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Sep 01, 2016
Court of Appeals
Division I
State of Washington

COA No. 73324-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

JESSICA CARDE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF KING COUNTY

The Honorable Timothy Bradshaw

REPLY BRIEF

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TABLE OF CONTENTS

A. REPLY ARGUMENT 1

 1. Denial of the right to counsel for trial. 1

 2. Denial of the right to counsel for purposes of restitution hearing – this situation involved privately retained counsel. 4

a. The Respondent acknowledges Hampton and Gonzalez-Lopez, but fails to consider that the trial court erroneously evaluated Ms. Carde’s claims of her preferred defense to restitution, and regarding necessary evidence, against the “appointed counsel” standard which does not permit a defendant to direct strategy of the litigation. 4

b. Reversal is required. 7

 3. Costs on appeal. 7

B. CONCLUSION 8

TABLE OF AUTHORITIES

WASHINGTON CASES

State v. Aguirre, 168 Wn.2d 350, 229 P.3d 669 (2010) 5

State v. Hampton, 184 Wn.2d 656, 361 P.3d 734 (2015) 4

State v. Roth, 75 Wn. App. 808, 881 P.2d 268 (1994). 5

In re Personal Restraint of Stenson, 132 Wn.2d 668, 940 P.2d 1239
(1997), cert. denied, 523 U.S. 1008 (1998) 2

UNITED STATES SUPREME COURT CASES

Arizona v. Fulminante, 499 U.S. 279, 111 S.Ct. 1246, 112 L.Ed.2d 302
(1991). 7

United States v. Gonzalez–Lopez, 548 U.S. 140, 146, 126 S.Ct. 2557,
165 L.Ed.2d 409 (2006) 5,7

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d
674 (1984) 2

A. REPLY ARGUMENT

I. Denial of the right to counsel for trial.

Ms. Carde has argued that the trial court erroneously denied her requests for new counsel – both (1) as to her substitution of appointed counsel for trial on the charges, and (2) as to her substitution of appointed counsel with *privately retained* counsel, for purposes of restitution and post-trial proceedings.

The Respondent’s argument regarding substitution of trial counsel relies on a contention that the trial court’s earlier granting of an order to substitute new appointed counsel, for original appointed counsel Jonathan Newcomb, establishes that Ms. Carde’s later motions were properly denied. Further, Respondent argues that a subsequent motion to substitute appointed counsel need not be granted where the reasons for seeking a new lawyer fall into the same category as prior requests, including where the reason(s) is ineffective assistance or a breakdown in communications. Brief of Respondent, at pp. 7, 19-21.

The State’s arguments should be rejected. The Respondent erroneously argues that a trial court has the authority to preclude a criminal defendant from requesting new counsel if the trial court has

previously granted a request. Further, each request for new counsel stands on its own. An indigent defendant can be entitled to substitute appointed counsel, if existing appointed counsel and the defendant are so completely unable to work together, beyond mere dislike of the defendant for counsel, such that counsel fails to pursue the accused's basic defense during the litigation. Appellant's Opening Brief, at p. 8 (citing, inter alia In re Personal Restraint of Stenson, 132 Wn.2d 668, 732, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998); and Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

Ms. Carde acknowledges that she presented multiple motions to obtain substitute counsel, including on December 23, 2014 and February 3, 2015. But this was because, despite her efforts, there was a complete breakdown of the relationship. Contrary to the State's argument, the fact that the court had previously granted an *earlier* request by Ms. Carde for new appointed counsel, which she made on December 5, 2013, did not preclude her from later seeking again to have new counsel appointed, if the circumstances warranted substitution. See Brief of Respondent, at p. 6 note 3, and pp. 7-8, 17

note 7, and pp. 18-19. Additionally, the fact that a later motion is based on one or more of these same reasons, does not invalidate the later motion, and the Respondent has not cited any authority that the trial court can preclude the raising of a later motion by telling the defendant that no such motion will be granted, or that the same reason for needing new counsel cannot be raised later – if the circumstances are appropriate, as in this case. BOR, at p. 7 (citing supplemental transcript of December 3, 2013, at pp. 3-5). Contrary to the State’s argument, the fact that the court had previously granted an *earlier* request by Ms. Carde for new appointed counsel, which she made on December 5, 2013, did not preclude her from later seeking again to have new counsel appointed, if the circumstances warranted substitution. See Brief of Respondent, at p. 6 note 3, and pp. 7-8, 17 note 7, and pp. 18-19. The Respondent has not cited any authority that the trial court can preclude the raising of a later motion by telling the defendant that no such motion will be granted. BOR, at p. 7 (citing supplemental transcript of December 3, 2013, at pp. 3-5).

Jessica Carde maintains that her right to counsel was violated at these December 23, 2014, and February 3, 2015 hearings, because it

was made adequately clear to the trial court that there had been a complete breakdown in the attorney-client relationship between her and her appointed lawyer.

2. Denial of the right to counsel for purposes of restitution hearing – this situation involved *privately retained counsel*.

As to new counsel for the restitution hearing, Ms. Carde argues that the Respondent’s argument fails to adequately distinguish between the standards required for new counsel in the circumstance raised in the second set of issues on appeal. Brief of Respondent, at pp. 21, 30-33. This issue involves the restitution hearing, and Ms. Carde argues in reply that the standard for substitution of privately retained counsel was met, certainly, under State v. Hampton, 184 Wn.2d 656, 361 P.3d 734 (2015).

a. The Respondent acknowledges Hampton and Gonzalez-Lopez, but fails to consider that the trial court erroneously evaluated Ms. Carde’s claims of her preferred defense to restitution, and regarding necessary evidence, against the “appointed counsel” standard which does not permit a defendant to direct strategy of the litigation.

The Respondent fails to adequately consider that the standard for substitution is different when private counsel seeks to substitute.

State v. Hampton, 184 Wn.2d 656, 361 P.3d 734 (2015).

The Sixth Amendment guarantees a defendant the right to be represented by retained counsel of choice. Hampton, supra, United States v. Gonzalez-Lopez, 548 U.S. 140, 144-50, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006). The right to select retained counsel of one's choice has been deemed the root meaning of the Sixth Amendment's constitutional guarantee. State v. Aguirre, 168 Wn.2d 350, 365, 229 P.3d 669 (2010); State v. Roth, 75 Wn. App. 808, 824, 881 P.2d 268 (1994).

The Respondent does not adequately respond to Ms. Carde's argument that where she had privately-retained counsel at hand to represent her, the court abused its discretion by failing to apply the correct legal standard under State v. Hampton and Gonzalez-Lopez under the Sixth Amendment, when it relied on existing counsel being "competent" as its primary basis for denying the motion, and a continuance of the post-trial restitution hearing would cause no unreasonable delay. Further, Ms. Carde relies on her argument as to the Hampton factors. AOB, at pp. 20-24.

Ms. Carde argued, in detail, that her attorneys had completely failed to seek out the specified documents and witnesses that would

allow her to defend against the false, or at the very least exponentially inflated, monetary claims of the claimants. 11/10/15RP at 5-7, 12-22.

However, the trial court denied the request simply because existing appointed counsel was able and competent. The court ruled that the case had already been continued, and,

This Court knows these defense counsel still of record to be competent and served in that capacity at trial. In other words, there's no adequate showing or good cause before this Court to grant the request to substitute private counsel.

11/10/15RP at 6. This was not the correct legal analysis under Hampton where Ms. Carde was now requesting that she be represented by retained counsel. Because there was a failure to apply the correct legal standard, reversal is required. In this new context, Ms. Carde's complaints about the basic strategy of the case being pursued were required to be given far more dominant weight than the trial court gave them. In comparison to indigent defendants who are entitled only to an attorney who is not incompetent below the standard of Strickland v. Washington, the right to counsel of choice guarantees a defendant the right to be represented by a retained attorney who he or she selects precisely because the client may steer strategy with greater

specificity than may the indigent represented.

b. Reversal is required.

Violations of the right to counsel require reversal. When a court unlawfully deprives an individual of her Sixth Amendment right to counsel, reversal is required. “[T]he erroneous denial of counsel bears directly on the ‘framework within which the trial proceeds’ – or indeed on whether it proceeds at all.” Gonzalez-Lopez, 548 U.S. at 150 (quoting Arizona v. Fulminante, 499 U.S. 279, 310, 111 S.Ct. 1246, 112 L.Ed.2d 302 (1991)). As such it constitutes structural error. Gonzalez-Lopez, 548 U.S. at 150. The violation of Ms. Carde’s right to counsel requires reversal of her convictions and sentence, or in the alternative, requires reversal of the restitution order.

3. Costs on Appeal. This Court has discretion not to allow an award of appellate costs if the State substantially prevails on appeal. State v. Sinclair, 192 Wn. App. 380, 367 P.3d 612, review denied, 185 Wn. 2d 1034 (2016). The defendant’s inability to pay appellate costs is an important consideration to take into account in deciding whether to disallow costs. Sinclair, *supra*. Here, the trial court found Carde indigent for purposes of appeal, and although the trial court stated

that it would consider recoupment of defense attorney fees, the court stated that restitution should be the focus of any repayment, and later orally stated it did waive all non-mandatory legal financial obligations (LFO's). 14RP at 2231-32, 2236 (sentencing hearing).

Ms. Carde's indigency is presumed to continue throughout review absent a contrary order by the trial court. Sinclair; RAP 15.2(f). Given Jessica Carde's continued indigency, this Court should exercise its discretion and disallow appellate costs should the State substantially prevail.

B. CONCLUSION

Based on the foregoing and on her Appellant's Opening Brief, Ms. Carde asks that this Court to reverse her convictions.

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JESSICA CARDE,)	
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Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 1ST DAY OF SEPTEMBER, 2016, 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:

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SIGNED IN SEATTLE, WASHINGTON THIS 1ST DAY OF SEPTEMBER, 2016.



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