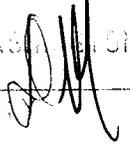


COURT OF APPEALS
DIVISION II

No. 41389-2-II

11 MAY 27 AM 9:41

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON
DEPUTY


STATE OF WASHINGTON,

Respondent,

vs.

JESUS CLOVIS SANCHEZ, JR.,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

Respondent's Brief

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I. ISSUES

- A. Did the trial court deny Sanchez his constitutional right to counsel when it denied his request for new counsel after Sanchez alleged he had an irreconcilable conflict with his court appointed attorney?
- B. Did the trial court err in including Sanchez's prior federal conviction for bank robbery as part of his offender score?
- C. Did Sanchez receive ineffective assistance of counsel during his sentencing hearing due to his trial counsel's failure to object to the inclusion of Sanchez's prior federal conviction?

II. STATEMENT OF THE CASE

On December 15, 2009 the State charged Sanchez by information with one count of Child Molestation in the First Degree. CP 1-3. The State alleged that on or about or between July 1, 2007 and August 31, 2007 Sanchez had sexual contact with J.F.P, whose date of birth is 02-18-1998 and was less than 12 years old and not married to Sanchez. CP 1. The molestation occurred while Sanchez was babysitting J.F.P. 3RP 97-100¹CP 4-6.

On January 6, 2010 the trial court appointed Dan Havarco to represent Sanchez in this matter. Supp. CP.² On March 17, 2010

¹ There are five volumes of verbatim transcripts of proceedings in this case. The State will be referring to them in chronological order as follows: March 17, 2010 Motion Hearing – 1RP; June 17, 2010 Motion Hearing – 2RP; Two volumes of continually numbered Jury Trial on June 24, 2010 and June 25, 2010 – 3RP; August 11, 2010 Motion Hearing, September 22, 2010 and October 27, 2010 Sentencing Hearing – 4RP.

² The State is filing a supplemental designation of Clerk's Papers to include Mr. Havarco's appointment by the trial court.

a ER 404(b) motion hearing was held. See, 2RP. Sanchez was present at the motion hearing and Mr. Hvirco represented Sanchez without any complaint by Sanchez. See, 2RP.

On June 10, 2010 Sanchez filed a letter addressed to the trial court requesting a hearing to have new counsel appointed. CP 47-59. Included in Sanchez's letter was a letter from Laura Kotula. CP 48. In Ms. Kotula's letter she alleges Mr. Hvirco spoke to the prosecutor about Sanchez's case in public in a joking fashion. CP 48. Ms. Kotula opined that Mr. Hvirco was not acting in a professional manner. CP 48. Sanchez, in his letter to the trial court alleged Mr. Hvirco made unethical suggestions, there was a complete breakdown in communications and Sanchez was uncomfortable with Mr. Hvirco's theory of the case and how he planned to proceed at trial. CP 47. Sanchez complained Mr. Hvirco would not consider the direction Sanchez wished the case to go. CP 47. Sanchez also alleged Mr. Hvirco was "slandering me Jesus Sanchez in public view!! In and outside of my presence." CP 49. Sanchez went on to complain that Mr. Hvirco was failing to represent Sanchez to the full extent of his defense and would not subpoena witnesses, allow witness testimony and would not exchange information with Sanchez. CP 49.

On June 17, 2010 the trial court held the trial confirmation hearing. 2RP 2. The state confirmed for trial. 2RP 2. Mr. Havirco told the trial court:

Defense is ready to confirm. I have been advised by Mr. Sanchez that he - - I know it's been his long desire to hire the legal services of Don McConnell and Associates, so he spoke with apparently Jonathan Meyer, who advised him I assume, as would Mr. McConnell too [sic] advise him to tender a waiver of speedy trial and then request a continuance to have more time to come up with the money to hire Mr. McConnell, but the defense - - I'm prepared, very ready. Mr. Armstrong, the Court approved investigator we have thoroughly - - we're prepared for trial, prepared to confirm.

2RP 2. The State opposed any continuance. 2RP 3. The State argued that Sanchez may have made a similar request at the last trial confirmation date on May 6, 2010 and due to the late hour the request was inappropriate. 2RP 3. The trial court noted the age of the victim in this matter and the requirement for specific statutory findings in granting a continuance. 2RP 3. The trial court also stated Sanchez had competent counsel. 2RP 3. Sanchez spoke directly to the trial court, stating that, he and Mr. Havirco, did not "have any kind of communication skills in this case together" and he did not fully understand what was going on. 2RP 4. Sanchez also stated he was requesting a continuance so he could hire an attorney and he was making the request on the advice of several

other attorneys. 2RP 4. The trial court confirmed the case and denied the continuance to seek new counsel. 2RP 7. The trial court judge told Sanchez not to be afraid to speak up at trial if he was having any further issues or concerns that were not being addressed. 2RP 6.

The jury trial was held on June 24 and June 25, 2010. 3RP 1, 160. Sanchez did not renew his request for new counsel and proceeded to trial with Mr. Havirco representing him. 3RP 3-4. Sanchez elected to testify in his own defense. 3RP 143. Sanchez was found guilty of the one count of Child Molestation in the First Degree. 3RP 208; CP 66.

A sentencing hearing was conducted on September 22, 2010 and continued to and completed on October 27, 2010. 4RP 1, 6, 17-18, 19. The main contention during the sentencing hearing was whether Sanchez's federal conviction for bank robbery by use of deadly weapon counted towards Sanchez's offender score. 4RP 14. The State filed a sentencing memorandum setting forth its reasoning why Sanchez's federal conviction for bank robbery was comparable to robbery in Washington and why it should be included in Sanchez's offender score. CP 67-89. Sanchez's trial counsel objected to the inclusion of the federal bank robbery

conviction in the offender score and the hearing was continued to allow the State to provide further information to the trial court. 4RP 17-18. A number of documents were submitted as exhibits to the trial court including certified copies of the federal indictment and the judgment and sentence for the 1996 bank robbery. Sent. Ex.³ The trial court ultimately ruled that the 1996 federal bank robbery conviction was comparable to attempted robbery in the first degree, a violent offense, thereby counting as two points for Sanchez's offender score. 4RP 19-20, 34, 37; CP 90-104. Sanchez's attorney did concede that the appropriate sentencing score was six and the State had met its burden in proving Sanchez's prior convictions. 4RP 34. Sanchez was sentenced to 130 months to life. 4RP 37; CP 94.

ARGUMENT

A. THE TRIAL COURT DID NOT DENY SANCHEZ HIS CONSTITUTIONAL RIGHT TO COUNSEL WHEN IT DENIED HIS REQUEST FOR NEW TRIAL COUNSEL.

A criminal defendant has a constitutional right to receive effective representation by his or her attorney. U.S. Const. amend XI; Const. art. 1, § 22; *Strickland v. Washington*, 466 U.S. 688, 684-

³ The state is including in its supplemental designation of Clerk's Papers designation of the federal indictment and the federal judgment and sentence exhibits that were admitted at the sentencing hearing.

85, 80 L. Ed. 674, 104 S. Ct. 2052 (1984). A criminal defendant does not have the right to be represented by an attorney of his choosing but by an effective advocate for his case. *In re Stenson*, 142 Wn.2d 710, 725-26, 16 P.3d 1 (2001) (citing *Wheat v. United States*, 486 U.S. 153, 159, 108 S. Ct. 1692, 100 L.Ed.2d 140 (1988)). The United States Supreme Court has held “that the Sixth Amendment does not guarantee a meaningful relationship between an accused and his counsel.” *In re Stenson*, 142 Wn.2d at 725 (citing *Morris v. Slappy*, 461 U.S. 1, 3-4, 103 S. Ct. 1610, 75 L.Ed.2d 610 (1983)). A defendant must make a showing of good cause to warrant substitution of trial counsel. *State v. Varga*, 151 Wn.2d 179, 200, 86 P.3d 139 (2004). Good cause can be shown through evidence of a conflict of interest, complete breakdown in communication between the defendant and his counsel or an irreconcilable conflict. *Id.* Loss of trust and confidence in one’s attorney is not considered a sufficient reason for the trial court to appoint new counsel. *Id.* A trial court’s denial of motions for new counsel and or a continuance to obtain new counsel are reviewed for abuse of discretion. *Id.*

1. The Trial Court Did Not Abuse Its Discretion When It Denied Sanchez's Request For A Continuance Of The Trial Date To Obtain New Counsel.

The reviewing court applies the following factors when determining if the trial court abused its discretion when determining if an irreconcilable conflict requires substitution of counsel: "(1) The extent of the conflict, (2) the adequacy of the inquiry, and (3) the timeliness of the motion." *In re Stenson*, 142 Wn.2d at 724-25.

Sanchez argues the trial court made no inquiry, there was a complete breakdown in communication and his motion for new counsel and/or continuance to obtain new counsel was timely.

Brief of Appellant 14-16.

Sanchez was charged with one count of Child Molestation in the First Degree, RCW 9A.44.083. CP 1-2. The victim, J.F.P. was born on February 18, 1998, making her 12 at the time of the trial.

CP 1. The legislature has determined that certain cases may not be continued simply by agreement of the parties, but must be continued by the trial court for substantial and compelling reasons.

RCW 10.46.085.

When a defendant is charged with a crime which constitutes a violation of . . . 9A.44 RCW, and the alleged victim of the crime is a person under the age of eighteen years, neither the defendant nor the prosecuting attorney may agree to extend the originally scheduled trial date unless the court within

its discretion finds that there are compelling reasons for a continuance of the trial date and that the benefit of the postponement outweighs the detriment to the victim. . .

RCW 10.46.085. Sanchez's attorney, Mr. Havarco, requested a continuance of the trial date on June 17, 2010, during the trial confirmation hearing. 2RP 2. Trial was set June 24, 2010. 2RP 3-4. Mr. Havarco stated that Mr. Sanchez had long desired to have a private defense attorney represent him and Sanchez was requesting a continuance to allow more time to come up with the funds necessary to retain that attorney. 2RP 2. There may have been one prior continuance to allow for Sanchez to procure other counsel, but that is not clear from the record. 2RP 3. The trial court in this case stated, "So we're talking about the statute, which basically would require me to make specific findings to continue the trial in any event. I'm not willing to do that."

Sanchez's request was not timely. Sanchez argues in his brief that he "made an initial request for substitute counsel on May 3, 2010, nearly two months before the trial." Brief of Appellant 16 (citing 2RP 3). This is not an accurate statement of the record before this court. There was a prior continuance of the trial date and it may have been to allow Sanchez more time to retain private counsel of his choosing, but there is no record of Sanchez, prior to

his letter filed on June 10, 2010, requesting the trial court appoint him new counsel. 2RP 3. Sanchez's letter to the trial court requesting new counsel was filed seven days prior to trial confirmation and 14 days prior to the first day of trial. 2RP 2; 3RP 1; CP 47-49. At the June 17, 2010 hearing, Sanchez only spoke of his desire to retain counsel and did not request that the trial court appoint him new counsel. 2RP 4. Seven days would not be an adequate amount of time for a new attorney, if one were to be hired or appointed, to competently prepare a Class A sex offense case with numerous witnesses to interview, review the trial court's previous rulings and discuss trial strategy with one's client. The case had been pending for over six months. The trial court also had to consider the impact on the victim in this case as required by RCW 10.46.085 and the trial court clearly indicated it was not going to make the required findings necessary to move the trial date. 2RP 3. The trial court properly used its discretion in denying Sanchez's request for a continuance of the trial date to accommodate his wish to retain counsel to replace his court appointed attorney.

2. The Trial Court Did Not Abuse Its Discretion When It Denied Sanchez's Request For New Counsel.

As stated in the previous section the reviewing court not only looks at timeliness of the motion, but also the adequacy of the trial court's inquiry regarding the alleged conflict and the extent of the conflict between the defendant and his trial counsel. *In re Stenson*, 142 Wn.2d at 724-25. Sanchez argues the trial court failed to conduct a meaningful inquiry into his alleged irreconcilable conflict with his trial counsel and Sanchez's request for a new attorney. Brief of Appellant 14. Sanchez also alleges the extent of his conflict with his attorney was sufficient to warrant the trial court to grant Sanchez's request for new counsel. Brief of Appellant 17.

During the June 17, 2010 trial confirmation hearing Sanchez did not request that the trial court appoint him new counsel. See 2RP. The request that was made to the court and addressed at that hearing was in regard to continuing the trial date to allow Sanchez to retain counsel of his choosing. 2RP 2-4. Sanchez stated:

First of all, I want to say the reason I made this request is not just by the advice of the people at the McConnell office, but also at the advice of several other attorneys around town. I believe that there's been an accumulation of events that clearly shows me and Mr. Havarco do not have any kind of communication skills in this case together, and I don't

fully understand all the aspects of what's coming against me, and the only reason I'm verbally putting this forward is because I was advised by all these people to do so, and if by some chance I can have an attorney hired by Monday or Tuesday, because I know that you said if I would have had an attorney hired, it would be a different story. I have people that I work for - - a couple of different people that said they would help me, any kind a verification that this is legitimate, and it could happen. I mean, I'm sorry your Honor. I'm really nervous. I'm scared to death to approach the Court. These issues have been building up for a long time, and I feel like I'm wrong for asking to get the attorney.

2RP 4. Sanchez never inquired if the trial court had read his letter or the letter he submitted from Ms. Kotula. 2RP 4-6, *See also* 3RP; CP 47-49. There is no evidence or testimony regarding when Ms. Kotula allegedly witnessed Mr. Havirco's behavior or what, if any, relationship Ms. Kotula had with Sanchez.

Sanchez relies heavily on the Ninth Circuit case, *United States v. Nguyen*⁴ in his analysis of what he perceives are errors committed by the trial court in this case. Brief of Appellant 11-18. Specifically, that the trial court has an obligation to speak to the attorney and the defendant "privately and in depth" regarding the nature of the problem alleged by the defendant. Brief of Appellant 13 (citing *Nguyen*, 262 F.3d 998, 1004 (2001)). *Nguyen* is factually distinguishable from Sanchez's case. *Nguyen* who was charged

⁴ *United States v. Nguyen*, 262 F.3d 998 (2001).

with three methamphetamine offenses spoke Vietnamese and had difficulty communicating with his court appointed counsel. *Nguyen*, 262 F.3d at 999-1000. *Nguyen* made repeated requests to the trial court to substitute privately retained attorney for his court appointed counsel. *See Nguyen*, 262 F.3d 998. *Nguyen* stopped communicating with his court appointed counsel. *Nguyen* offered evidence to the trial court regarding the court appointed attorney's inappropriate conduct but the trial court chose not to hear *Nguyen's* witnesses. *Id.* at 1004-05. Ultimately the trial court ruled, the morning trial was scheduled to begin, that the privately retained attorney could associate in with the court appointed attorney but no continuance would be granted to allow the privately retained attorney to prepare the case and proceed with his representation of *Nguyen* solo. *Id.* at 1000. *Nguyen* was not present for this hearing. *Id.* Throughout the trial *Nguyen* repeatedly attempted to have his court appointed attorney removed and substitute in privately retained counsel to no avail. *Id.* 1000-02. The Ninth Circuit held the trial court had abused its discretion by denying *Nguyen* the right to have his private counsel substitute in without a justifiable reason for the findings and denial of a continuance without holding a hearing. *Id.* 1003. The Court in *Nguyen* stated "the trial court

should question the attorney or defendant 'privately and in depth'" regarding the request for the substitution of counsel. *Id.* at 1004. Also, in *Nguyen*, the court appointed counsel admitted there was a complete breakdown in communication between himself and Nguyen. *Id.* at 1005.

In the present case Sanchez discussed with the trial court his desire to retain counsel at the trial confirmation hearing on June 17, 2010. 2RP 4. It is not clear from the record if there was any discussion regarding Sanchez wanting to retain counsel at his prior trial confirmation hearing on May 6, 2010. 2RP 3. While Sanchez did write a letter to the trial court, the record is silent as to whether the trial court actually received a copy and read the letter. Sanchez never addresses his letter when speaking with the court. See 2RP. Further, Sanchez proceeded to trial with Mr. Havarco as his attorney and did not address with the trial court anytime during the trial any dissatisfaction with Mr. Havarco or renew his request for a continuance to hire outside counsel. See 3RP.

Sanchez's reliance on *Nguyen* is misplaced due to the distinctly different facts of the two cases. The trial court did not abuse its discretion by failing to conduct an in depth inquiry regarding the alleged irreconcilable differences between Sanchez

and Mr. Havirco when Sanchez failed to address the issue himself when given the chance. Further, Sanchez failed to make it clear to the trial court that he wanted it to appoint him new counsel due to his argument for a continuance so he could retain private counsel. There was no evidence presented or argument that would lead the trial court to make a finding that Mr. Havirco could no longer effectively represent Sanchez. Sanchez's conviction should be affirmed.

3. Sanchez Received Effective Representation From His Trial Counsel And Assisted His Trial Counsel In His Own Defense.

Sanchez also claims he was unable to assist fully in his own defense due to the alleged complete breakdown in the communication with his trial counsel. Brief of Appellant 17. A review of the record would indicate that this is not an accurate description of the events that occurred at trial and Sanchez was able to assist in his own defense by testifying not only during trial but during a CrR 3.5 hearing. 3RP 21, 143. Sanchez argues he was "constructively denied his constitutional right to the effective assistance of counsel." Brief of Appellant 18.

To prevail on an ineffective assistance of counsel claim Sanchez must show that (1) the attorney's performance was

deficient and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 688, 687, 104 S. Ct. 2052, 80 L. Ed. 674 (1984); *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The presumption is that the attorney's conduct was not deficient. *State v. Reichenbach*, 153 Wn.2d at 130, *citing State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Deficient performance exists only if counsel's actions were "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. The court must evaluate whether given all the facts and circumstances the assistance given was reasonable. *Id.* at 688. If counsel's performance is found to be deficient, then the only remaining question for the reviewing court is whether the defendant was prejudiced. *State v. Horton*, 116 Wn. App. 909, 921, 68 P.3d 1145 (2003). Prejudice "requires 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *State v. Horton*, 116 Wn. App. at 921-22, *citing Strickland v. Washington*, 466 U.S. at 694.

Sanchez has not made the required showing that his trial counsel was deficient. Sanchez's trial counsel participated in the 404(b) hearing in March, demanded a CrR 3.5 hearing prior to trial, cross-examined the State's witnesses during trial, conducted a

direct examination of Sanchez and argued Sanchez's case during the closing argument at trial. See, 1RP and 3RP. Sanchez's claim under the theory he was constructively denied effective counsel fails and his conviction should be affirmed.

B. SANCHEZ'S PRIOR FEDERAL BANK ROBBERY CONVICTION IS NOT COMPARABLE TO ROBBERY IN WASHINGTON AND THEREFORE THE STATE CONCEDES SANCHEZ'S CASE MUST BE REMANDED FOR RESENTENCING.

In a sentencing hearing, "[a] criminal history summary relating to the defendant from the prosecuting authority . . . shall be prima facie evidence of the existence and validity of the convictions listed therein." RCW 9.94A.500. The State must prove a defendant's prior criminal convictions by a preponderance of the evidence. RCW 9.94A.500(1); *State v. Kipling*, 166 Wn.2d 93, 101, 206 P.3d 322 (2009). Illegal or erroneous sentences may be challenged for the first time on appeal. *State v. Ross*, 152 Wn.2d 220, 229, 95 P.3d 1225 (2004)(citations omitted). The remedy for an erroneous sentence is remand for resentencing. *Id.*

When calculating a person's offender score for purposes of sentencing:

Federal convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law. If there is no clearly comparable offense under Washington law or

the offense is one that is usually considered subject to exclusive federal jurisdiction, the offense shall be scored as a class C felony equivalent if it was a felony under the relevant federal statute.

RCW 9.94A.525(3). “[F]undamental principles of due process prohibit a criminal defendant from being sentenced on the basis of information which is false, lacks a minimum indicia of reliability or is unsupported in the record.” *State v. Ford*, 137 Wn.2d 472, 481, 973 P.2d 452 (1999)(citations omitted).

A foreign conviction is equivalent to a Washington offense if there is either a legal or factual comparability. *In re Lavery*, 154 Wn.2d 249, 255-58, 111 P.3d 837 (2005). If the foreign statute is broader than the Washington definition of the particular crime, the sentencing court may look at the defendant’s conduct, as evidenced by the indictment or the information, to determine whether the conduct would have violated the comparable Washington statute. *State v. Duke*, 77 Wn. App. 532, 535, 504 P.2d 1174 (1973).

The State concedes that the federal crime of bank robbery under 18 U.S.C. § 2113 is not legally comparable to the crime of robbery in Washington. *Lavery*, 154 Wn.2d at 255-56. Bank robbery under the federal code is a general intent crime while robbery in Washington requires that the State prove the essential,

non-statutory element that person had the specific intent to steal. *Id.* Therefore, the State's argument that Sanchez's federal bank robbery conviction was comparable to attempted first degree robbery in Washington was in error. The State also concedes it did not provide evidence of the facts regarding Sanchez's federal bank robbery conviction. Therefore, the trial court would not have been able to make a factual comparison of Sanchez's conduct which constituted the federal bank robbery with the elements of robbery in Washington. Sanchez's federal bank robbery conviction should have been counted as one point under RCW 9.94A.525(3), instead of the two points used by the State and the trial court in calculating Sanchez's offender score. The sentence must be reversed and the case remanded for resentencing.

C. THE STATE WILL NOT ADDRESS THE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM IN REGARD TO THE SENTENCING HEARING.

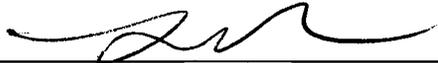
Because the State is conceding that the State and trial court improperly sentenced him, the State will not address Sanchez's claim of ineffective assistance of counsel at the sentencing hearing.

CONCLUSION

For the foregoing reasons, this court should affirm Sanchez's conviction for Child Molestation in the First Degree. This court must reverse Sanchez's sentence and remand for resentencing due to the improper offender score calculation.

RESPECTFULLY submitted this 26th day of May, 2011.

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by: 

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Attorney for Plaintiff

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STATE OF WASHINGTON
BY [Signature]

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,) NO. 41389-2-II
Respondent,)
vs.) DECLARATION OF
) MAILING
JESUS CLOVIS SANCHEZ, JR.,)
Appellant.)
)
)
_____)

Ms. Teri Bryant, paralegal for Sara I. Beigh, Deputy
Prosecuting Attorney, declares under penalty of perjury under the
laws of the State of Washington that the following is true and
correct: On May 26, 2011, the appellant was served with a copy of
the **Respondent's Brief** by depositing same in the United States
Mail, postage pre-paid, to the attorney for Appellant at the name
and address indicated below:

Maureen M. Cyr
Washington Appellate Project
1511 3rd Ave., Suite 701
Seattle, WA 98101-3635

DATED this 26 day of May, 2011, at Chehalis, Washington.

Teri Bryant
Teri Bryant, Paralegal
Lewis County Prosecuting Attorney Office