

NO. 70651-9-I

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

REC'D
NOV 20 2013
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

DAVID JONES, JR

Appellant.

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

The Honorable Barbara Linde, Judge

BRIEF OF APPELLANT

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COURT OF APPEALS
DIVISION ONE
STATE OF WASHINGTON
[Handwritten Signature]

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A. ASSIGNMENT OF ERROR

1. Appellant was denied his right to effective assistance of conflict-free counsel.

2. The trial court erred in denying appellant's request for appointment of new counsel so that he could pursue a motion to withdraw his guilty plea based on a claim of ineffective assistance of counsel.

Issue Pertaining to Assignments of Error

While represented by an attorney from the Northwest Defender Agency (NDA), appellant pleaded guilty. The attorney that represented appellant during the plea process left NDA before sentencing and a new NDA attorney was assigned.

1. Did the trial court err in denying appellant's request, made before sentencing, for appointment of new non-NDA counsel so he could pursue a motion to withdraw his guilty plea based on a claim his original attorney affirmatively misadvised him about the consequences of pleading guilty?

2. Did refusal to appoint conflict-free deprive appellant of his right to effective assistance of counsel?

B. STATEMENT OF THE CASE

After consulting then NDA attorney Miguel Duran, appellant David Jones, Jr., pleaded guilty to criminal solicitation to deliver cocaine. CP 7-26. Jones subsequently failed to appear for the August 2012 sentencing. RP 18¹; Supp CP __ (sub no. 40, Motion, Certification and Order for Bench Warrant, 8/17/12). Duran and NDA withdrew from representing Jones on September 10, 2012. Supp CP __ (sub no. 43, Notice of Withdrawal of Counsel, 9/10/12).

On May 9, 2013, attorney Kari Boyum, also from NDA, filed a notice of appearance on Jones' behalf. Supp CP __ (sub no. 47, Notice of Appearance and Discovery Demand..., 5/9/13). At a hearing on June 7, 2013, however, Boyum asked to withdraw, noting Jones wished to pursue a motion to withdraw his guilty plea based on a claim of ineffective assistance of counsel by Duran, who no longer worked at NDA. RP 1-4. Boyum argued she could not represent Jones in the claim against Duran because it would constitute a conflict of interest, such that she could not even advise Jones whether he had a valid claim or not. RP 4-5.

When questioned directly by the court about the basis for wanting to withdraw his guilty plea, Jones claimed Duran had misadvised him

¹ There is a single volume of verbatim report of proceedings for the dates of June 7, 2013, June 28, 2013, and July 12, 2013, collectively referenced as "RP."

about what sentence recommendations could be made by the defense. RP 7-8. In response, the court informed Boyum that it was denying her motion to withdraw, but would entertain a new motion if it were supported by a declaration from Jones explaining the basis for his assertion that Duran had misadvised him and a brief from Boyum explaining why there was a conflict. CP 31; RP 8-11.

Prior to the next hearing Boyum submitted a "Defense Memorandum on RPC 10.1." Supp CP __ (sub no. 76, filed 10/28/13). The memo includes a declaration from Boyum outlining the chronology of events in Jones' case. It also includes a memorandum arguing Jones was entitled to appointment of new counsel to pursue a motion to withdraw his guilty because he had articulated a factual basis for his claim - that Duran had misadvised him - and under RPC 1.10, Boyum was ethically bound to withdraw. Id.

After considering Boyum's memorandum and a memorandum filed by the State prior to the earlier hearing (CP 27-30), the court once again denied Boyum's request to withdraw, concluding Jones had failed to make a prima facie showing of an arguable basis to withdraw his plea. RP 13-16. Jones was subsequently sentenced to 54 months of confinement. CP 32-39; RP 32. He now appeals. CP 41-44.

C. ARGUMENT

JONES WAS DEPRIVED OF HIS RIGHT TO EFFECTIVE ASSISTANCE OF CONFLICT-FREE COUNSEL.

The Sixth Amendment and Wash. Const. art. 1, § 22 guarantee a criminal defendant's right to effective counsel. In re Personal Restraint of Davis, 152 Wn.2d 647, 672, 101 P.3d 1 (2004). This right is so basic that its denial can never be treated as harmless error. State v. Robinson, 79 Wn. App. 386, 393, 902 P.2d 652 (1995).

Effective assistance includes duties of loyalty and to avoid conflicts of interest. State v. McDonald, 143 Wn.2d 506, 511, 22 P.3d 791 (2001)(citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)); State v. White, 80 Wn. App. 406, 410, 907 P.2d 310 (1995), review denied, 129 Wn. 2d 1012, 917 P.2d 130 (1996). The right to counsel is denied if the case "'loses its character as a confrontation between adversaries.'" Robinson, 79 Wn. App. at 393 (quoting United States v. Cronin, 466 U.S. 648, 656-57, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984)).

A defendant need not show prejudice, and reversal is required, where he establishes an actual conflict of interest that adversely affected counsel's performance. Cuyler v. Sullivan, 446 U.S. 335, 349-50, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980); In re Personal Restraint of Richardson, 100 Wn.2d 669, 677, 675 P.2d 209 (1983), abrogated in part on other grounds, State v.

Dhaliwal, 150 Wn.2d 559, 571, 79 P.3d 432 (2003). An "actual conflict" in the course of representation exists when the interests of the attorney and client diverge with regard to a material factual or legal issue or to a particular course of action. State v. Regan, 143 Wn. App. 419, 427-28, 177 P.3d 783, review denied, 165 Wn.2d 1012, 198 P.3d 512 (2008). Expressed alternatively, "the conflict 'must cause some lapse in representation contrary to the defendant's interests,' or have 'likely' affected particular aspects of counsel's advocacy on behalf of the defendant." State v. Robinson, 79 Wn. App. 386, 395, 902 P.2d 652 (1995) (quoting Sullivan v. Cuyler, 723 F.2d 1077, 1086 (3d Cir.1983) and United States v. Miskinis, 966 F.2d 1263, 1268 (9th Cir.1992))(internal citations omitted).

Similarly, the rules of professional conduct recognize a conflict of interest when a lawyer's personal interests materially limit representation of the client. RPC 1.7(a)(2).²

² RPC 1.7(a)(2) provides that current conflict of interest exists if "there is a significant risk that the representation of one or more clients will be materially limited . . . by a personal interest of the lawyer."

Furthermore, lawyers who are part of the same firm are prohibited from representing a client that another attorney at the firm is prohibiting from representing as a result of RPC 1.7, "unless the prohibition is based on a personal interest of the disqualified lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm." RPC 1.10(a). This prohibition is maintained even if the disqualified lawyer has left the firm if "(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and (2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter." RPC 1.10(b).

As Boyum noted in her memorandum to the court, she had access to "information [regarding Jones] protected by RPC 1.6 and 1.9 as a file is maintained at Northwest Defenders Association for every client." Supp CP ___ (sub no. 76, supra, at 5). As such, if Jones made a prima facie showing Duran was ineffective during the plea process, and the guilty plea was therefore invalid because it was not a knowing, voluntary and intelligent choice, then RPC 1.10 should have prohibited Boyum from representing Jones in his attempt to withdraw his guilty plea based on that claim.

Here, despite the trial court's finding to the contrary, Jones did make a prima facie showing that Duran provided him with ineffective assistance of counsel during the plea process by affirmatively misadvising him about the consequences of pleading guilty and therefore his guilty plea was not knowing, voluntary and intelligent. Specifically, Jones claimed Duran told him he would be able to request a sentence that the plea agreement prohibits him from requesting. RP 7-8. As the discussion below shows, this was enough

"Due process requires an affirmative showing that a defendant entered a guilty plea intelligently and voluntarily." State v. Ross, 129 Wn.2d 279, 284, 916 P.2d 405 (1996); U.S. Const. Amend. XIV, Wash. Const. art. I, § 3. A guilty plea is otherwise invalid. Boykin v. Alabama. 395 U.S. 238, 242-44, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969); State v. Branch, 129 Wn.2d 635, 642, 919 P.2d 1228(1996). This standard is reflected in CrR 4.2(d), "which mandates that the trial court 'shall not accept a plea of guilty, without first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea.'" State v. Mendoza, 157 Wn.2d 582, 587, 141 P.3d 49 (2006). "Under CrR 4.2(f), a court must allow a defendant to withdraw a guilty plea if necessary to correct a manifest injustice." In re Pers. Restraint of Isadore,

151 Wn.2d 294, 298, 88 P.3d 390 (2004). "An involuntary plea produces a manifest injustice." Isadore, 151 Wn.2d at 298.

A guilty plea is not knowingly made when it is based on misinformation regarding a direct sentencing consequence. Mendoza, 157 Wn. 2d at 584, 590-91. A guilty plea is also invalid if a defendant is affirmatively misadvised about even collateral consequence. State v. A.N.J., 168 Wn.2d 91, 114, 225 P.3d 956 (2010); see also In re Pers. Restraint of Quinn, 154 Wn. App. 816, 836-37, 226 P.3d 208 (2010) (in holding defendant entitled to withdraw plea because not informed of longer community custody term, finding no meaningful distinction between characterizing the term of community custody as either a direct consequence or a collateral consequence of his guilty plea); Padilla v. Kentucky, 559 U.S. 356, 130 S. Ct. 1473, 1481-82, 1486, 176 L. Ed. 2d 284 (2010) (declining to reach question of whether deportation is direct or collateral consequence in holding counsel was constitutionally deficient in failing to inform client whether his plea made him subject to deportation).

It is important to recognize the issue here is not whether Duran *actually* misadvised Jones, but instead whether Jones' claim that he did is sufficient to warrant appointment of conflict-free counsel to pursue that claim. In light of the cases cited above, it was. This Court should remand

for appointment of non-NDA counsel to assist Jones in pursuing a motion to withdraw his guilty plea.

D. CONCLUSION

For the reasons stated, this Court remand for appointment of conflict-free counsel for Jones so he can pursue his plea withdrawal motion.

DATED this 20th day of November, 2013.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
vs.)	COA NO. 70651-9-1
)	
DAVID JONES,)	
)	
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 20TH DAY OF NOVEMBER, 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] DAVID JONES
DOC NO. 881312
MONROE CORRECTIONAL COMPLEX
P.O. BOX 777
MONROE, WA 98272

SIGNED IN SEATTLE WASHINGTON, THIS 20TH DAY OF NOVEMBER, 2013.

X *Patrick Mayovsky*