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FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2011 JUN 30 AM 10:41

No. 65605-8-I

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,
vs.
JARVIS GIBBS,
Appellant.

APPELLANT'S SUPPLEMENTAL PRO-SE BRIEF

JARVIS GIBBS
STAFFORD CREEK CORR. CTR.,
191 CONSTANTINE WAY,
ABERDEEN, WA., 98520

APPELLANT, PRO-SE

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STATUTES AND CONSTITUTIONAL PROVISIONS

The **Sixth Amendment** states in pertinent part that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial...and to have the assistance of counsel for his defence."

The **Fourteenth Amendment** states in pertinent part that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article I, §22 of the Washington State Constitution states "[i]n criminal prosecutions the accused shall have the right to appear and defend...by counsel,... to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial..."

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B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The failure of counsel to interview witnesses, justifies a presumption that Appellant's conviction was insufficiently reliable to satisfy the United States Constitution.

Further, counsel entirely failed to subject the prosecution's case to meaningful adversarial testing.

2. The failure of defense counsel to sever co-defendant's in order to protect Appellant's demand for speedy trial, constitutes ineffective assistance of counsel, in violation of the Sixth and Fourteenth Amendments to the United States Constitution.

SUMMARY OF ARGUMENT

Mr. Jarvis Gibbs was denied effective assistance of counsel, when counsel failed to interview witnesses, and move for severance, in order to protect the Appellant's right to speedy and public trial. The Appellant-Petitioner, respectfully request that this Honorable Court REVERSE, and REMAND, for new trial.

C. STATEMENT OF THE CASE

Mr. Jarvis Gibbs, the Appellant in this direct review, was charged by information with 2-counts of robbery in the first degree, and one count of second degree identity theft. CP-52-53. Appellant was arraigned on October 1, 2009, and at this point, he specifically demanded a Sixth Amendment right to speedy and public trial. RP(October 23, 2009), 2. In this regard, the prosecution admitted that it had a pre-assigned trial on a November 16th trial date. Id.

On November 6, 2009, it was defense counsel's position that the appellant would be ready for trial on November 16th. RP(November 6, 2009), 3. Mr. Gibbs had thus been adamant that he did not under any circumstances, wanted to continue the trial date. RP-4. Counsel failed to ensure that the appellant would not receive any undue continuances by moving for severance of co-defendants. Id. at 5,6.

On November 13, 2009, with co-defendant's present, the mismanagement of the prosecution came to light due to its late discovery. One of the attorneys of appellant's co-defendants had run late, and the matter was set for trial off the arraignment calendar by appellant's counsel. The trial court responded that it didn't know if it could be done. Nevertheless, the prosecution's late discovery became apparent and counsel failed to move

for dismissal of the charges for late discovery as the appellant had requested him. RP 3. Instead, counsel announced that it had "difficulties" in communicating with appellant as another trial tactic. RP 4.

Another trial tactic -- the misuse of the competency statute, by requesting an examination for appellant's competency to stand trial. Id.

On January 15, 2010, Appellant requested that counsel sever co-defendants in order to protect his speedy trial rights. Instead, counsel raised an issue of appellant's competency to stand trial. RP(January 15, 2010), 2. Both the prosecution and the co-defendants raised motions to continue the trial date. Id.

Unsurprisingly, counsel had not interviewed witnesses for the defense, and thus, was not prepared to go to trial.

RP 3. Appellant requested that counsel move to dismiss the charges, and filed motion to dismiss himself, which was ultimately denied. Id. At this point, the appellant demanded that counsel discharge himself due to ineffective assistance. Id.

In this regard, instead of removing himself from the case, counsel moved for competency evaluation. RP 4. The State correctly noted that the appellant cited ineffective assistance of counsel, and claimed that there were problems communicating with his client.

"I don't know how you make a jump from problems with communicating to competency issues."

RP 5.

Based on what the prosecution has observed, there was clearly no competency concerns. Id. Without questioning the appellant, as to his understanding of the charges against him, the trial court ordered an examination at the County jail, and the appellant insisted that counsel move the court for substitution of counsel. The appellant's co-defendant's also filed motions for substitution of counsel because their counsel had apparently not made any progress. RP 6.

Due to counsel's failure to sever co-defendants, the trial was continued. RP 8. Appellant's co-defendant also insisted on going to trial and the State requested an continuance. RP 9.

In summary, Mr. Gibbs' request for speedy trial was ignored or camouflaged by frivolous motions for competency. Counsel failed to interview witnesses, and failed to communicate with him on crucial alibi-defense. Appellant further filed motion to dismiss for violation of his Sixth Amendment right to speedy-trial. RP 11. Consequently, defense counsel failed to adhere to his client's speedy trial right request, by filing motion for severance pursuant to CrR 4.4(c)(2).

To make matters worse, the trial court continued the proceedings on counsel's motion for competency without making the threshold determination. RP(January 15, 2010), 12. Defense counsel had still failed to interview witnesses for the defense by the January 29th hearing. RP 4. The State utterly took advantage of counsel's failure to move for severance of the co-defendants by gaining yet another continuance of the trial date. RP 5. Counsel stated that it would be ready on February 8, 2010, which seemed highly ironically impossible due to the ineffectiveness of counsel.

In order to grant the State a continuance over Appellant's demand for speedy trial, the trial court simply went on a fishing-expedition in order to postpone the trial date. In this regard, the trial court noted that Mr. Gibbs had been trying to substitute his counsel due to ineffective assistance. With this in mind, the trial court granted the appellant substitution of counsel. RP 7,8. Appellant's substituted counsel filed severance on May 4, 2010. RP 4.

Point 1:

D. ARGUMENT

THE PETITIONER RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL, IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. See Strickland v. Washington, 466 U.S. 668, 687 (1984).

To prevail on a claim of ineffective assistance, Mr. Gibbs, the appellant in this direct review, must show that (1) his trial counsel's representation was deficient, and (2) the deficiency prejudiced him. See Strickland v. Washington, 466 U.S. supra; State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Representation is deficient if it falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.3d 1239 (1997). Thus, prejudice occurs when, but for the deficient performance, there is a reasonable probability that the outcome would have been different. See In Re Personal Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998).

In its essentials, counsel's performance is presumed effective. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). As long as there could have been a legitimate reason for counsel's decision, ineffective assistance cannot be established. See

State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994).

Here, the Appellant claims that the failure of counsel to interview witnesses, move to sever co-defendants in order to protect his rights to speedy trial, constitutes ineffective assistance.²

Severance

The trial court should sever defendants' trials at any point in the trial whenever, "upon consent of the severed defendant, it is deemed necessary to achieve a fair determination of the guilt or innocence of a defendant." See CrR 4.4(c)(2)(ii).

Trial court's properly grant such severance motions only if a defendant demonstrates that a joint trial would be "so manifestly prejudicial as to outweigh the concern for judicial economy." State v. Hoffman, 116 Wn.2d 51, 74, 804 P.2d 577 (1991), (quoting, State v. Philips, 108 Wn.2d 627, 640, 741 P.2d 24 (1987)).

Here, due to the Appellant's adamant exercise of a Sixth Amendment right to speedy trial, defense counsel was obligated to move for severance. CrR 4.4(c)(ii).³

²Gibbs also alleges that counsel moved for a frivolous motion for his competency to stand trial, instead of filing the requested motion to discharge himself from the case due to an irreconcilable conflict of interest.

³It is also argued that a massive and quantity of evidence against Appellant's co-defendant's had made it impossible for the jury to separate evidence as it related to each defendant, when determining innocence or guilt. (c)(i).

Here, defense counsel did not protect Mr. Gibbs' demand for speedy trial, by simply moving the trial court to sever co-defendant's, especially when the co-defendants moved for continuances over Mr. Gibbs' objection.

Generally, an attorney can waive his client's CrR-3.3 timely trial rights, even over his client's objection, and even if it results in the trials starting beyond the 60-90 day rule, when a continuance is required in the administration of justice, and does not prejudice the defendant. See CrR 3.3(f)(2); State v. Campbell, 103 Wn.2d 1, 15, 691 P.2d 929 (1984).

Here, Mr. Hartman, [counsel for one of the co-defendants], moved for a 2 and half week continuance, in order to get a statement transcribed, which had nothing to do with the Appellant's case. RP(January 8, 2010), 3.

In this regard, defense counsel knew or should have known, his client's best interest in not waiving his Sixth Amendment right to speedy trial. Instead, counsel feined that "there's still some discovery that we've not received, and so that's interesting." RP 4. Further, in failing to interview potential alibi witnesses, counsel's assistance was rendered ineffective. Consequently, the trial court took advantage of counsel's unprofessional conduct and continued Omnibus for 1-week. RP 5. Appellant opposed the multiple continuances, and counsel's delay-tactics.

Specifically, defense counsel did not file an affidavit in support of the motion and presented little more than a cursory opinion concerning appellant's competence.

In an attempt to sacrifice appellant's demand for speedy trial, by accommodating the co-defendants schedule, made it appear to be more than a trial tactic than an indication of real concern as to the appellant's competency. Counsel attempted to misuse the competency statute, RCW 10.77, which amounts to a conflict of interest. State v. Gordon, 39 Wn.App. 437, 441, 693 P.2d 741 (1985), (citing, United States v. Hall, 523 F.2d 665, 667 (2nd.Cir.1975).

In addition, the trial court failed to question the appellant on whether he understood the charges against him and their consequences.

Appellant was simply not willing to have his attorney continue representation. The attorney's statement concerning appellant's ability to assist in preparing his defense was nothing more than an attempt to request a continuance of the trial date. The statement was not supported by sufficient facts to cause a reason to doubt competency. Therefore, the first prong of the Strickland standard is satisfied by a showing that counsel failed to protect a speedy trial right by moving to sever the co-defendants' cases per CrR 4.4(c)(1).

While a motion for severance may not have been successful, it is axiomatic that the failure to adhere to the client's speedy trial right request, violated the Sixth Amendment right to effective assistance of counsel. CrR 4.4(C)(2)(ii). Counsel's failure to seek severance under these circumstances constitutes deficient performance and prejudiced the case. Added with the failure to interview witnesses that would have cleared the Appellant's innocence, this court should be left with a firm conviction that, but for counsel's unprofessional errors, the result of the proceeding would have been different. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995), (citing, State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987), (adopting 2-prong test in Strickland, 466 U.S. at 694)).

E. CONCLUSION

Mr. Gibbs respectfully request that this court reverse, and remand for new trial based upon the fact that he received ineffective assistance of counsel.

RESPECTFULLY SUBMITTED,

JARVIS GIBBS
Appellant, Pro-se

DECLARATION OF SERVICE BY MAIL
GR 3.1

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STATE OF WASHINGTON
2011 JUN 30 AM 10:41

I, Jarvis Gibbs, declare and say:

That on the 28 day of JUNE, 2011, I deposited the following documents in the Stafford Creek Correction Center Legal Mail system, by First Class Mail pre-paid postage, under cause No. COA# 65605-8-I:

- PRO-SE SUPPLEMENTAL BRIEF;
- _____;
- _____;
- _____.

addressed to the following:

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PROSECUTING ATTY.'S OFF.
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED THIS 28 day of JUNE, 2011, in the City of Aberdeen, County of Grays Harbor, State of Washington.



 JARVIS GIBBS

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