

NO. 74232-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

BENJAMIN SMALLS,

Appellant.

FILED
Mar 29, 2016
Court of Appeals
Division I
State of Washington

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

The Honorable Veronica Galvan, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The sentencing court violated appellant's constitutional right to his choice of counsel.

Issue Pertaining to Assignment of Error

Under the Sixth Amendment, a criminal defendant enjoys the right to hire counsel he believes to be best for the situation. While a court may balance this right against the demands of its calendar, it may not deny a continuance to obtain private counsel where no such demands exist. Appellant was in the process of securing private counsel for a resentencing hearing following a successful appeal and needed as little as two days to complete that process. Where the circumstances revealed no legitimate reason to deny a short continuance, did the sentencing court err by requiring appellant to proceed with counsel he did not want?

B. STATEMENT OF THE CASE

In November 2008, Benjamin Smalls pled guilty to murder in the second degree and assault in the second degree. The murder conviction included a firearm enhancement. CP 11-15.

Shortly after entering these pleas, attorney Craig McDonald replaced original counsel to pursue a motion to vacate the pleas based on concerns over Smalls' competency. See Supp. CP __

(sub no. 93, Defendant's Request For Continuance and Sentencing Memorandum). Ultimately, no motion was filed and, on September 25, 2009, Smalls was sentenced to 418 months in prison. CP 40-41.

Smalls appealed and argued his pleas were "involuntary because of post-plea changes in the law about the length of community custody authorized for his crimes[.]" CP 114. This challenge to the plea agreement was rejected, although the case was remanded for entry of an order amending the applicable community custody period. CP 114; State v. Smalls, 158 Wn. App. 1031 (2010).

In April 2012, Smalls filed a CrR 7.8 motion collaterally attacking the plea agreement. The trial court transferred that motion to this Court to be treated as a personal restraint petition. CP 115. In July 2014, this Court vacated the assault conviction because the charge had been filed in violation of the statute of limitations (a facial challenge to the judgment that could be brought anytime), but concluded that any challenge to the entire plea agreement based on this error was now time barred under RCW 10.73.090(1) because Smalls had filed his collateral attack more than one year after his convictions became final. Thus, the murder

conviction was left intact, albeit with a reduced offender score in light of the assault dismissal. The matter was then remanded for resentencing solely on the murder conviction. CP 113-122. The mandate issued May 22, 2015. CP 112.

Resentencing was scheduled for September 18, 2015 before the Honorable Veronica Galvan. CP 123. Unfortunately, Smalls was not transferred to the King County Jail until the afternoon of September 15, 2015, and Craig McDonald, who had once again been assigned as defense counsel, did not have an opportunity to speak with him until September 16. CP 123.

On September 16, McDonald moved to continue sentencing 30 days to obtain documentation proving Smalls had completed several academic and life skills courses during his incarceration, to allow Smalls' fiancé to attend the hearing, and for McDonald to research the circumstances of the original plea agreement – specifically, if the terms of that agreement bound the State to a mid-range sentencing recommendation. CP 123-124.

Based on this request, sentencing was continued to October 23, 2015. CP 126. However, on October 22, McDonald filed a memorandum indicating that Smalls wished to discharge him and replace him with another attorney. CP 126. When seeking to

assist Smalls with withdrawal of his pleas in 2009, McDonald had failed to recognize that the assault charge was filed in violation of the statute of limitations. RP 3. McDonald indicated that because he was involved in events associated with the time bar on Smalls' attempt to undo the entire plea agreement, and he could be called as a witness to those events in any future challenge to the plea agreement, he should not represent Smalls for the resentencing. CP 126. Moreover, Smalls was still trying to obtain documents from DOC and from community colleges regarding the many programs he had completed while incarcerated. CP 126-127.

The parties appeared before Judge Galvan on October 23. RP 2. McDonald repeated the request to continue sentencing, again noting his potential conflict of interest given his failure to timely identify grounds to attack the plea agreement based on the statute of limitations violation. RP 3-4. Judge Galvan recognized McDonald's delicate position. But given the unequivocal ruling in the PRP that Smalls' claims against the plea agreement were time barred, she was not going to delay sentencing based on the unlikely event McDonald might someday become a witness concerning his failures. RP 4.

Smalls then addressed the court. He informed Judge Galvan that his family was hiring an attorney to represent him at the resentencing. All that remained was delivery of payment to the attorney. Therefore, he merely sought a one-week continuance. RP 5. Smalls described McDonald as "a good dude," but indicated he and his family had lost faith in him. RP 5.

Judge Galvan indicated that, regardless of who represented Smalls, the standard range was going to be the same. She also noted she did not have a notice of appearance from anyone other than McDonald. RP 5.

Smalls again asked for a week or, at the very least, two days. He promised that within the next two days he would have the new attorney present and would obtain supportive letters from his mother and children. RP 5. Judge Galvan asked why Smalls did not obtain the letters in the past 30 days, and Smalls explained that he had had limited contact with McDonald, who had been in trial. He and his family had tried to contact McDonald, but there had been a breakdown in communication. RP 6. He understood the standard range would not change, but he wished to be represented by private counsel. RP 7.

The State objected to continuing the sentencing even two days, noting that the matter was already continued 30 days “to do their due diligence in terms of making their presentation.” RP 7. The prosecutor noted that several relatives of Steven Kirk, the murder victim, were present by telephone and two Seattle Police detectives that had investigated the case were present in the courtroom. RP 7.

Judge Galvan denied the motion to continue. RP 7-8.

The State asked Judge Galvan to impose a sentence at the high end of the now reduced range for murder, which was 276 to 376 months. RP 8-9, 13. Several of Kirk’s relatives then shared their thoughts regarding the impact of Kirk’s death on their family. RP 9-13. The two police detectives did not wish to say anything. RP 13.

McDonald indicated that none of Smalls’ family members were available that morning, including by phone. RP 14. Citing Smalls’ significant efforts to turn his life around and his many accomplishments while in prison, McDonald asked Judge Galvan to impose a sentence at the low end of the range. RP 15-16. Smalls, now 32 years old, apologized to Kirk’s family for what he had done when he was 18 and the impact it continued to have on them. RP

17-18. He spoke of his maturing process, his accomplishments while in prison, and promised to continue his preparation for becoming an upstanding member of the community upon his release. RP 17-19. He echoed McDonald's request for a sentence at the low end of the range. RP 19.

Judge Galvin denied that request and imposed 300 months. RP 20; CP 143. Smalls timely filed his Notice of Appeal. CP 152-161.

C. ARGUMENT

1. SMALLS WAS DENIED HIS SIXTH AMENDMENT RIGHT TO COUNSEL OF CHOICE FOR RESENTENCING.

"[T]he Sixth Amendment right to counsel of choice . . . commands . . . that a particular guarantee of fairness be provided – to wit, that the accused be defended by the counsel he believes to be best." United States v. Gonzalez-Lopez, 548 U.S. 140, 146, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006). The right to counsel of choice applies to all aspects of trial, including sentencing hearings. See State v. Aguirre, 168 Wn.2d 350, 364-366, 229 P.3d 669 (2010) (examining request to substitute counsel for sentencing under Sixth Amendment principles).

In State v. Hampton, 184 Wn.2d 656, 361 P.3d 734 (2015), the Supreme Court of Washington held that, when faced with a defendant's request to substitute current counsel with new privately retained counsel, trial courts must balance the right to counsel of choice "against the demands of its calendar." Hampton, 184 Wn.2d at 663 (quoting Gonzalez-Lopez, 548 U.S. at 152). This balancing often becomes necessary where the substitution of counsel requires a continuance. Id. at 663.

The denial of a continuance is reviewed for abuse of discretion. Hampton, 184 Wn.2d at 663, 670. A court abuses its discretion "when its decision 'is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons.'" Id. at 670 (quoting State v. Blackwell, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993); State v. Michiellj, 132 Wn.2d 229, 240, 937 P.2d 587 (1997)). "A decision is based 'on untenable grounds' or made 'for untenable reasons' if it rests on facts unsupported in the record or was reached by applying the wrong legal standard." State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003) (quoting State v. Rundquist, 79 Wn. App. 786, 793, 905 P.2d 922 (1995)).

The erroneous deprivation of the right to counsel of choice is "structural error" and requires reversal; the defendant need not

make any additional showing of prejudice. Hampton, 184 Wn.2d at 665 (citing Gonzalez-Lopez, 548 U.S. at 150).

In assessing whether the Sixth Amendment requires a continuance to accommodate the choice of counsel, the Hampton Court held that trial courts should consider all relevant information, including the following factors:

- (1) whether the request came at a point sufficiently in advance of trial to permit the trial court to readily adjust its calendar;
- (2) the length of the continuance requested;
- (3) whether the continuance would carry the trial date beyond the period specified in the state speedy trial act;
- (4) whether the court had granted previous continuances at the defendant's request;
- (5) whether the continuance would seriously inconvenience the witnesses;
- (6) whether the continuance request was made promptly after the defendant first became aware of the grounds advanced for discharging his or her counsel;
- (7) whether the defendant's own negligence placed him or her in a situation where he or she needed a continuance to obtain new counsel;
- (8) whether the defendant had some legitimate cause for dissatisfaction with counsel, even

though it fell short of likely incompetent representation;

- (9) whether there was a “rational basis” for believing that the defendant was seeking to change counsel “primarily for the purpose of delay”;
- (10) whether the current counsel was prepared to go to trial;
- (11) whether denial of the motion was likely to result in identifiable prejudice to the defendant’s case of material or substantial nature.

Hampton, 184 Wn.2d at 669-670 (quoting 2 Wayne R. LeFave et al., Criminal Procedure § 11.4(c) at 718-20 (3d ed. 2007)).

Examining all relevant information surrounding Smalls’ resentencing, within the framework of the factors listed above, reveals a violation of his right to choice of counsel.

(1) This was not an entire trial; it was merely a resentencing hearing. Thus, although the continuance request was made a day before the scheduled hearing, there is nothing in the record indicating Judge Galvan could not have readily adjusted her calendar to accommodate this relatively short hearing on another day. See United States v. Brown, 785 F.3d 1337, 1349-1350 (9th Cir. 2015) (court abused its discretion, in part, because record did

not demonstrate the demands of the calendar required denial of the defendant's motion to substitute counsel);

(2) The requested continuance was very short. Smalls hoped to get an additional week, but indicated new counsel could be ready in just two days. RP 5;

(3) Speedy trial was not a consideration. Nor was speedy sentencing. See State v. Modest, 106 Wn. App. 660, 664, 24 P.3d 1116 (no court rule or statute dictates time limit for resentencing following issuance of mandate), review denied, 145 Wn.2d 1010, 37 P.3d 290 (2001);

(4) There had been one previous continuance at defense request, but that request was necessary given the paucity of time between Smalls' arrival in King County and the original sentencing date and the total lack of prior communication between McDonald and Smalls. CP 123-124;

(5) A two, or even seven-day continuance would not have seriously inconvenienced the witnesses. All of Kirk's relatives appeared by telephone. RP 7, 9-13. None had traveled to Seattle for the hearing. Moreover, the two detectives were local and had nothing to say anyway. RP 7, 13;

(6) The request for continuance appears to have been made promptly once Smalls received confirmation that his family had hired private counsel. All that remained was delivery of a check to private counsel. RP 4-5;

(7) There is no indication Smalls' negligence resulted in the need for a continuance;

(8) Smalls most certainly had legitimate cause for dissatisfaction with McDonald. In 2009, McDonald had failed to recognize that Smalls' guilty plea to the assault charge was entered in violation of the statute of limitations at a time when Smalls sought to withdraw his pleas and could have filed a timely motion to undo the entire plea agreement based on this error;

(9) There was no basis, much less a rational one, to conclude that Smalls was seeking to change counsel "primarily for the purpose of delay." He was going to remain in custody until resentencing and for many years thereafter. Smalls' goal in requesting a continuance was to be represented by his attorney of choice;

(10) McDonald was partially prepared for sentencing. He was unable to arrange for the participation of Smalls' family members, whom he assumed would be present. There had been a

breakdown in communication. RP 6. Moreover, it is not clear that McDonald had received all documents he sought demonstrating Smalls' educational progress and growth during his incarceration. See RP 6 (noting only that he had just received some additional materials from DOC, but no mention of community college records);

(11) Denial of the brief continuance prejudiced Smalls because he was deprived his attorney of choice, forced to proceed without the benefit of family members' statements, and may not have obtained all documents demonstrating his rehabilitation in prison.

In nonetheless denying a seven or two-day continuance, Judge Galvan essentially focused on a single fact – that she had previously granted the approximately month-long continuance to allow the defense to prepare for resentencing. See RP 6-8. But McDonald requested that extension the first day he had a chance to speak with Smalls since his representation in 2009. Moreover, the primary purpose of that request was to allow time to collect more materials supporting a low-end sentencing recommendation. Smalls could not be expected, at that time, to know he would be hiring private counsel or how long that process might take. The

fact there had been one continuance to gather materials should not have precluded a seven or two-day additional extension for the purpose of completing the process of substituting counsel.

In any event, Judge Galvan's focus on the one extension was an abuse of discretion because she should have been focusing on the totality of circumstances. And – as discussed above – that totality provided little reason not to grant one more additional and extremely short continuance. As Gonzalez-Lopez and Hampton make clear, a trial court must balance the right to counsel “against the demands of its calendar.” There simply were no demands of consequence outweighing Smalls' exercise of his right to choose his counsel. Compare Aguirre, 168 Wn.2d at 357-358, 364-366 (no violation where sentencing court denied request for 8-week continuance, defendant already had two months to prepare for sentencing, and victim had flown across the country to be present for sentencing on that date and could not return at any later date).

Reversal and remand for a new sentencing hearing, where Smalls is represented by counsel of choice, is the proper remedy.

2. APPEAL COSTS SHOULD NOT BE IMPOSED.

Smalls has been in custody since 2008 and is serving a 300-month sentence. Judge Galvan properly found Smalls to be indigent and entitled to appointment of appellate counsel at public expense. See Supp. CP ____ (sub no. 151, Order of Indigence). If Smalls does not prevail on appeal, he asks that no costs of appeal be authorized under title 14 RAP. See State v. Sinclair, ____ P.3d ____, 2016 WL 393719 (filed January 27, 2016) (instructing defendants on appeal to make this argument in their opening briefs).

RCW 10.73.160(1) states the “court of appeals . . . may require an adult . . . to pay appellate costs.” (Emphasis added.) “[T]he word ‘may’ has a permissive or discretionary meaning.” Staats v. Brown, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). Thus, this Court has ample discretion to deny the State’s request for costs.

Trial courts must make individualized findings of current and future ability to pay before they impose LFOs. State v. Blazina, 182 Wn.2d 827, 834, 344 P.3d 680 (2015). Only by conducting such a “case-by-case analysis” may courts “arrive at an LFO order appropriate to the individual defendant’s circumstances.” Id.

Accordingly, Smalls' ability to pay must be determined before discretionary costs are imposed. The sentencing court made no such finding. Indeed, the court waived all discretionary LFOs. See CP 142. Without a basis to determine that Smalls has a present or future ability to pay, this Court should not assess appellate costs against him in the event he does not substantially prevail on appeal.

D. CONCLUSION

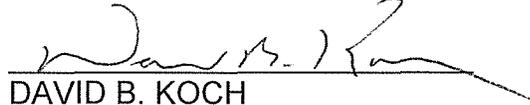
Smalls was denied his constitutional right to choice of counsel for resentencing. His sentence should be vacated and the matter remanded for a new hearing.

If Smalls is not deemed the substantially prevailing party on appeal, this Court should decline to assess appeal costs should the State ask for them.

DATED this 29th day of March, 2016.

Respectfully submitted,

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 74232-9-1
)	
BENJAMIN SMALLS,)	
)	
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 29TH DAY OF MARCH 2016, 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] BENJAMIN SMALLS
DOC NO. 856519
COYOTE RIDGE CORRECTIONS CENTER
P.O. BOX 769
CONNELL, WA 99326

SIGNED IN SEATTLE WASHINGTON, THIS 29TH DAY OF MARCH 2016.

x *Patrick Mayovsky*