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71856-8

FILED
September 8, 2015
Court of Appeals
Division I

COA NO. 71856-8-I

State of Washington
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ADRIAN SASSEN VANELSLOO,

Appellant.

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

The Honorable Deborra Garrett, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE COURT VIOLATED SASSEN VANELSLOO'S CONSTITUTIONAL RIGHT TO BE REPRESENTED BY COUNSEL OF CHOICE AND THIS STRUCTURAL ERROR REQUIRES REVERSAL OF THE CONVICTIONS.

The State's presentation of events leading up to Sassen Vanelstloo's request for private counsel is one-sided. Some of the delay cannot be fairly attributed to assigned counsel and Sassen Vanelstloo himself did not cause the delays.

For example, a conflict of counsel issue existed for a period of time due to assigned counsel's representation of another client. 9RP 4-8; 10RP 6; 14RP 30-31; CP 159. The conflict of counsel issue was a major cause of delay in Sassen Vanelstloo's case. 12RP 32. The trial court recognized this was not Sassen Vanelstloo's fault. 12RP 32. The court understood that Sassen Vanelstloo, "through no fault of his own but through a series of unfortunate events has experienced a great deal of delay getting his cases to trial." 12RP 32. The court recognized Sassen Vanelstloo was unhappy with the delay. 12RP 32.

In June, assigned counsel requested a continuance in cases two and three because she needed to interview a witness in case two, but that witness was currently on warrant status after the State had promised to facilitate an interview but then declined to do so. 4RP 9-12, 14-15. The

State, through its failure to promise an interview, caused the need for this continuance. It was not until August 29 that the material witness in case two was located. 5RP 6. The cases had been proceeding chronologically and counsel was investigating and interviewing witnesses in chronological order of the three cases. 4RP 8, 12.

The stage was set for protracted delay from the start when the court commissioner declared at the preliminary appearance that one attorney from the Public Defender's Office would be assigned to represent Sassen Vanelsloo on all three cases that were pending. 1RP 7. Assigned counsel, the parties and the court for a long time proceeded on the assumption that the first two cases would go to trial before case three (the present case on appeal). 4RP 8, 12; 5RP 9; 12RP 23-25. As a result, counsel gave case three the lowest priority in terms of preparation, believing the first two cases would go to trial first. See 4RP 8 (counsel tells court she was investigating and interviewing witnesses in chronological order of the cases). She described all three cases as "complicated." 4RP 4. The prosecutor agreed. 4RP 5. It was only after one case was dismissed and the other was unexpectedly continued that case three was pushed into the "ready" slot for trial. 6RP 8; 12RP 22-25, 28. This scenario would likely not have occurred had the court not assigned all three cases to one attorney in the first place, rather than divvy up the workload.

The State of course emphasizes the continuances that were granted at assigned counsel's request. The trial court recognized Sassen Vanelstoo was not happy with the repeated continuances. By the time it was put on the record that Sassen Vanelstoo wished to retain private counsel, he had endured a long delay in bringing his case to trial. The delay provided an impetus to seek private counsel to get the case moving. It is not always realistically possible for the accused to quickly realize that private counsel is a better choice than assigned counsel, or for that realization to come to fruition in synchronicity with the trial court calendar. That realization can take time. The case drags on and no viable defense is put on the table. At that point the need for private counsel becomes apparent.

The trial judge said she was "not prepared to order a continuance long enough to allow new counsel to step in and take full advantage of all the court rules that permit a two-week evaluation period and then additional time for determining whether experts are necessary, *hiring those experts, that should have been done before this if that was the defense plan.*" 12RP 36 (emphasis added). In other words, the trial court held assigned counsel's failure to retain an expert against Sassen Vanelstoo's request for private counsel when one of the reasons for wanting private counsel was that assigned counsel did not retain an expert to aid the defense. Underlying the right to counsel of choice is the

recognition that attorneys will differ as to their trial strategy, and "often the most important decision a defendant makes in shaping his defense is his selection of an attorney.'" United States v. Gonzalez-Lopez, 399 F.3d 924, 928, 934 (8th Cir. 2005) (quoting United States v. Mendoza-Salgado, 964 F.2d 993, 1014 (10th Cir. 1992)), aff'd, 548 U.S. 140, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006). It was improper for the trial court to refuse the needed continuance to enable private counsel to prepare on the basis that assigned counsel followed a different trial strategy. Different trial strategies—including whether to retain an expert to pursue a particular line of defense—lie at the heart of the right to counsel of choice.

The trial court said Sassen Vanelstloo "has had a lot of time to consider hiring private counsel" before the eve of trial. 12RP 35. Perhaps so, but it is an uncontroversial proposition that defendants may need time to acquire the services of counsel of choice. State v. Hampton, 182 Wn. App. 805, 827 n.18, 332 P.3d 1020 (2014), review granted, 342 P.3d 327 (2015). Sassen Vanelstloo was in custody while the case was pending. The ability to contact and consult with potential private counsel while incarcerated is a hindrance, certainly more difficult than it would be if a defendant were free on bail and not subject to limitations on contact imposed by the jail environment.

The commissioner initially set bail at a whopping 10 million dollars. 1RP 15-17. In September, the court lowered the amount to \$500,000. 7RP 9-10. Sassen Vanelsloo is indigent. He was unable to post bond. And it is understandable that it would take time for an indigent defendant to round up sufficient funds to hire private counsel.

Taking all of the circumstances into account, the trial court's ruling on the continuance to retain counsel of choice qualified as an "unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay." United States v. Nguyen, 262 F.3d 998, 1003 (9th Cir. 2001) (quoting Morris v. Slappy, 461 U.S. 1, 11-12, 103 S. Ct. 1610, 75 L. Ed. 2d 610 (1983) (quoting Ungar v. Sarafite, 376 U.S. 575, 589, 84 S. Ct. 841, 11 L. Ed. 2d 921 (1964))). This violated Sassen Vanelsloo's Sixth Amendment right to counsel of choice.

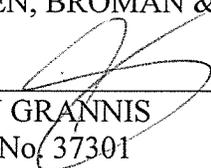
B. CONCLUSION

For the reasons set forth above and in the opening brief, Sassen Vanelsloo requests (1) reversal of the conviction; (2) that the community custody terms for the eluding and firearm counts be stricken; and (3) reversal of the discretionary legal financial obligations and remand for resentencing.

DATED this 5th day of September 2015

Respectfully Submitted,

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Respondent,)	
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v.)	COA NO. 71856-8-I
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ADRIAN SASSEN VAN-ELSLOO,)	
)	
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 8TH DAY OF SEPTEMBER 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] ADRIAN SASSEN VAN-ELSLOO
DOC NO. 837829
STAFFORD CREEK CORRECTIONS CENTER
191 CONSTANTINE WAY
ABERDEEN, WA 98520

SIGNED IN SEATTLE WASHINGTON, THIS 8TH DAY OF SEPTEMBER 2015.

X *Patrick Mayovsky*