

67108-1

67108-1

NO. 67108-1-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ANTHONY MICHAEL TERRY,

Appellant.

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2012 MAR -8 PM 2:19

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BETH M. ANDRUS

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

JAMES M. WHISMAN
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

TABLE OF CONTENTS

	Page
A. <u>ISSUE</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
C. <u>ARGUMENT</u>	4
D. <u>CONCLUSION</u>	13

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Martel v. Clair, No. 10-1265
(USSC, filed Mar. 5, 2012) 8

Washington State:

State v. Adel, 136 Wn.2d 629,
965 P.2d 1072 (1998)..... 6

State v. DeWeese, 117 Wn.2d 369,
816 P.2d 1 (1991)..... 6

State v. Harell, 80 Wn. App. 802,
911 P.2d 1034 (1996)..... 5, 12, 13

State v. Lopez, 79 Wn. App. 755,
904 P.2d 1179 (1995)..... 6, 7

State v. McFarland, 127 Wn.2d 322,
899 P.2d 1251 (1995)..... 10

State v. Rosborough, 62 Wn. App. 341,
814 P.2d 679 (1991)..... 6

State v. Schaller, 143 Wn. App. 258,
177 P.3d 1139 (2007)..... 5

State v. Sinclair, 46 Wn. App. 433,
730 P.2d 742 (1986)..... 6

State v. Stark, 48 Wn. App. 245,
738 P.2d 684 (1987)..... 6, 7

State v. Stenson, 132 Wn.2d 668,
940 P.2d 1239 (1997)..... 6

Rules and Regulations

Washington State:

CrR 3.5..... 11

A. ISSUE

Is remand for a hearing on ineffective assistance of trial counsel unnecessary where the defendant has identified no conflict of interest and no legal error that trial counsel could have remedied through different representation?

B. STATEMENT OF THE CASE

Anthony Michael Terry was arrested on June 6, 2010 after he was found to be assisting two young women in committing acts of prostitution at the Warwick Hotel in Seattle. CP 4. While in jail, Terry made numerous telephone calls to L.F., a juvenile, directing her to continue in prostitution so she could post his bail. CP 4-5. Terry and L.F. also coordinated their stories to thwart prosecution. Id. Defense counsel, Mr. Walter Peale, filed a notice of appearance on Terry's behalf on June 11, 2010. CP 64-66.

On June 24, 2010, Terry posted a \$30,000 bond and was released from jail. About two weeks later on July 8, 2010, Terry was rearrested in the company of L.F., the juvenile, as she was attempting with Terry's assistance to set up a "date" with a police detective at a local motel. CP 62. Terry was arrested again.

Based on this more recent conduct, Terry was charged under King County cause number 10-1-06237-4 SEA with Promoting Commercial Sex Abuse of a Minor and Tampering with a witness. CP 1-2. The information was later amended to consolidate all pending charges for a single trial. The amended information charged two counts of Promoting Commercial Sex Abuse of a Minor (L.F. was the named victim), Promoting Prostitution in the Second Degree (a young woman who was not a juvenile was the named victim), and Tampering with a Witness (L.F.). CP 8-10.

Terry ultimately waived a jury trial and the case was tried to the court. CP 11. After hearing the testimony and reviewing the evidence, the Honorable Beth M. Andrus entered detailed findings of fact and conclusions of law finding Terry guilty as charged. CP 15-31 (attached as Appendix A).

At sentencing, the prosecutor noted that he had received that morning a presentence report from defense counsel which "raised an issue with respect to withdrawal." 13RP 2. The defense report said

The defense makes the following motions, to be considered at sentencing: 1. Mr. Terry will assert his defense representation was ineffective at trial. This

assertion puts in issue the performance of trial counsel. Trial counsel will seek permission to withdraw and for appointment of new counsel to represent Mr. Terry at sentencing and to review the file to address the issue raised and to present any appropriate request for relief.

CP 72. The report also said that "Mr. Terry does not wish to make an allocution. Mr. Terry will request an appeal and does not want additional comments in the record." CP 72. Once the hearing began, defense counsel addressed the court as follows:

MR. PEALE: Good morning, Your Honor. I'm here with Mr. Terry and I had an opportunity before Court this morning about [sic] speaking to him 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 purposes of pre-sentencing argument.

THE COURT: Thank you, Mr. Peale. I too received your pre-sentence report this morning. I'm going to deny your request to withdraw at this time. We will proceed to sentencing this morning. After that it is also my understanding that Mr. Terry wishes to proceed in forma pauperis with an appeal and I'm willing to sign documentation to that effect and you can withdraw after the sentencing hearing.

13RP 2-3.

The sentence range on Count II was longest (240 months - 318 months) so it effectively controlled the sentence. The prosecutor recommended 318 months. 13RP 3-8. The court considered a letter faxed from victim L.F. to the court in which she continued to proclaim Terry's innocence. 13RP 6-7; CP 75. She made similar comments over the telephone in open court. 13RP 11. Defense counsel then began his remarks to the court by saying, "Mr. Terry has asked I not allocute on his behalf because he has an appeal pending or will have." 13RP 9. Counsel asked for a sentence at the low end of the range and stated his reasons for such a sentence. Id.

The court asked Terry if there was anything he would like the court to know before it imposed sentence. Terry replied, "No, Your Honor." 13RP 10. The court imposed a sentence of 240 months, the bottom of the range on Count II. CP 38.

C. ARGUMENT

Terry asserts that he 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." Br. of App. at 1. He is mistaken.

Appointment of a new lawyer is required only where there exists an actual conflict of interest between counsel and the defendant. Although defense counsel mentioned at sentencing that Terry was alleging deficient performance, neither he nor Terry provided additional detail at that time and Terry declined to address the court. 13RP 2, 10. Moreover, appellate counsel has conducted a full review of the proceedings below and has identified no conflict of interest. Thus, even if the sentencing court should have inquired further, any error was harmless.

When a defendant alleges before sentencing that trial counsel was ineffective, a conflict can exist between counsel and the client, leaving the defendant without an advocate for his position. State v. Harell, 80 Wn. App. 802, 911 P.2d 1034 (1996). Whether such a conflict actually exists, however, depends on whether there is any basis for the defendant's complaint; there is no rule that requires appointment of new counsel upon any claim of ineffective assistance. A defendant must show good cause to warrant substitution of counsel, such as a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant. State v. Schaller, 143 Wn. App. 258, 267-68, 177 P.3d 1139 (2007) (citing State v.

Stenson, 132 Wn.2d 668, 734, 940 P.2d 1239 (1997)). “[I]f a defendant could force the appointment of substitute counsel simply by expressing a desire to raise a claim of ineffective assistance of counsel, then the defendant could do so whenever he wished, for whatever reason.” State v. Stark, 48 Wn. App. 245, 253, 738 P.2d 684 (1987) (citing State v. Sinclair, 46 Wn. App. 433, 436-37, 730 P.2d 742 (1986)). Thus, a mere allegation of ineffective assistance does not create an inherent conflict of interest requiring substitute counsel. State v. Rosborough, 62 Wn. App. 341, 346, 814 P.2d 679 (1991). Whether dissatisfaction with court-appointed counsel is meritorious and justifies appointment of new counsel is matter within discretion of trial court. State v. DeWeese, 117 Wn.2d 369, 375, 816 P.2d 1 (1991). To determine whether a conflict exists, the trial court should conduct an inquiry. State v. Lopez, 79 Wn. App. 755, 767, 904 P.2d 1179 (1995), *disapproved of on other grounds by*, State v. Adel, 136 Wn.2d 629, 965 P.2d 1072 (1998).

The trial court in this case did not conduct an inquiry based on Terry's terse statements. This is likely due to the fact that the court did not witness deficient performance at trial, and because Terry seemed to indicate that he did not want to discuss the matter

at sentencing. It might also be that the trial court could see from the demeanor of Terry and his lawyer that they simply wanted to preserve a claim that Peale was ineffective, but did not want to discuss the issue further on that day. Still, it would have been better for the court to inquire before ruling.

Terry seems to suggest on appeal that error in failing to inquire requires automatic remand. He is mistaken. This Court has previously held that error in summarily denying a motion to substitute counsel can be harmless.

The “peremptory denial” of a defendant’s request for new counsel is harmful only if counsel’s performance actually violated the defendant’s Sixth Amendment right to effective assistance of counsel. . . . To prove an attorney’s representation was unconstitutionally ineffective, a defendant must show (1) that, considering all the circumstances, the attorney’s performance was deficient, i.e., that it fell below an objective standard of reasonableness; and (2) that the defendant was prejudiced, i.e., there is a reasonable probability that the result would have been different but for the attorney’s deficient performance.

Lopez, 79 Wn. App. at 767 (citation omitted); State v. Stark, 48 Wn. App. at 253 (“Our own review of the record reveals no indication that Stark was not well represented by [defense counsel]”). More recently, the Supreme Court held that a trial court’s failure to properly inquire of a defendant who wanted

substitute counsel was not reversible error where it was clear from the record that the motion would have been denied. Martel v. Clair, No. 10-1265, slip op. at 14-16 (USSC, filed Mar. 5, 2012).

Any deficiency in the inquiry here was harmless because, even after appellate counsel's careful review of the record, there is no basis to claim that Peale's work was prejudicially deficient.

Peale represented the defendant since the first case was charged in June, 2010. CP 64-66. Peale continued on the case through closing arguments on March 28, 2011 and sentencing on April 28, 2011. 11RP; 13 RP. During that time, nearly a year, the record does not reveal any animosity or personal conflict between Terry and Peale, and it appears that Terry never raised an issue as to Peale's competence. Counsel ably litigated numerous pretrial motions, cross-examined witnesses, presented closing argument, and argued scoring issues at sentencing. The sentencing judge was also the trial judge so she had ample opportunity to observe interactions between counsel and the defendant. She evidently saw nothing in the relationship between Peale and Terry to signify a true conflict.

The trial court was also likely skeptical about Terry's accusations at sentencing. The court heard him testify. It

expressly found that "Terry's testimony that he was merely asking [L.F.] to post an ad for the sale of a car was not credible." CP 23, FOF #20. Terry's story that he was simply dealing drugs rather than promoting prostitution, or that he was unaware of L.F.'s age, was rejected by the court's detailed ruling. See, e.g., CP 24, FOF #29 ("The cell phone text messages between Terry and [L.F.] on July 8, 2010, and the contents of the HP laptop establish beyond a reasonable doubt that L.F. was once again engaged in prostitution and that Terry was fully aware of, and in fact helping her, with these illegal activities"). The trial court also saw the defendant flat-out lie in court under oath, and then admit his lie when caught. Specifically, when asked about photographs of L.F. in suggestive poses taken in Hawai'i, Terry replied, ". . . I was never there." 10RP 109. Just before cross-examination, however, when the prosecutor offered documents showing Terry had purchased airline tickets to Hawai'i at the relevant time, Terry admitted he had lied under oath. 10RP 115-23, 145-48. These substantial lapses in credibility likely (and appropriately) influenced the trial court's decision to deny Terry's belated motion for new counsel. In other words, from all appearances the motion was facially incredible, and Terry was not credible, either.

Moreover, appellate counsel has not raised a single claim of error arising from the trial or sentencing, other than the failure of the trial court to inquire further at sentencing. Appellate counsel does not assign error to a single finding of fact nor challenge a single conclusion of law. Likewise, Terry has filed a pro se statement of additional grounds and, although he takes issue with several findings of fact and legal conclusions, he does not assert that his lawyer was deficient in presenting his case, and he does not ask for an opportunity to develop the facts of that claim. There is no basis to conclude that counsel was ineffective or that an actual conflict of interest existed between Peale and Terry. Thus, even if the court should have inquired further into a potential conflict, the shortcoming was not harmful.

Had either appellate counsel or Terry raised a claim of ineffective assistance of counsel on appeal, it might be sensible to remand for a hearing in light of the fact that Terry tried to raise the claim in the trial court. In other words, it would perhaps be inappropriate to require him to prove his allegations in a personal restraint petition when he had tried to develop the record before sentencing. Cf. State v. McFarland, 127 Wn.2d 322, 899 P.2d 1251 (1995). However, in light of the fact that neither appellate

counsel nor Terry identify deficiencies in counsel's representation, there is no basis to say counsel should have performed better, and the trial court's limited inquiry was harmless. Remand is unnecessary.

Appellate counsel alludes to but fails to explain two potential deficiencies in representation; neither shows that counsel was deficient. First, appellate counsel says that Peale could have brought a motion to suppress evidence but did not. Br. of App. at 8-9 (citing 4RP 58-59). This seed of a constitutional claim is unsupported by any discussion of facts in the record or applicable law. The circumstances surrounding Terry's arrest were developed in the CrR 3.5 hearing and at trial. If a colorable search and seizure violation – and a claim of deficient performance in failing to litigate that violation – was possible, appellate counsel would surely have developed the claim. And, such an argument on appeal might have justified a remand, under these circumstances, to develop any facts not previously adduced. But, with absolutely no explanation as to what rights were violated, and how, there is no basis to even suspect that Peale's performance was deficient.¹ Moreover,

¹ Trial counsel likely did not challenge the search of the Warwick Hotel room because to claim a privacy interest in that room would have been to undercut Terry's version of events. Although the State's theory was that Terry had rented

appellate counsel fails to explain what evidence would have been suppressed and why that would have altered the result of trial.

Second, appellate counsel suggests that Peale may have been deficient when, in haste to correct an alleged failure to file a motion to suppress, counsel "nearly opened the door to damaging hearsay." Br. of App. at 9 n.5 (citing 6RP 3-6). But, because the trial court disallowed the "damaging hearsay," Terry cannot show prejudice. Thus, it does not follow that counsel was constitutionally ineffective on that point.

Finally, Terry's reliance on State v. Harell is inapt. Harell pled guilty to three counts of rape and later claimed that his lawyer provided ineffective assistance of counsel in plea negotiations. He moved to withdraw the guilty pleas and the court ordered a hearing to inquire into the matter. At that hearing, defense counsel "declined to assist Harell," the court ordered that the attorney-client privilege was waived, and the lawyer took the stand and testified against Harell under questioning by the prosecutor. Harell, 80 Wn. App. at 803-04. On appeal, the State conceded that Harell

the Warwick room to promote prostitution, 6RP 80-81, Terry denied any role in renting the room, and denied that he had any proprietary or possessory interest in the room; he said he was simply visiting the Warwick to sell marijuana. 10RP 78-79.

was essentially acting pro se at the hearing. The Court of Appeals held that, because the trial court initially determined there was a sufficient showing of ineffective counsel, and because Harell's lawyer testified against him without another lawyer present to defend him, he was denied a lawyer at a critical stage of the proceedings, i.e., a hearing to withdraw his guilty plea, and he was entitled to a new hearing with new counsel. Id. at 804.

Here, the trial court never determined that there was a prima facie showing of ineffective counsel, Peale never declined to assist Terry, and he never testified against Terry at sentencing. Rather, Peale continued to ably represent Terry and successfully advocated for a sentence at the bottom of the standard range. Harell is not controlling.

D. CONCLUSION

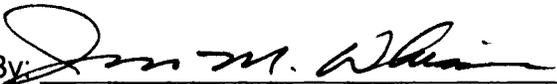
For the foregoing reasons, there is no reason to believe that trial counsel was prejudicially deficient. Thus, although the trial court could have inquired further at sentencing to avoid a potential conflict, there was not actual conflict, so the court's failure to inquire was not prejudicial in this case. Terry's convictions should be affirmed.

Even assuming, however, that this court is inclined to remand, the scope of that remand should be strictly limited to the question of whether there is any factual basis for Terry's claim that counsel was ineffective.

DATED this 8th day of March, 2012.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 

JAMES M. WHISMAN, WSBA #19109
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jennifer Winkler, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. ANTHONY MICHAEL TERRY, Cause No. 67108-1-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

U Brame
Name
Done in Seattle, Washington

3/8/12
Date 3/8/12