

COURT OF APPEALS
2010 MAR 25 P 4:10 *u*

NO. 63997-8-1

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

STATE OF WASHINGTON,

Respondent,

v.

ROBERTO HERNANDEZ,

Appellant.

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

The Honorable Steven J. Mura, Judge

REPLY BRIEF OF APPELLANT

JARED B. STEED
ERIC BROMAN
Attorneys for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

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A. ARGUMENT IN REPLY

COUNSEL'S CONFLICT OF INTEREST ADVERSELY
AFFECTED THE REPRESENTATION AND DEPRIVED
HERNANDEZ OF EFFECTIVE ASSISTANCE OF COUNSEL

1. Hernandez was Denied the Right to Effective Conflict-Free
Counsel

Hernandez argues defense counsel's efforts to serve Stock's interests adversely affected counsel's representation and deprived Hernandez of effective, conflict-free counsel. Brief of Appellant (BOA) at 10, 15-19, 21. The State claims Hernandez cannot demonstrate his trial attorney had an actual conflict of interests that adversely affected his representation. Brief of Respondent (BOR) at 7, 10-17 (citing State v. Dhaliwal, 150 Wn.2d 559, 79 P.3d 432 (2003); State v. Martinez, 53 Wn. App. 709, 770 P.2d 646 (1989), rev. denied, 112 Wn.2d 1026 (1989); State v. Hatfield, 51 Wn. App. 408, 754 P.2d 136 (1988)). The State's reliance on each of these cases is misplaced. None of them permit trial counsel to represent both the accused and an informant who supplied incriminating evidence against the accused.

Hatfield was charged with second-degree assault in connection with a rock-throwing incident. The complaining witness identified Hatfield as the person who hit him with a rock. Hatfield testified Andre Anderson threw the rock. Hatfield's trial counsel informed the court

Anderson was a key witness who could be charged with the crime, and that he was represented in a different matter by another attorney from the Public Defender Association. Hatfield, 51 Wn. App. at 409-10.

According to Hatfield's defense attorney, a conflict arose out of the inability of Anderson's attorney to advise him of his privilege against self-incrimination. Anderson invoked his privilege against self-incrimination after consulting with an attorney appointed by the court who was not a public defender. Hatfield's trial counsel gave no indication the court's resolution of the potential conflict was inadequate. Hatfield, 51 Wn. App. at 411-12.

Hatfield argued the Public Defender Association owed a duty of loyalty both to him and Anderson. Hatfield argued the Public Defender Association's duty to him and Anderson would of necessity be limited by its duty to the other. Finding no ineffective assistance of counsel claim had been established, the court concluded prejudice could not be presumed "because Hatfield does not even allege that his counsel 'actively represented conflicting interests' or that the actual conflict 'adversely affected' his attorney's performance." The court noted Hatfield failed to "identify a single act or omission on the part of his attorney which would suggest that she was caught in a "struggle to serve two masters," or assert

his representation “was *defective* in any way.” Hatfield, 51 Wn. App. at 413-14 (emphasis in original).

Unlike Hatfield, prejudice must be presumed because Hernandez has shown defense counsel’s efforts to serve two masters adversely affected counsel’s representation of Hernandez. Defense counsel’s loyalties to Stock prevented him from calling and questioning Stock about information that would have supported Hernandez’s defense that Stock was biased and unreliable. Furthermore, while screening may be an effective resolution to a potential conflict of interest as it was in Hatfield, no evidence of screening exists in this case.

In Martinez, police officers saw two people in the Bellingham National Bank while responding to the bank’s burglar alarm. A juvenile crawling across the floor noticed the police, then waited for them. The officers saw Martinez run past the juvenile and up the bank’s stairs. Seconds later, officers saw Martinez on the awning outside the second floor. Martinez was arrested and searched. During the search, officers found a small pipe tool on Martinez. Martinez was convicted of second-degree burglary. Martinez, 53 Wn. App. at 710-11.

Different attorneys with the Whatcom County Public Defender’s Office represented Martinez and the juvenile at separate trials. The juvenile initially said he “didn’t know anything about the case.” When

Martinez indicated he wanted to call the juvenile as a witness, the court gave Martinez time to locate the juvenile and learn the substance of his potential testimony and to allow the juvenile to speak with his attorney. Martinez then learned the juvenile would testify Martinez had been in the bank. The next morning, Martinez's counsel informed the court he had spoken with the juvenile, in the presence of his attorney, and based upon this conversation he would not be calling the juvenile to testify. Martinez, 53 Wn. App. at 711-12.

Although the court recognized this was an actual conflict of interests, the conflict did not adversely affect counsel's performance. The court reasoned the juvenile's testimony would have been harmful to Martinez. The court concluded counsel's decision not to call the juvenile served Martinez's best interests. Martinez, 53 Wn. App. at 716.

Nothing in Martinez suggests the juvenile, in an effort to support his own case, supplied incriminating evidence against Martinez. In contrast, here Stock sought to have his case dismissed or reduced in exchange for gathering the incriminating evidence against Hernandez. Moreover, unlike Martinez, Hernandez's defense counsel made no attempt to locate or interview Stock prior to trial. Though the State makes assumptions that defense counsel could neither have located Stock nor that Stock's testimony would have aided Hernandez's defense

(BOR at 15-16), neither assumption is supported by the evidence. Defense counsel was in a position to contact and locate Stock using any information Stock provided to the public defender's office. 2RP 154. Additionally, without Stock's testimony, defense counsel was prohibited from questioning Stock about facts relevant to Hernandez's defense.

Dhaliwal is the third case cited by the State. BOR at 14-15. Dhaliwal was convicted of killing fellow Farwest Cab Company taxi driver Jasbir Bassi. At trial, Dhaliwal was represented by Antonio Salazar who previously represented Gurinder Grewal and Harbhajan Singh on an assault charge in which Dhaliwal was a codefendant. At Dhaliwal's trial, Grewal testified for the State and Singh testified for the defense. Dhaliwal, 150 Wn.2d at 562-65.

Dhaliwal argued Salazar's performance was negatively affected because he was unable to effectively challenge Grewal's testimony about the previous assault case due to his representation of Grewal in that matter. As relevant to this analysis, the court noted there was likely no conflict as to Grewal because Salazar's representation of Grewal was not ongoing at the time of Dhaliwal's trial. Dhaliwal, 150 Wn.2d at 571, n. 8.

Salazar also simultaneously represented Gurcharan Saidpur, Resham Singh, Harbhajan Sidhu, and Surinder Sohal in a separate shareholder action against Farwest. Saidpur and Singh testified for the

defense while Sohal testified for the State at Dhaliwal's trial. Dhaliwal, 150 Wn.2d at 562-65. Dhaliwal argued Salazar's performance was affected by his dual representation of Dhaliwal and Sohal because Salazar failed to object to various hearsay statements and testimony about Dhaliwal's prior bad acts during Sohal's testimony. Dhaliwal, 150 Wn.2d at 571-72.

Finding Salazar thoroughly cross-examined the witnesses Salazar had previously or was currently representing, the court held Dhaliwal's representation was not adversely affected. The court concluded Salazar's failure to object to testimony was a tactical decision that, without more, did not indicate that he was acting under a conflict of interest. Dhaliwal, 150 Wn.2d at 571-73.

Unlike Dhaliwal, the public defender represented Hernandez during an ongoing representation of Stock, requiring a duty of loyalty and protection of Stock's interests. Furthermore, trial counsel's failure to call Stock as a witness cannot be considered a mere trial tactic in a case where the State relied almost exclusively on evidence gathered by Stock. As addressed in Hernandez's opening brief, without Stock's testimony, defense counsel could neither challenge Stock about facts relevant to show how Hernandez had been framed, nor attack Stock's credibility by

questioning him about his motives for cooperating with the State. BOA at 10-19.

2. The Trial Court Erred by Failing to Inquire into Counsel's Conflict

The State also refers to the proper procedure for trial court inquiry into a known or reasonably known conflict. BOR at 9-10. The State acknowledges the trial court must inquire further when the court knows or reasonably should know a conflict exists. BOR at 9. Cuyler v. Sullivan, 446 U.S. 335, 347, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980); State v. Regan, 143 Wn. App. 419, 425-26, 177 P.3d 783 (2008), rev. denied, 165 Wn.2d 1012 (2008). Whether reversal is required absent a timely objection by the defense is of no consequence. In Hernandez's case, the trial court was made aware of the conflict created by the public defender's simultaneous representation of both Hernandez and Stock. The prosecutor mentioned it four times, and went so far as to point out defense counsel was in no position to dispute the State's opposition to the missing witness instruction. 2RP 154. Defense counsel's silence admitted the State's assertions. In any event, Hernandez has demonstrated his trial counsel had an actual conflict that adversely affected counsel's performance. Thus, prejudice must be presumed and reversal is required. Cuyler, 446 U.S. at 349-50; Regan, 143 Wn. App. at 427.

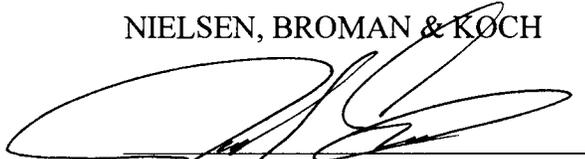
B. CONCLUSION

For the reasons discussed above and in the opening brief, Hernandez's conviction should be reversed and the case remanded for a new trial.

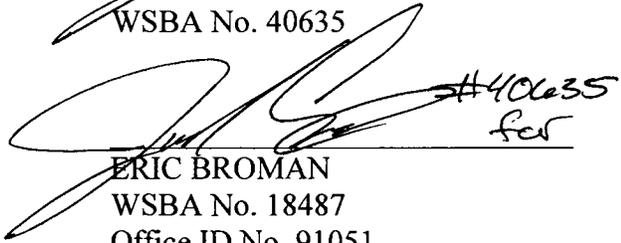
DATED this 24th day of March, 2010.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



JARED B. STEED
WSBA No. 40635



ERIC BROMAN
WSBA No. 18487
Office ID No. 91051

Attorneys for Appellant

Today I deposited in the mails of the United States of America a
letter and envelope, containing a copy of the
enclosed document.
CHATHAM COUNTY, VT
I certify of the laws of the State of
Vermont that the foregoing is true and correct.
Name John Stone Date 3-25-10
Done in Seattle, WA