72305-7

FILED
July 22, 2015
Court of Appeals
Division I
State of Washington

NO. 72305-7-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ABDIRAHMAN WARSAME,

Appellant.

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

APPELLANT'S REPLY BRIEF

NANCY P. COLLINS
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

United States Supreme Court Decisions

Federal Court Decisions

United States Constitution

Washington Constitution

A. ARGUMENT.

Contrary to the State's misrepresentation of the record, Mr. Warsame was denied his right to retain counsel of choice

The State's argument hinges on a single claim that fundamentally misstates the substance and tenor of the statements by the available, proposed replacement attorney. It insists that Mr. Warsame's retained counsel of choice, Teri Rogers Kemp, "agreed" and "admitted" she could not provide effective assistance of counsel to Mr. Warsame. *See, e.g.*, Resp. Brief at 17, 23. These assertions misrepresent Ms. Rogers Kemp's discussion with the court. Ms. Rogers Kemp said that she was "very experienced" and "willing" to represent Mr. Warsame, not that she felt her assistance would fall below professional standards of competence. 1RP 191. She "could do it." 1RP 192. She also said that she thought currently assigned attorney Lucas Garrett was "more familiar with the case" and it would be in Mr. Warsame's best interest to keep him, but at the same time she affirmed her abilities as a capable, experienced trial attorney who was frequently called upon as a quick study in conducting trials. 1RP 191-92.

Contrary to the State's depiction of events, Ms. Rogers Kemp was not starting from scratch. She had met with Mr. Warsame about the

case when the case was first charged and read the probable cause certification, which was an eight-page detailed description of the investigation. 1RP 192; CP 5-12. She was "familiar with the facts of the case." *Id*.

The case only involved a few witnesses who Mr. Garrett had not interviewed until just before trial started, and she would have a pre-arranged three-day adjournment to further prepare. 1RP 6. While these circumstances were not ideal, Mr. Warsame understood and said, "this is my choice" and "my life." 1RP 194. Mr. Warsame did not change his mind despite hearing Ms. Rogers Kemp urge him to consider staying with assigned counsel. *See* 1RP 191-93.

In its response brief, the State pontificates about the importance of an attorney who has the luxury of extensive preparation. It is well-established that the necessity of an investigation is context-dependent. *In re Yates*, 177 Wn.2d 1, 37, 296 P.3d 872 (2013). When counsel may discern the line of defense based on "what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether." *In re Gomez,* 180 Wn.2d 337, 355, 325 P.3d 142 (2014), *quoting Strickland v. Washington*, 466 U.S. 668, 691, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Only an unreasonable failure to further

investigate constitutes deficient performance. *Yates*, 177 Wn.2d at 37. Here, the original attorney had spent minimal time interviewing witnesses, only told Mr. Warsame about medical reports just before trial, the trial only involved a few witnesses, and the intended defense theory hinged on Mr. Warsame's own testimony of self-defense. *See* 3RP 54-55, 106.

The State also elevates defense counsel's obligation to comply with the Rules of Professional Conduct as an absolute requirement. Yet "the RPCs do not embody the constitutional standard for effective assistance of counsel." *In re Gomez,* 180 Wn.2d 337, 349, 325 P.3d 142 (2014). If defense counsel could be reasonably prepared and able to make tactical decisions, no more is required under the right to counsel. In *Morris v. Slappy*, 461 U.S. 1, 5-6, 103 S. Ct. 1610, 75 L. Ed. 2d 610 (1983), the defendant complained about having been assigned a new public defender one and one-half days before trial. The defendant was upset because he thought further investigation was needed. *Id*. at 6. The attorney assured the court that he had time to review the case and could use the upcoming weekend, during trial, for final preparations. *Id*. at 7. The Supreme Court concluded that based on counsel's efforts and his assurance that he believed he was prepared for trial, "it would have

been remarkable" for the court to have concluded anything other the belatedly assigned attorney was competent to proceed. *Id*. at 12.

In Mr. Warsame's case, his newly retained counsel of choice said she could be ready even if the circumstances were less than ideal. Rather than weigh heavily Mr. Warsame's right to counsel of choice, the court insisted that current counsel was more prepared and could not be replaced despite his "utmost respect" for Ms. Rogers Kemp. 1RP 194.

The court failed to accord the right to counsel of choice the heavy deference it is owed. The Sixth Amendment "grants to the accused personally the right to make his defense," because "it is he who suffers the consequences if the defense fails." *Faretta v. California,* 422 U.S. 806, 819-20, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). Mr. Warsame was unequivocal in insisting his choice was to replace Mr. Garrett with Ms. Rogers Kemp even after he heard Ms. Rogers Kemp explain at length that she thought Mr. Warsame should keep Mr. Garrett because he is more familiar with the case. 1RP 191-93.

"A defendant who can hire his own attorney has a different right, independent and distinct from the right to effective counsel, to be represented by the attorney *of his choice*." *United States v. Rivera-*

Corona, 618 F.3d 976, 979 (9th Cir. 2010). If an accused person can afford to hire counsel, he is entitled to counsel of choice "unless a contrary result is compelled by 'purposes inherent in the fair, efficient and orderly administration of justice.'" *Id*., citing *United States v. Ensign*, 491 F.3d 1109, 1115 (9th Cir.2007) (emphasis added). "When there is no threat of a delay in the proceedings," a defendant "may, consistent with her right to choice of counsel, freely substitute one retained counsel for another, without showing a conflict with assigned counsel. *Id*. at 984 (Fisher, J., concurring).

Because an additional constitutional right is at stake, other than the right to adequate representation, the court's decision-making authority is constrained and it must presume counsel of choice unless "compelled" to reach a contrary decision. *Id*. at 979.

The State's heavy reliance on *Wheat v. United States*, 486 U.S. 153, 159, 108 S.Ct. 1692, 1697, 100 L.Ed. 2d 140 (1988) is incorrect. In *Wheat*, the court characterized the "the essential aim of the Sixth Amendment" as the "guarantee" of "an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers." But superceding this analysis, the *Gonzalez-Lopez* Court explained that the

right to effective assistance of counsel is grounded in the fair trial provision of the due process clause, not the Sixth Amendment. *United States v. Gonzalez–Lopez,* 548 U.S. 140, 147-48, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006).

The root meaning of the Sixth Amendment is the right to select counsel of one's choice, not the fair trial right at issue in weighing counsel's preparation and its effect on the trial. *Id*. *Gonzalez-Lopez* dictates the result here, where the court failed to accord the necessary deference to Mr. Warsame's request for a different attorney who would not delay the proceedings and who would be able to adapt to the self-defense theory Mr. Warsame intended to present. *Wheat* involved a serious potential conflict, where one attorney was representing three people, each of whom might testify or incriminate each other in the same proceeding, and focused on the effectiveness of counsel. 486 U.S. at 159. It did not involve a judge balancing a qualified attorney against another attorney and deciding that the most qualified must have the case over the defendant's express objection.

Mr. Warsame's request was made understanding that the trial had started, he would not delay the proceedings, and his requested counsel did not believe she was the best prepared attorney available.

1RP 193. Because Ms. Rogers Kemp said she was available, ready, and capable, and the court also respected her skills, Mr. Warsame retained the overarching right to exert reasonable control over his defense by selecting a replacement attorney who would not delay the proceedings. *See Faretta*, 422 U.S. at 819–820; *Gonzalez–Lopez*, 548 U.S. at 147-48.

B. CONCLUSION.

For the foregoing reasons and those addressed in Appellant's Opening Brief, Mr. Warsame was denied his right to counsel as guaranteed by the Sixth Amendment and article I, section 22, requiring a new trial.

DATED this 22nd day of July 2015.

. Respectfully submitted,

s/ Nancy P. Collins
NANCY P. COLLINS (28806)
Washington Appellate Project (91052)
Attorneys for Appellant

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 72305-7-I
v.	)	
	)	
ABDIRAHMAN WARSAME,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 22ND DAY OF JULY, 2015, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] STEPHANIE KNIGHTLINGER, DPA [paoappellateunitmail@kingcounty.gov] [stephanie.knightlinger@kingcounty.gov] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	( ) ( ) (X)	U.S. MAIL HAND DELIVERY AGREED E-SERVICE VIA COA PORTAL
[X] ABDIRAHMAN WARSAME 23123 136TH PL SE KENT, WA 98042	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 22ND DAY OF JULY, 2015.

X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710