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July 23, 2015  
Court of Appeals  
Division I  
State of Washington

No. 71856-8-I

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

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**STATE OF WASHINGTON, Respondent,**

**v.**

**ADRIAN SASSEN VANELSLOO, Appellant.**

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**BRIEF OF RESPONDENT**

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**A. ASSIGNMENTS OF ERROR**

None.

**B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR**

1. Whether the trial court acted within its discretion conditionally denying Sassen Vanelstoo's belated request to substitute counsel on the eve of trial where Sassen Vanelstoo made repeated requests to delay his trial for over a year and where notwithstanding the delay, the trial court said it would permit the substitution of counsel if new counsel could determine within a two week window if she could be ready to try the case in five weeks.
2. Whether the trial court had the statutory authority to impose community custody on Sassen Vanelstoo's convictions for offenses that do not qualify for community custody pursuant to RCW 9.94A.701.
3. Whether this Court should remand this matter back to the sentencing court for consideration of Sassen Vanelstoo's ability to pay discretionary legal financial obligations as part of his judgment and sentence.

**C. FACTS**

Adrian Sassen Vanelstoo was charged with attempting to elude a police vehicle with firearm and actual endangerment enhancements, second degree driving with a suspended license, and two counts of first degree unlawful possession of a firearm. CP 3, 5. See also, CP 25-27 (third amended information).

On March 10<sup>th</sup> 2014, following a jury trial, Sassen Vanelsloo was found guilty as charged and the jury returned affirmative special verdicts for all the charged enhancements. CP 67-70. At sentencing, the court imposed 115 months total confinement, community custody and legal financial obligations. CP 89-91. Sassen Vanelsloo timely appeals. CP 99-116.

*Pre-trial procedural facts*

On December 12, 2012, Vanelsloo made a preliminary appearance under three separate cause numbers. 1RP 4. The first offense filed in August 23<sup>rd</sup>, 2012, pertained to a collision Sassen Vanelsloo was involved in that resulted in a driving while under the influence and VUCSA charge for which an arrest warrant was outstanding.

Subsequent to that arrest warrant being issued for the August 23<sup>rd</sup> 2012 offenses, a second arrest warrant was issued for additional charges of unlawful eluding, unlawful possession of a firearm and a VUCSCA offense, stemming from a second, subsequent incident. Sassen Vanelsloo was picked up on these two outstanding arrest warrants when he was arrested and taken into custody in December 2012 based on a third incident which resulted in the charges of a second attempting to elude an officer and unlawful possession of a firearm charge on Whatcom county

superior court cause number 12-1-01368-6, the subject of this appeal. 1RP 8.

Following arraignment, on all three of these separate cause numbers December 21<sup>st</sup> 2012, trials were set in each matter for February 11<sup>th</sup> 2013. On January 21<sup>st</sup>, 2013 Sassen Vanelstloo was arraigned on amended information after a second weapon was found in Vanelstloo's vehicle pursuant to a search warrant. 2 RP 4. On January 30<sup>th</sup>, the parties agreed to continue the trials from February 11<sup>th</sup> to April 1<sup>st</sup>, 2013. 3 RP 7.

On March 20<sup>th</sup> 2013, the parties initially thought and represented to the trial court that they were close to a settlement. 4 RP 3. Just prior to trial however, on March 30<sup>th</sup> 2013, the parties agreed to continue all three cases to a May 20<sup>th</sup> 2013 trial date. 4 RP 3, CP 126. Sassen Vanelstloo's attorney subsequently asked the court to find good cause to grant this when Sassen Vanelstloo refused to sign the continuance/trial setting order even though he told his attorney he didn't object to the new proposed trial date. Sassen Vanelstloo's attorney explained she requested the continuance because she had not completed witness interviews and was unprepared to go to trial. 4 RP 4, CP 126.

On May 9<sup>th</sup> defense counsel requested additional time to prepare for trial in this matter and a continuance was granted from May 20<sup>th</sup> 2013 to July 9<sup>th</sup> 2013. Prior to the July trial date, Sassen Vanelstloo's attorney advised

the court, on June 27<sup>th</sup> 2013, she was preparing Sassen Vanelstloo's cases in chronological order and was ready on the oldest case but was again requesting more time on the two subsequent cases (inclusive of the matter at issue in this appeal). 4 RP 12. The trial court concerned that continuances were being granted over Sassen Vanelstloo's objections, maintained the oldest case for July 9<sup>th</sup> 2013 but continued the other two, at defense counsel's request beyond the 60 day speedy trial deadline to September 9<sup>th</sup> 2013. Sassen Vanelstloo agreed to the continuance request. 4 RP 18.

On August 29<sup>th</sup> 2013 the prosecutor confirmed the parties intended to try the second case (based on chronological order) on September 9<sup>th</sup>, 2013 and suggested the third (this) matter be set for September 30<sup>th</sup> 2013. 5 RP 9. Sassen Vanelstloo's attorney agreed to a continuance but requested a later, mid-October trial date instead, asserting that this would be defense counsel's last request for a continuance. 5 RP 9. The state objected to Sassen Vanelstloo's lengthy request and asked the matter be set within the 30 day speedy trial window. 5 RP 11. Sassen Vanelstloo's attorney then assured the court she needed more than 30 days to prepare for trial and, that her client would agree to waive speedy trial. Trial was then set in this matter for October 14<sup>th</sup> 2014. 5 RP 12, CP 136.

On the eve of the October 14<sup>th</sup> 2013 trial date however, defense counsel again filed a motion to continue this matter again stating she still needed more time to prepare. CP 140-141. Defense counsel asserted she just obtained new discovery and still need to conduct witness interviews. CP 140-141. The state agreed to the request in light of the difficulties the parties were encountering in setting up witness interviews. 9 RP 3. Defense counsel sought another 60 day continuance. CP 142. Thereafter, a new order was entered setting a new December 2<sup>nd</sup> 2013 trial date. Id.

Despite the repeated requests for more time, Defense counsel again state she needed more time on November 20<sup>th</sup> 2013 and requested another continuance to February 10<sup>th</sup> 2014 trial date possibly to retain an expert witness. 2 RP 5. On Order re-setting the trial date to February 10<sup>th</sup> 2014 was thereafter entered. CP 144. The trial judge at the November 20<sup>th</sup> 2013 hearing advised all of the parties there would be no more continuances of the trial date. 12 RP 24.

On January 29<sup>th</sup>, 2014 however, Sassen Vanelsloo appeared in custody with counsel and his attorney advised the court her client was hiring private counsel, Andrew Subin. 11 RP 3. The state noted it was opposed to a continuance request for the purpose of obtaining new counsel due to delay in making the request. Id.

Andrew Subin did not subsequently move to substitute in as counsel. Instead, Sassen Vanelsoo formally requested on February 4<sup>th</sup> 2014 that the court permit private attorney Dellino to substitute in as his attorney. 12 RP 8. Dellino requested the trial court give her two weeks to determine how readily she could come up to speed in the case. 12 RP 11. Sassen Vanelsoo's current counsel explained she was seeking a continuance anyways in order to review police reports received from a neighboring County she asserted were relevant to the beginning of the car chase that resulted in her clients current charges. 12 RP 19. Defense counsel acknowledged she had been trying to get another case of Sassen Vanelsoo's to go to trial before this one and when she realized this one would go first, she encouraged Sassen Vanelsoo that if he wanted private counsel, now was the time to move for a change. 12 RP24. The state opposed the continuance request given the substantial delays to present and reasserted all relevant discovery had been previously provided. Id at 27.

The trial court was unimpressed with Sassen Vanelsoo's untimely request for new counsel on the eve of trial but did agree to a short continuance for Sassen Vanelsoo's current attorney to review the alleged new police reports defense counsel had obtained from a neighboring county, regardless of materiality. 12 RP 26-37. The trial court then also

agreed, albeit with reluctance, to permit Dellino two weeks to determine if she could be up to speed and ready to trial this case on March 3rd 2014. Dellino however, noted she had a conflict on the proposed trial date of March 3<sup>rd</sup> 2014. 12 RP 42. In light of this conflict the trial court stated that it would allow Dellino to substitute in as counsel if she could be prepared to go to trial March 10<sup>th</sup> 2014, some five weeks out. 12 RP 42-43.

On February 19<sup>th</sup> 2014, the parties, confirmed the March 3<sup>rd</sup> 2014 trial date and no further mention of substituting in new counsel was made. During preliminary proceedings in Sassen Vanelsoo's trial in this matter, Sassen Vanelsoo's attorney advised the trial court that Ms. Dellino had previously contacted her and told her she would be unable to get the case prepared in time for trial for a March 10<sup>th</sup> 2014 trial date and therefore had not been substituted in as counsel 14 RP 30. Sassen Vanelsoo now appeals contending the trial court erred conditionally denying his motion to substitute new counsel before trial, in addition to alleged sentencing errors.

## D. ARGUMENT

1. **The trial court acted well within its discretion to limit Vanelstloo's belated request to substitute his trial attorney on the eve of trial after repeated requests for continuances by advising proposed counsel the court would allow a substitution if counsel could determine within a two week window whether she could be ready to try the case in five weeks.**

The Sixth Amendment right to counsel includes the right of a Defendant who is able to afford an attorney to have counsel of his choice. Wheat v. United States, 486 U.S. 153, 159, 108 S. Ct. 1692, 100 L.Ed. 2d 140 (1988). The right is not absolute, and maybe limited so that a defendant may not be represented by counsel United States v. Gonzalez-Lopez, 548 U.S. 140, 152, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006) who for whatever reason declines to represent him. Trial courts have wide latitude in balancing the right to counsel of choice against the needs of fairness and the demands of its calendar. Gonzalez-Lopez, 548 U.S., 152.

The decision whether to grant a continuance in order for a defendant to obtain substitute counsel is reviewed for an abuse of discretion. State v. Roth, 75 Wn. App. 808, 826, 881 P.2d 268 (1994), *review denied*, 126 Wn.2d 1016 (1995). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or for untenable reasons. In re

In re Marriage of Littlefield, 133 Wash. 2d 39, 46-47, 940 P.2d 1362 (1997), State v. Chase, 59 Wash. App. 501, 799 P.2d 272 (1990).

Here, Sassen Vanelsloo contends the trial court abused its discretion by unreasonably insisting on expeditiousness of the trial in the face of a justifiable request for delay to allow counsel of choice to prepare for trial. Br. of App. at 13. Sassen Vanelsloo leaves out critical facts in his analysis that counter his argument. Namely, that his trial had been repeatedly continued primarily at his or his attorney's request for well over a year with no mention of wanting to substitute in new counsel and his request was made on the eve of the March 2014 trial date. Moreover, the trial court did not deny his request but instead determined it would permit the substitution if proposed counsel could be ready to trial the case by March 10<sup>th</sup>, 2014, which was then five weeks out.

The trial court's conditional decision was not unreasonable under the circumstances. It gave Sassen Vanelsloo's proposed new attorney a two week window to determine to determine if she could be ready five weeks from then, to try this case but also balanced the concerns of avoiding further substantial delays in this case. Given the delay and timing of Vanelsloo's request to substitute in counsel, the trial court acted well within its discretion to place reasonable parameters, over a month, on

the request to substitute counsel after this case had been pending over a year.

When considering the timing of the motion to substitute counsel the court has analogized it to the right to self-representation. Chase, 59 Wash. App. 501, 506, 799 P.2d 272 (1990). "If the request is made shortly before or as the trial is to begin, the existence of the right depends on the facts with a measure of discretion in the trial court. In the absence of substantial reasons a late request should generally be denied, especially if the grant of such a request may result in delay of the trial." Id., *quoting*, State v. Garcia, 92 Wash. 2d 647, 655-56, 600 P.2d 1010 (1979).

Historically, when considering a request to substitute in counsel of choice, trial courts consider (1) whether the court has granted previous continuances at the defendant's request, (2) whether the defendant had some legitimate dissatisfaction with counsel, (3) whether available counsel is prepared to go to trial, (4) and whether the denial of the motion is likely to result in identifiable prejudice to the defendant's case of a material and substantial nature. State v. Price, 126 Wn. App. 617, 109 P.3d 27, *review denied*, 155 Wn.2d 1018 (2005).

In State v. Hampton, 182 Wn.App. 805, 822, 332 P.3d 1020 (2014), *review granted*, 182 Wn.2d 1002 (2015), however, the court of appeals concluded the second factor, legitimate dissatisfaction with

counsel and the fourth factor, whether denying a request will result in material prejudice to the defendant, no longer applied to the inquiry following the U.S. Supreme Court's decision in Gonzalez-Lopez, 548 U.S. 144 (2006).

Neither of those factors were at issue here. Instead, the trial court's focus in this case was on the timing of Sassen Vanelos's request and the ability of proposed substitute counsel to be prepared to try this case within a reasonable amount of time. In fact, the trial court gave substitute counsel a two –week period in which she was to discern whether she could be ready to try the case by March 10<sup>th</sup> 2014-which ultimately gave substitute counsel a five week window, to prepare the case for trial.

Regardless of how the Hampton case is resolved at the state supreme court, trial courts continue to have wide latitude in balancing the right to counsel against the needs of fairness, and against the demands of its Calendar. Gonzalez-Lopez, 548 U.S. 146. Two factors that should be consider when presented with a request to substitute in counsel of choice remain at a minimum whether the defendant has requested and obtained previous continuances and whether available counsel is prepared to go to trial. Hampton, 182 Wash. App. at 821, 825.

Here, Sassen Vanelos's case had been pending for over a year. Sassen Vanelos, through his attorney made repeated and numerous

requests for continuances, notwithstanding requests made intermitted for discovery purposes and a brief time when appointed counsel was removed due to a potential conflict. Even following re-appointment, Sassen Vaneloslo's attorney represented she would not make additional continuance requests as this matter entered the fall of 2013. Additionally, the trial court advised the parties in November 2013, it would not entertain more continuances. Despite the substantial delay and failure to take action in or by November 2013, Sassen Vaneloslo didn't make any formal request to substitute in new counsel until the eve of trial on February 4<sup>th</sup> 2014.

Given the extensive delay, the trial court was reasonable in considering Sassen Vaneloslo's last minute request in the context of how reasonably quickly substitute counsel could be ready to try this case. Sassen Vaneloslo's attorney made it clear to the trial court she wanted this matter tried after Sassen Vaneloslo's other pending case and only when she realized this case was going, encouraged Sassen Vaneloslo to move to substitute counsel at that time. In light of the delay and Sassen Vaneloslo's representations to the trial court, it is understandable the trial court was frustrated with the late request and was concerned that this request was a transparent ploy for further delay. The timing of Sassen Vaneloslo's request made little sense. Moreover, Sassen Vaneloslo

provided no substantial reasons for the last minute request or desire for new counsel that could reasonably motivate the trial court to put aside its timing concerns.

Notwithstanding these concerns, the trial court nevertheless, recognizing Sassen Vanelsloo's right to counsel of choice discussed and agreed to reasonable parameters for permitting Dellino to substitute in if she reasonably and timely could get this matter to trial. Namely, the trial court agreed to the substitution if Dellino could be ready to try the case by March 10<sup>th</sup> 2014-some five weeks out. The trial court's conditional denial of Sassen Vanelsloo's request, under these circumstances with the considerations made by the court, was reasonable and well within the trial court's discretion. State v. Aguirre, 168 Wn.2d 805, 332 P.3d 1020 (2014).

**2. This Court should remand this matter back to the sentencing court to strike community custody terms not statutorily authorized pursuant to RCW 9.94A.701.**

Next, Sassen Vanelsloo contends the sentencing court erred imposing community custody terms for each of his convictions. He contends that because his unlawful possession of a firearm and attempting to elude convictions do not qualify as a 'serious violent offense' a 'serious offense' or a 'crime against person,' the court did not have the statutory

authority to impose community custody terms for these offenses pursuant to RCW 9.94A.701.

The state agrees and respectfully requests this Court remand this matter back to the trial court to strike the community custody terms ordered pursuant to Sassen Vanelsoo's convictions in the judgment and sentence.

**3. In light of Blazina, this Court should remand this matter back to the sentencing court to reconsider Sassen Vanelsoo's ability to pay discretionary legal financial obligations.**

The defendant relies on State v. Blazina, 182Wn.2d 827, 344 P.3d 680 (2015) to argue the sentencing court erred by failing to consider Sassen Vanelsoo's ability to pay before imposing discretionary financial legal obligations at sentencing. Sassen Vanelsoo did not object below to the imposition of discretionary legal financial obligations.

Pursuant to RCW 10.10.160(3), "[t]he court shall not order a defendant to pay costs unless the defendant is or will be able to pay them." RCW 10.01.160(3). In Blazina, the court construed this statute as requiring an individualized inquiry into the defendant's current and future ability to pay prior to imposing discretionary costs. The state concedes no such inquiry was made in this case and although Sassen Vanelsoo did not object below and therefore is not subject to appellate review as a matter of

right, the state has no objection to remanding this matter back to the sentencing court for inquiry into Sassen Vanelosloo's ability to pay and reconsideration of the imposition of the discretionary legal financial obligations previously imposed.

**E. CONCLUSION**

The State respectfully requests this Court to affirm Sassen Vanelosloo's convictions and remand this matter back to the sentencing court to strike community custody terms and reconsider the imposition of legal financial obligations in light of Sassen Vanelosloo's ability to pay.

Respectfully submitted this 23rd day of July, 2015.

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