT: I would just like to file my motions to the court. I'm not seeking a continuance. I just like my paperwork to be filed to the court.^[10]

After a recess to secure a venire, Chappelle again raised the issue of his representation:

DEFENDANT: I would just like to ask at this time of the record, motion filed for me to have co-counsel, and also I would like for my jury instructions, ask for motion to find my jury instructions later, since I don't have them today with me. If I can file them tomorrow maybe.

THE COURT: Let me suggest, sir, if you are pro se that a co-counsel representation does not exist. You either are represented by counsel or you are not. And you have unequivocally told me you wanted to discharge counsel. It was not a good decision. I told you it wasn't a good decision. But having co-counsel with yourself is not an arrangement that's recognized under our court system.

DEFENDANT: Okay. Well, I just like, on the record, that I wanted to file a motion.

THE COURT: What's that?

DEFENDANT: Like to put on the record that I would like to file motion for counsel.

⁹ Id. at 17-19.

¹⁰ Id. at 20.

THE COURT: For counsel?

DEFENDANT: Uh-huh.

THE COURT: You have already discharged counsel.

DEFENDANT: Yeah, I wanted to discharge that counsel for ineffective assistance.

THE COURT: That was not your motion. Your motion was to go pro se. I allowed that motion. Despite the fact that I told you that it was not a wise thing to do. You told me unequivocally you wanted to discharge counsel. I told you if you discharge counsel you were pro se, and you would remain pro se. As I understand it, your attorney has now gone off to try another case for a different defendant.^[11]

A supporter of Chappelle's in the courtroom informed the trial court that what he believed Chappelle wanted was different court-appointed counsel, not to represent himself. Chappelle said, "Yes; that's correct."¹² The trial court explained:

Well, that was not the motion he made. The motion he made . . . was to go pro se. . . . I explained to him the hazards of going pro se. . . . I went through a long colloquy with him concerning his request to go pro se. I asked him if he was asking me unequivocally that he wanted to be pro se. I told him there would be no standby counsel. He would be by himself. He acknowledged he understood all that. He allowed his counsel to be discharged, and his counsel is now off trying another case.^[13]

The trial court began discussing the procedure for jury selection. As the venire entered the courtroom, Chappelle stated, "So the motion to appoint new counsel, that's the motion I would like to put forth, but I can't put that motion--."¹⁴ The trial court did not respond and jury selection began.

¹¹ Id. at 23-24.

¹² Id. at 26.

¹³ Id. at 26-27.

¹⁴ Id. at 28.

That afternoon, during the direct examination of the State's first witness, Chappelle claimed he had not seen one of the State's exhibits. The trial court immediately recessed the trial until the following day. The deputy prosecutor contacted Gonzales, who reported he had previously provided Chappelle with a redacted copy of discovery. The deputy prosecutor determined that the only documents Chappelle had not been previously provided were transcripts of witness interviews. She provided the King County jail an electronic copy of the witness interviews that evening to give to Chappelle, and provided Chappelle a hard copy the following morning.

Trial continued on November 14, 2012 with no further requests from Chappelle. On November 15, 2012, Chappelle again claimed that he was missing discovery materials, including police reports, medical records and his booking photo. The deputy prosecutor provided Chappelle with additional copies of the materials he requested.

After four days of testimony, the jury found Chappelle guilty of second degree assault but rejected the deadly weapon allegation.

Following his conviction, Chappelle requested court-appointed counsel to file a motion for a new trial. Ramona Brandes of Northwest Defenders Association was assigned to represent Chappelle. Brandes argued that Chappelle was entitled to a new trial because he did not knowingly, intelligently and voluntarily waive his right to counsel and because the State did not timely provide him with discovery so that he could adequately defend himself.

At the hearing on the motion, the State raised the concern that a conflict of interest existed because Gonzales and Brandes were employed by the same public

defense agency and Chappelle had requested to proceed pro se because he did not believe Gonzales was advocating for him effectively. Brandes asserted there was no conflict of interest because Chappelle's motion for a new trial was not based on ineffective assistance of counsel. The trial court asked Chappelle if he was "comfortable going forward this morning with Ms. Brandes . . . even though I'm now told that Ms. Brandes and Mr. Gonzales are in the same firm?"¹⁵ Chappelle replied that he was. The trial court asked again, "If you think there's a conflict, let me know. If not, I'm asking if you waive any conflict that there might be with your current counsel."¹⁶ Chappelle responded, "I don't have any conflicts."¹⁷

Gonzales appeared at the hearing in response to a subpoena issued by the State. Gonzales told the trial court that he had provided Chappelle a redacted copy of discovery in September 2012. The deputy prosecutor reiterated that on November 14, 2012, she provided Chappelle with transcripts of all interviews with both State and defense witnesses, and on November 15, 2012, following a complaint from Chappelle that he still did not have discovery, she provided him with another full copy of redacted discovery. Chappelle agreed that he had a redacted copy of discovery at the work release facility at which he resided prior to trial, but he had not been permitted to take it with him when he was transferred to the county jail the night before his trial began.

¹⁵ RP (Apr. 30, 2013) at 5.

¹⁶ Id. at 6.

¹⁷ Id.

The trial court denied Chappelle's motion. In doing so, the trial court made the following findings:

1. This court presided over the pretrial motions and trial in this matter.
2. This court engaged in a lengthy colloquy with the defendant. When the defendant, in the beginning of the colloquy, made an equivocal request to proceed pro se, the court clarified with the defendant the exact nature of his request and he subsequently made repeated and unequivocal requests to proceed pro se.
3. This court advised the defendant, and the defendant was aware, of the nature of his charges, the standard range and maximum punishment allowed by law. The defendant was also aware that standby counsel would not be afforded and a continuance would not be afforded should the defendant elect to proceed pro se. After such advisement, the defendant unequivocally repeated his desire to proceed to trial pro se and waive his right to counsel.
4. Despite the defendant's later requests for counsel and for continuances, the defendant's request to proceed pro se was unequivocal and his waiver of the right to counsel was knowingly, intelligently and voluntarily made.
5. This Court ordered the State to provide discovery to the defendant and the Court is satisfied the State did so. This Court takes judicial notice and finds the defendant did, in fact, have discovery materials in his possession while cross-examining witnesses.^[18]

Chappelle appeals.

DISCUSSION

Waiver of Right to Counsel

The constitutional right to proceed without counsel is guaranteed to a criminal defendant by both article I, section 22 of the Washington State Constitution and the Sixth Amendment to the United States Constitution.¹⁹ "This right is so fundamental that

¹⁸ Clerk's Papers at 291-92.

¹⁹ State v. Barker, 35 Wn. App. 388, 391-92, 667 P.2d 108 (1983).

it is afforded despite its potentially detrimental impact on both the defendant and the administration of justice.”²⁰ To execute this right, a defendant must affirmatively request to proceed pro se, and the request must be unequivocal when viewed in the context of the record as a whole.²¹ Moreover, because a request to proceed pro se involves the waiver of the constitutional right to the assistance of counsel, the request must be made knowingly, voluntarily, and intelligently.²²

We review the trial court’s grant of a motion to proceed pro se for abuse of discretion.²³ A trial court abuses its discretion when its decision is “manifestly unreasonable” or “rests on facts unsupported in the record or was reached by applying the wrong legal standard.”²⁴

Chappelle claims that he did not knowingly, intelligently and voluntarily waive his right to counsel. He argues that his request to proceed pro se was equivocal because the record showed he did not want to represent himself but instead wanted different court-appointed counsel.

We agree with the trial court that Chappelle’s initial statements were equivocal. On October 26, Chappelle asked for different court-appointed counsel. The court denied Chappelle’s request because Chappelle had not articulated any grounds for

²⁰ State v. Madsen, 168 Wn.2d 496, 503, 229 P.3d 714 (2010).

²¹ State v. Luvene, 127 Wn.2d 690, 698-99, 903 P.2d 960 (1995).

²² City of Bellevue v. Acrey, 103 Wn.2d 203, 208-09, 691 P.2d 957 (1984).

²³ State v. Breedlove, 79 Wn. App. 101, 106, 900 P.2d 586 (1995).

²⁴ Madsen, 168 Wn.2d at 504 (quoting State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)).

such a change. On November 13, Chappelle asked to “discharge” counsel and “take my counsel off the case.”²⁵ When the trial court inquired if Chappelle wanted to proceed pro se, Chappelle stated that he did not, and expressed his displeasure that the court on October 26 would not appoint him new counsel.

However, Chappelle persisted in complaining about Gonzales's performance. When the trial court asked again if Chappelle wanted to discharge Gonzales and represent himself, Chappelle said he did. The trial court stated that “if I allow Mr. Gonzales to be discharged, you will be by yourself through the entire case representing yourself.”²⁶ Chappelle stated that he understood. The trial court explained that Chappelle would have to abide by all court rulings, and Chappelle agreed. When Chappelle asked if he could have co-counsel, the court made it very clear that he could not. “You represent yourself, you are up here, you make all your own decisions. You have no lawyer.”²⁷ The trial court properly informed Chappelle of the charge, the standard range, the maximum sentence, and the existence of procedural rules. The trial court concluded, “Finally, is it your desire to be without an attorney in this case?”²⁸ Chappelle said yes. The trial court then turned to Gonzales and stated that he would be discharged “if [Chappelle's] ultimate decision is unequivocal that he intends to represent himself.”²⁹ The trial court once again addressed Chappelle, stating that he did not

²⁵ RP (Nov. 13, 2012) at 7, 9.

²⁶ *Id.* at 11.

²⁷ *Id.* at 13.

²⁸ *Id.* at 16.

²⁹ *Id.* at 18.

recommend that Chappelle proceed pro se but that he was required to allow it as long as Chappelle made the unequivocal decision to do so. The trial court asked Chappelle if that was his decision. Chappelle responded, "That's my decision."³⁰ We find that this constituted an unequivocal request to proceed pro se and a knowing, intelligent and voluntary waiver of the right to counsel. That Chappelle later renewed his requests for substitution of counsel or co-counsel does not retroactively render his request equivocal.

Relying upon State v. Brittain,³¹ Chappelle argues that the trial court's failure to rule on his request for substitution of counsel demonstrates that his waiver was not knowing, intelligent, or voluntary because he was not made aware that "his only choices were continuing the trial with his current attorney or continuing the trial pro se."³² But in Brittain, the defendant specifically conditioned his waiver of the right to counsel on the outcome of his request for substitution of counsel.³³ Chappelle did not. Furthermore, Chappelle had previously moved for substitution of counsel on October 26, claiming Gonzales had not contacted witnesses critical to his defense. A different judge denied Chappelle's request. Chappelle's subsequent request for substitution of counsel was vague and did not provide the trial court with any legitimate or sufficient grounds.

Chappelle further contends that his waiver was not knowing, intelligent and voluntary because the trial court did not conduct a sufficient colloquy regarding the dangers of self-representation. He argues the trial court did not inquire into his level of

³⁰ Id. at 19.

³¹ 38 Wn. App. 740, 689 P.2d 1095 (1984),

³² Reply Br. at 3.

³³ Brittain, 38 Wn. App. at 742.

education, explain the process for jury selection or making objections, or discuss the elements of the charged crime. But "there are no steadfast rules for determining whether a defendant's waiver of the right to assistance of counsel is validly made."³⁴

Rather,

the preferred procedure for determining the validity of a waiver involves the trial court's colloquy with the defendant, conducted on the record. This colloquy should include a discussion about the seriousness of the charge, the possible maximum penalty involved, and the existence of technical procedural rules governing the presentation of the accused's defense.^[35]

The record shows that Chappelle was familiar with the charge, including the deadly weapon allegation, the standard range, and the statutory maximum sentence.

Furthermore, the trial court discussed the rules of evidence and criminal procedure with Chappelle, going as far to quiz Chappelle on the definition of "hearsay" and the purpose of a suppression hearing. Finally, the trial court informed Chappelle of the difficulty of proceeding pro se and advised him not to do so. Based on the colloquy, the trial court did not abuse its discretion in finding that Chappelle knowingly, intelligently, and voluntarily waived his right to counsel.

Materials to Conduct a Defense

Article I, section 22 of the Washington Constitution "affords a pretrial detainee who has exercised his constitutional right to represent himself a right of reasonable access to state-provided resources that will enable him to prepare a meaningful pro se defense."³⁶ What measures are necessary or appropriate to constitute reasonable

³⁴ State v. Modica, 136 Wn. App. 434, 441, 149 P.3d 446 (2006).

³⁵ Id.

³⁶ State v. Silva, 107 Wn. App. 605, 622, 27 P.3d 663 (2001).

access lies within the sound discretion of the trial court after consideration of all the circumstances.³⁷

Chappelle contends that he was denied his constitutional right to present a defense because he lacked the necessary resources to do so as a pro se litigant. Specifically, Chappelle contends that he was not provided discovery in a timely fashion, was not given access to an investigator or a telephone, did not have legal materials such as copies of the relevant court rules or statutes, and was not appointed standby counsel.

Chappelle had been provided a redacted copy of discovery in the months prior to trial. Because he did not have it in his possession at the time he requested to proceed pro se, the State provided him additional copies of the documents he requested, including witness interviews, police reports, medical records and his booking photo. The record shows Chappelle cross-examined all of the State's witnesses and attempted to impeach many of them with their reports or prior statements. In light of the fact that Chappelle requested to proceed pro se on the second day of trial and stated he was not seeking a continuance, Chappelle was provided with reasonable discovery materials with which to conduct his defense.

Chappelle's remaining claims also lack merit. Though Chappelle argues he was denied the services of an investigator, "[t]here is no authority holding that the right of self-representation embodies a right to have an investigator assigned to the

³⁷ Id. at 622-23.

defendant.”³⁸ Furthermore, Chappelle does not explain how his defense was impacted by the lack of a telephone. Despite his incarceration, Chappelle was able to schedule a witness to testify on his behalf. And though Chappelle asserts he had no opportunity to locate any other witnesses, the record is devoid of evidence that other such witnesses existed. Chappelle’s claim that he was not provided with any legal materials is similarly unsupported by the record.

Finally, Chappelle contends the trial court erred by not appointing standby counsel to assist him. But there is no absolute right for a pro se defendant to have standby counsel.³⁹ We review a trial court’s refusal to appoint standby counsel for abuse of discretion.⁴⁰ Chappelle fails to explain how the trial court abused its discretion in this regard.

Conflict of Interest

The Sixth Amendment guarantees a criminal defendant the right to effective assistance of counsel which is free from any conflict of interest.⁴¹ But to establish that a conflict of interest deprived him or her of effective assistance of counsel, a defendant must show that an actual conflict adversely affected the attorney’s performance in some way.⁴² “[A] mere theoretical division of loyalties” is insufficient.⁴³ This court reviews de novo whether circumstances demonstrate a conflict of interest.⁴⁴

³⁸ Id. at 624.

³⁹ State v. DeWeese, 117 Wn.2d 369, 379, 816 P.2d 1 (1991).

⁴⁰ Locks v. Sumner, 703 F.2d 403, 407-08 (9th Cir.1983).

⁴¹ 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).

⁴² State v. Dhaliwal, 150 Wn.2d 559, 571, 79 P.3d 432 (2003).

Chappelle argues that Gonzales was constitutionally ineffective for failing to provide him with discovery materials when he was discharged. He argues that, because Brandes worked in the same public defense agency as Gonzales, she had a conflict of interest because the relationship prevented her from revealing Mr. Gonzales' ethical violation or using it as the basis for a new trial.

Chappelle does not show that the alleged conflict affected Brandes' performance. Chappelle's claim that Gonzales was constitutionally ineffective is premised on Rule of Professional Conduct 1.16(d), which requires an attorney, upon termination of representation, to turn over "papers and property to which the client is entitled." But to satisfy the test for ineffective assistance of counsel, a defendant must demonstrate both (1) that his attorney's representation was deficient, i.e., that it fell below an objective standard of reasonableness, and (2) resulting prejudice, i.e., a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different.⁴⁵ Even if Gonzales was ethically bound to provide Chappelle with his client file when the trial court discharged him as counsel, without a showing of prejudice, this failure does not constitute ineffective assistance of counsel.⁴⁶ Because Chappelle does not demonstrate that the outcome of the proceeding would have been different

⁴³ Id. at 570 (quoting Mickens v. Taylor, 535 U.S. 162, 171, 122 S. Ct. 1237, 152 L. Ed. 2d 291 (2002)).

⁴⁴ State v. Vicuna, 119 Wn. App. 26, 30-31, 79 P.3d 1 (2003).

⁴⁵ State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

⁴⁶ See In re Pers. Restraint of Gomez, 180 Wn.2d 337, 349, 325 P.3d 142 (2014) ("the RPCs do not 'embody the constitutional standard for effective assistance of counsel'") (quoting State v. White, 80 Wn. App. 406, 412-13, 907 P.2d 310 (1995)).

had he been provided with his client file at the time Gonzales left the courtroom, Gonzales was not constitutionally ineffective. Because Gonzales was not ineffective, we cannot infer, as Chappelle urges us to do, that Brandes failed to claim ineffective assistance as a basis for a new trial because of her working relationship with Gonzales.

Statement of Additional Grounds

In a pro se statement of additional grounds, Chappelle contends that the trial court violated his constitutional right to counsel of his choice when it denied his request to substitute Gonzales with retained counsel. Where a defendant retains counsel, the Sixth Amendment encompasses the right to counsel of his or her choice.⁴⁷ But the right to retain counsel of choice is not unlimited. In considering a motion to substitute retained counsel, “the trial court must weigh the defendant’s right to choose his counsel against the public’s interest in the prompt and efficient administration of justice.”⁴⁸ One factor the trial court must consider is whether available counsel is prepared to go to trial.⁴⁹ We review a trial court’s decision regarding a defendant’s motion to substitute retained counsel for abuse of discretion.⁵⁰

Chappelle requested to substitute Gonzales with retained counsel on the second day of trial. Though Chappelle asserted there were attorneys willing to take him as a client, he did not identify any by name nor inform the trial court of their availability. In

⁴⁷ United States v. Gonzalez-Lopez, 548 U.S. 140, 148, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006).

⁴⁸ State v. Aguirre, 168 Wn.2d 350, 365, 229 P.3d 669 (2010).

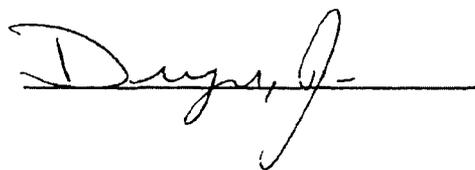
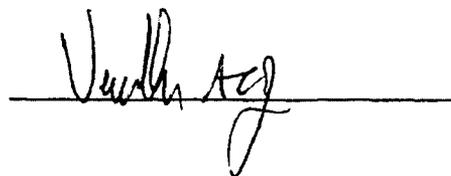
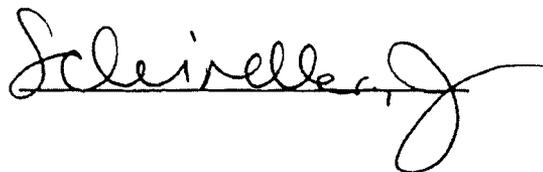
⁴⁹ State v. Hampton, No. 69601-7-1, slip. op. at 12-13 (Aug. 11, 2014); State v. Price, 126 Wn. App. 617, 632, 109 P.3d 27 (2005).

⁵⁰ Price, 126 Wn. App. at 632.

light of these facts, the trial court did not abuse its discretion in denying Chappelle's request to substitute retained counsel.⁵¹

Affirmed.

WE CONCUR:

A handwritten signature in cursive script, appearing to read "Dwyer", written over a horizontal line.A handwritten signature in cursive script, appearing to read "Vukobratovic", written over a horizontal line.A handwritten signature in cursive script, appearing to read "Scheinberg", written over a horizontal line.

⁵¹ Chappelle's remaining claims are adequately addressed in his appellate counsel's brief.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 70337-4-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

- respondent Andrea Vitalich, DPA
[PAOAppellateUnitMail@kingcounty.gov]
King County Prosecutor's Office-Appellate Unit
- petitioner
- Attorney for other party


MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: October 20, 2014