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NO. 67108-1-I

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

REC'D
DEC 05 2011
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

ANTHONY TERRY,

Appellant.

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

The Honorable Beth Andrus, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Appellant was denied his constitutional right to conflict-free representation when the trial court denied his attorney's motion to appoint substitute counsel for a new trial motion alleging ineffective assistance.

Issue Pertaining to Assignment of Error

Every criminal defendant has the right to legal representation on a motion for new trial. Where that motion is based on a claim of ineffective assistance of counsel, the trial court must appoint conflict-free counsel. Did the trial court deny appellant this right when it denied his counsel's motion to withdraw and refused to appoint conflict-free counsel to prepare a motion for new trial?

B. STATEMENT OF THE CASE¹

The State charged appellant Anthony Terry with two counts of promoting commercial sexual abuse of a minor (occurring January 1-June 6, 2010 and July 8, 2010);² second degree promoting prostitution (occurring January 1-June 6, 2010); and witness tampering (occurring

¹ This brief refers to the verbatim reports as follows: 1RP – 1/31/11; 2RP – 2/15/11; 3RP – 2/16/11; 4RP – 2/17/11; 5RP – 2/18/11; 6RP – 2/22/11; 7RP – 2/23/11; 8RP – 2/24/11; 9RP – 3/9/11; 10RP – 3/10/11; 11RP – 3/28/11; 12RP – 3/30/11; and 13RP – 4/28/11.

² The Legislature substantially increased the penalty for that crime as of June 10, 2010. RCW 9.68A.101 (crime is a Class A felony); laws of 2010, ch. 289, § 14 (increasing penalty for crime).

June 6-July 8, 2010). CP 1-10. The first two counts pertained to 17-year-old L.F.; the third referred to Maria Hernandez-Blas, an adult; the fourth did not specify a victim. CP 8-9. The case was tried to the bench after Terry waived his right to a jury. CP 11; 3RP 104-08.

An undercover police officer monitoring websites such as backpage.com for prostitution activity made a date with Hernandez³ at the Warwick Hotel in downtown Seattle on June 6, 2010. 4RP 36-39, 42; 5RP 67. Hernandez was arrested after she agreed to have sex with the officer in exchange for money. 4RP 42-44; 5RP 69-70.

The arresting officers directed Hernandez to send a text message to her pimp requesting condoms for her next assignation. 4RP 44; 5RP 71-73, 79-81. Hernandez sent a message to a phone number identified on her cell phone as "Mack." 5RP 86. She later called that number and repeated her request as police officers listened to the call. 5RP 80.

Terry appeared at Hernandez's hotel room door shortly thereafter. 5RP 82. When he saw the men at the door, Terry exclaimed "oh shit" and ran, but officers quickly tackled him. 4RP 47; 5RP 82-83. Terry had condoms in his pocket. 5RP 84-85.

³ Despite efforts to locate Hernandez and the issuance of a material witness warrant, she did not appear for trial. 2RP 10-11, 70-71; 3RP 102.

Additional investigation led police officers to another room, 903, where officers found L.F. feigning sleep. 4RP 52, 62. Officers discovered that someone had used a cell phone located near L.F. to contact Hernandez's cell phone. 4RP 53-54; 5RP 93. The officers also seized items including a camera, a cell phone, credit cards in Terry's name, a laptop, and condoms, many of which were later introduced at trial. 4RP 58-61.

When the State moved to admit the items at trial, defense counsel Walter Peale objected that the items had been illegally seized. Peale acknowledged, however, that he had failed to file a suppression motion. 4RP 58-59, 62. The court ruled that counsel's objection was untimely. 4RP 59. Shortly thereafter, on cross-examination of a police officer, Peale asked a number of questions apparently designed to elicit that police lacked a basis to search room 903. 4RP 61-67. The prosecutor, however, argued that by this inquiry counsel opened the door to previously excluded, damaging hearsay statements by Hernandez. 4RP 69-70. The court eventually ruled it would not consider the hearsay in support of the underlying charges. 4RP 69; 6RP 3-6.

After Terry was arrested, he agreed to speak with police. 5RP 88-91. Terry explained that a friend had borrowed his phone that night and must have sent Hernandez the messages. 5RP 89. He admitted Hernandez

was an acquaintance and explained he knew L.F. through Hernandez. 5RP 90.

Terry was jailed the two weeks following his arrest and made a number of calls to L.F.'s residence. 7RP 47, 58. The calls contain conversations arguably supporting the State's theory that Terry knew L.F. was underage and that he was directing L.F. to advertise sex on the Internet in order to raise bail money. Ex. 15 (CD containing calls); see also Exs. 35-38, 38A (illustrative transcripts of selected calls); 5RP 105 (exhibit 15 admitted); 7RP 73-77 (selected calls played in court); 8RP 161-63 (same); 9RP 14-30 (same).

Police monitored L.F.'s online postings and noticed an advertisement on backpage.com on July 8. 5RP 94; 7RP 17-20. Detective Bill Guyer called the number on the advertisement, and a woman who sounded like L.F. directed Guyer to the Country Inn and Suites in Bothell.⁴ 7RP 29, 63. L.F. and Terry were arrested at that hotel that evening. 7RP 31-37, 63-66.

⁴ Jason Hoffman, a taxi driver who knew L.F. and Terry, testified Terry gave him money to rent the hotel room so Terry could rendezvous with an out-of-town girlfriend. 6RP 17-20, 56-59. Matthew Taylor, a friend of Terry, testified Terry gave him money to rent a room at the Warwick but, like Hoffman, denied Terry planned to use the room for prostitution purposes. 6RP 80; 7RP 8-9.

A different detective examined cell phones, laptops, and camera seized by police on June 6 and July 8. 6RP 104, 108-13; 7RP 70-73. The laptops and camera contained pictures of L.F. and Hernandez posing provocatively, L.F. alone in such poses, and a number of photos of L.F. and Terry together in motel rooms and other settings. 6RP 127-57, 206-24; 8RP 152-53. The laptops also contained Internet history documenting the submission of advertisements to backpage.com and similar websites. 6RP 164-95. Analysis of the cell phones showed, among other things, 200 text messages between Terry and L.F. on July 8. 9RP 39; 10 RP 56.

L.F. was arrested and prosecuted for promoting prostitution based on her involvement in the June 6 incident at the Warwick. The trial court ordered her to testify in Terry's case because the State had granted her broad immunity. 7RP 55, 79-84. L.F. acknowledged working as a prostitute since she was 15 years old but denied ever having a pimp, given her preference to work independently. 7RP 88-91; 8RP 47-49, 58-59, 63, 92-97. L.F. maintained that Terry was merely an acquaintance and she could not remember talking to Terry while he was incarcerated. 7RP 105, 118-21, 143; 8RP 45, 123. In addition, L.F. explained Terry was at the Bothell hotel because he could provide her with marijuana. 7RP 127. At one point in their acquaintanceship, L.F. showed Terry a forged identification card indicating she was over 18. 8RP 120-23.

Terry took the stand and denied acting as pimp for either Hernandez or L.F. He testified his myspace.com page, which proclaimed “images in this slideshow may contain a pimp in action,” pertained to his career as a hip-hop musician, not a promoter of prostitution. 10RP 68-74, 110, 148. He admitted, however, that he was present at the hotels in his capacity as a marijuana dealer. 10RP 78. In any event, L.F. showed him an identification card indicating she was over 18. 10RP 77.

The court found Terry guilty as charged and entered findings of fact and conclusions of law to that effect. CP 12-32. The court set sentencing for a month later. 12RP 2; 13RP 2. At the beginning of the sentencing hearing, Peale informed the court:

I had an opportunity before Court this morning [to] speak to [Mr. Terry] about the sentencing hearing. One of the things we discussed is how he wanted to proceed and I would advise he would urge upon the Court I was ineffective at trial. He'd like an attorney appointed to represent him for that question and for the purposes of pre-sentencing argument.

13RP 2.

The court summarily denied the motion and sentenced Terry to a low-end standard range sentence of 240 months of incarceration. 13RP 2-3.

C. ARGUMENT

THE COURT ERRED WHEN IT DENIED TERRY'S REQUEST FOR THE APPOINTMENT OF CONFLICT-FREE COUNSEL.

The Sixth Amendment and article 1, § 22 of the Washington Constitution guarantee an accused the right to representation at all critical stages of a criminal prosecution. State ex rel. Juckett v. Evergreen Dist. Ct., 100 Wn.2d 824, 828, 675 P.2d 599 (1984). The right to counsel extends to those stages in which a defendant's rights may be lost, defenses waived, privileges claimed or waived, or in which the outcome of the case is otherwise substantially affected. State v. Agtuca, 12 Wn. App. 402, 404, 529 P.2d 1159 (1974); see also State v. Harell, 80 Wn. App. 802, 804, 911 P.2d 1034 (1996) (“A stage is critical if it presents a possibility of prejudice to the defendant.”).

A criminal defendant is merely considered an “accused person” – and therefore entitled to this right – until formal judgment and sentence have been entered. McClintock v. Rhay, 52 Wn.2d 615, 616, 328 P.2d 369 (1958); see also State v. Rupe, 108 Wn.2d 734, 741, 743 P.2d 210 (1987) (right to counsel extends through sentencing), cert. denied, 486 U.S. 1061 (1988). Every defendant therefore has the right to conflict-free counsel when seeking to challenge a conviction before entry of the judgment. Harell, 80 Wn. App. at 804 (post-guilty-plea challenge).

Here, once the court learned Terry was alleging that Peale was ineffective, there was a conflict of interest between Peale and Terry. See, e.g., United States v. Soldevila-Lopez, 17 F.3d 480, 486 (1st Cir. 1994) (when pursuit of a client's interests would lead to evidence of an attorney's malpractice, actual conflict of interest may result). The court's summary denial of the motion for new counsel left Terry without conflict-free counsel to pursue his ineffective assistance claim in a motion for a new trial.

In Harell, this Court held that when a defendant moves to withdraw his plea based on ineffective assistance, he is entitled to conflict-free counsel for the motion. Harell was denied this right because his attorney (against whom he made the claim) could not assist him and, in fact, became a witness against him. 80 Wn. App. at 805. Such a denial of counsel is presumed prejudicial and warrants reversal without a harmless error analysis. Id.

In this case, as in Harell, Terry was left without counsel to advocate for him. Although Terry was appointed counsel on appeal, this was no substitute for counsel on a motion for a new trial. Deficient representation is often not apparent from the trial record because the mistakes occur outside the formal court proceedings. But claims for which the record was not sufficiently developed will not be heard on

appeal. See State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995) (defendant must provide an adequate record demonstrating deficient performance).

Based on counsel's ineffective assistance, Terry had a conflict with the only attorney who could have made such a record. While the existing record suggests instances of ineffective assistance,⁵ the trial court's ruling left Terry without conflict-free counsel to make the appropriate record in support of his ineffective assistance claim.

This Court should therefore remand for the appointment of conflict-free counsel to further explore Terry's claims of ineffective assistance. Harell, 8 Wn. App. at 805.

⁵ 4RP 58-59 (acknowledging failure to file motion to suppress); 4RP 61-70; 6RP 3-6 (in haste to correct failure to file motion to suppress, nearly opening door to damaging hearsay).

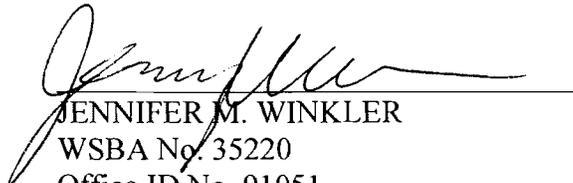
D. CONCLUSION

Terry's case should be remanded and conflict-free counsel appointed for his motion for new trial based on ineffective assistance.

DATED this 5TH day of December, 2011.

Respectfully submitted,

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)	
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v.)	COA NO. 67108-1-1
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ANTHONY TERRY,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 5TH DAY OF DECEMBER, 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] ANTHONY TERRY
DOC NO. 885143
COYOTE RIDGE CORRECTIONS CENTER
P.O. BOX 769
CONNELL, WA 99326

SIGNED IN SEATTLE WASHINGTON, THIS 5TH DAY OF DECEMBER, 2011.

x Patrick Mayovsky

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