

NO. 63997-8-I

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

STATE OF WASHINGTON,

Respondent,

v.

ROBERTO HERNANDEZ,

Appellant.

2009 OCT 11 AM 3:54
STATE OF WASHINGTON
COURT OF APPEALS
2

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

The Honorable Steven J. Mura, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Appellant was denied his constitutional right to conflict-free counsel.

2. The trial court erred by failing to inquire into counsel's conflict because it knew or reasonably should have known of the conflict's existence.

Issues Pertaining to Assignment of Error

The Whatcom County Public Defender represented both the appellant and the State's informant who supplied the incriminating evidence against appellant. Before trial, the prosecutor informed the trial court that the informant was represented by the Public Defender on a drug possession charge which the informant sought to have dismissed or reduced in exchange for obtaining the incriminating evidence used against appellant at trial. The prosecutor also informed the court the informant had an outstanding warrant on the possession charge and could not be located by the State for trial. Defense counsel acknowledged the case would "rise or fall" on the informant's credibility, but did not attempt to call him as a witness to reveal his motives for cooperating with the State. Defense counsel did not deny that his office represented the informant. The trial court did not conduct any inquiry into the conflict of interest or determine whether appellant or the informant had waived the conflict.

1. Did defense counsel deprive appellant of his constitutional right to effective assistance of conflict-free counsel, when counsel failed to call the informant as a witness in order to support appellant's defense that the informant was biased and unreliable?

2. Did the trial court fail to fulfill its duty to inquire into the conflict to determine whether disqualification of counsel was required and to ensure appellant was aware of the conflict?

B. STATEMENT OF THE CASE

1. Procedural History

On January 26, 2009, The Whatcom County prosecutor charged Roberto Hernandez with unlawful delivery of heroin, occurring on or about January 22, 2009. CP 57-58.

On July 14, 2009, the Honorable Steven J. Mura conducted a pre-trial hearing on the State's motion to admit Hernandez's custodial statements. 1RP.¹ The court found the statements admissible and entered written findings of fact and conclusions of law on August 11, 2009. 1RP 39-42; 3RP 3; CP 29-30. Trial commenced on July 15, 2009. See 2RP.

¹ This brief refers to the verbatim report of proceedings as follows: 1RP – July 14, 2009; 2RP – July 15, 2009 & July 16, 2009; 3RP – August 11, 2009

A jury found Hernandez guilty. CP 31. Hernandez was sentenced to 36 months in prison, with nine to twelve months of community custody. CP 19-28; 3RP 12. Hernandez timely appeals. CP 2-16.

2. Charged Offense

On January 22, 2009, Bellingham Police Department Officers arranged an undercover controlled buy of heroin using an informant later identified as Wesley Stock. 2RP 4. Stock had incentive to set up sellers for the police in order to work off his own pending heroin possession charge. 2RP 14-16.

Stock contacted a person he thought would sell heroin. 2RP 22. Telephone arrangements were made for the purchase of \$100 of heroin from a person at a Fred Meyer in Bellingham. Detective Kent Poortinga listened in on the phone conversation. Poortinga said the person who spoke with Stock identified himself as Roberto. Police approved the Fred Meyer location. It is unclear who suggested the buy occur there. 2RP 23-25.

After a search of Stock revealed no drugs or money, the police gave him \$100 in pre-recorded "buy money." 2RP 25-27, 32. Poortinga drove Stock to the Fred Meyer in an unmarked car and instructed him to remain visible to other officers watching the store. Stock used a pay phone inside the Fred Meyer lobby to contact the alleged seller. 2RP 33,

35, 144. No evidence shows the police had previously searched the lobby or pay phone for heroin.

After Stock left the lobby, police saw a white car drive up to him. Hernandez was identified as the driver and sole occupant. 2RP 59, 65. Stock got into the front seat and the car drove a short distance in the parking lot. 2RP 36, 59-60. Approximately 30 seconds later, the car stopped and Stock got out. 2RP 38, 61, 101. Acting on Poortinga's instructions, Stock walked directly to the store, and heroin was taken out of Stock's pants pocket. 2RP 28-29, 38-40, 133-36.

When they saw Stock leave the car, Detective Brooks Laughlin and Sergeant Claudia Murphy drove their unmarked car behind Hernandez's car and activated their lights and siren. Hernandez stopped after a short distance. 2RP 60-62, 102-103. Laughlin ordered Hernandez out of the car. 2RP 61-62. Laughlin handcuffed and searched Hernandez. 2RP 62, 64, 67. He found \$97.00 in Hernandez's wallet. 2RP 67. No drugs or weapons were found during the search. 2RP 67.

Laughlin read Hernandez his Miranda² rights. Laughlin said Hernandez acknowledged he understood his rights and wanted to talk, but Hernandez was not provided a waiver form. 2RP 66-67, 74. After being

² Miranda v. Arizona, 384 U.S. 436, 469-73, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

told he was under arrest for delivery of a controlled substance, Hernandez denied selling drugs and shook his head. When asked, Hernandez said he was a heroin user and purchased half an ounce of heroin from an unnamed person in Mount Vernon. 2RP 68. When told by Laughlin that half an ounce was a large amount for personal use, Hernandez said that he collects money from friends for the half-ounce and distributes it to friends who provided money. 2RP 68-69. Laughlin acknowledged Hernandez's statements referred to Hernandez's general practice of obtaining heroin, and did not specifically refer to the alleged transaction with Stock. 2RP 75.

Patrol Sergeant Jason Monson searched the car and found money in the ashtray. Monson picked up the money and counted four twenty-dollar bills and two ten-dollar bills folded in half. Under the folded money were five one-dollar bills. 2RP 142. The folded \$100 matched the pre-recorded buy money. 2RP 42, 71, 116-17, 142, 150. No drugs or drug paraphernalia were found in the car. A drug-sniffing dog alerted only to the ashtray where the buy money was located. 2RP 76, 117, 143, 150-51.

Monson videotaped the incident. The videotape showed Stock walk into the Fred Meyer lobby area, speak on the pay phone, pace in the parking lot, and get into Hernandez's car. 2RP 144, 147-49. The

videotape did not show the transaction that allegedly occurred in the car.
2RP 45-46, 52, 148-49.

3. Conflicted Counsel

David Brown, a public defender with the Whatcom County Public Defender Office, represented Hernandez at trial. 1RP 2; 2RP 2; 3RP 2. At the beginning of the pre-trial CrR 3.5 hearing, the State informed the court the State could not locate Stock to testify at trial. 1RP 3-4. The prosecutor explained:

We used the Bellingham Police Department, we used a confidential informant; that informant can't be found by law enforcement for purposes of trial. It's my understanding that the confidential informant has been revealed to the defense in interviews. They had a case pending with the Public Defender's Office with the C.I. and he's out on warrant status. So the defense knows all about that.

1RP 4.

In response to defense counsel's intent to request a missing witness instruction, the prosecutor again commented on the conflict of interest:

Just on the missing witness instruction your honor, it's kind of interesting in this case they would even be discussing that but this is not a witness uniquely available only to the State. This person is their client and they have the case and there's a warrant out in their office.

1RP 5-6.

During the State's motions in limine, the prosecutor again addressed the conflict, noting that Stock was represented by the public defender's office on the possession charge that caused him to become an informant:

He [informant] is not here, we cannot find him. He is out on warrant status for the original case in which he rolled on this, what we have before us, the charge before us. In that case he was represented by the Public Defender's Office, they're aware that he has a warrant.

2RP 3.

The prosecutor addressed the conflict a final time at the conclusion of the State's case-in-chief, arguing against a missing witness instruction:

I do want to state for the record, I don't believe Mr. Brown's in a position to dispute this, the Public Defender's Office did represent this quote missing witness and may have case files on him as well. So if he is available to the State as much as the Public Defender's Office, we are all in the same position about trying to get him here. So I ask the motion be denied, Your Honor.

2RP 154.

Defense counsel did not deny his office represented Stock, and declined to address the issue each time it was mentioned by the State. No evidence shows Hernandez was informed of the conflict or waived it. The trial court failed to conduct any further inquiry into the conflict of interest.

Ruling that a missing witness instruction was improper, the trial court reasoned Stock was not within the control of, or peculiarly available to the State. 2RP 154.

4. Hernandez's Trial Defense

Defense counsel focused throughout the trial on Stock's reliability and motives. Prior to trial, counsel stated the case would "rise or fall" on Stock's reliability. 1RP 4-5.

During trial, Poortinga revealed Stock was on warrant status and had become an informant as a result of a heroin possession charge. 2RP 16, 54-55. Poortinga testified it is common to lose contact with informants and telephone calls and surveillance of Stock's supposed residence were unsuccessful in finding him. 2RP 17-18, 46.

On cross, defense counsel questioned Poortinga on the general motivations and reliability of informants. Poortinga said "working off a criminal charge" meant an informant had to set up a number of people to commit drug transactions in order to have his own criminal charge reduced or dismissed. If an informant successfully set up enough people, the police would ask prosecutors for leniency. If an informant did not succeed, leniency would not be requested. 2RP 48. Poortinga denied any informant he worked with had ever stolen drugs or money. 2RP 49-50.

Poortinga said Stock did not testify because he could not be located, not because police were trying to protect his identity. 2RP 54-55.

Murphy reiterated many of Poortinga's claims regarding the motivations and reliability of informants. Murphy said it was not unusual to lose contact with informants, and that the Bellingham Police Department had nothing to do with Stock's absence. 2RP 94-96, 104-05, 111-15. Murphy said Stock expressed a fear of Hernandez because of Stock's cooperation with police. 2RP 130-31. Murphy also stated Stock was on warrant status and had become an informant after being found in possession of heroin by police. 2RP 113, 120. Murphy testified that when an informant disappears and fails to testify they receive no request for leniency from the police. Murphy admitted however, that Stock's case had never "made it" to the prosecutor's office. 2RP 124, 132. No other testimony shared what leniency Stock received in exchange for his cooperation, or the terms of his agreement with the police.

In closing, defense counsel argued Stock was biased, unreliable, and had framed Hernandez. Stock was unreliable: "the first thing we saw is that this case rises and falls on the back of an informant, a snitch, someone who is setting these types of situations up to get out of trouble." 2RP 165. Stock's motivations for getting out of trouble caused him to frame Hernandez. Counsel argued the additional five dollars found in the

ashtray, coupled with the quick, 30-second exchange, and no attempt by Hernandez to conceal the buy money, showed that the Stock had simply dumped the money in the ashtray and gotten out of the car. 2RP 166, 170-71. Counsel pointed out Stock used the pay phone in the Fred Meyer lobby to contact Hernandez, which gave the Stock an opportunity to recover previously stashed drugs he then turned over to the police. 2RP 167. The drug-sniffing dog only alerted to the money, not to anything else in the car, showing Stock had kept the heroin and money in the same place. 2RP 170-71. In conclusion, counsel argued: "This is a set up. That's what this was. Roberto Hernandez was set up by a drug addict who did this in order to get out of his own felony charges." 2RP 171.

C. ARGUMENT

COUNSEL'S CONFLICT OF INTEREST ADVERSELY AFFECTED THE REPRESENTATION AND DEPRIVED HERNANDEZ OF EFFECTIVE ASSISTANCE OF CONFLICT-FREE COUNSEL

1. Summary of Argument

Defense counsel and the Whatcom County Public Defender owed a duty of loyalty to both Stock and Hernandez. Stock's interests as an informant against Hernandez clearly conflicted with Hernandez's interests. Defense counsel's efforts to serve these two masters adversely affected counsel's representation of Hernandez. By continuing to represent

Hernandez, despite the conflict, counsel deprived Hernandez of his constitutional right to effective, conflict-free counsel.

2. Effective Counsel is Conflict-Free

The Sixth Amendment and Wash. Const. art. 1, § 22 guarantee an accused's right to effective counsel. State v. Regan, 143 Wn. App. 419, 425, 177 P.3d 783 (2008), review denied, 165 Wash.2d 1012 (2008). Effective assistance includes the duty of loyalty to a client and the duty of loyalty 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 (1996). The "right to counsel guaranteed by the Constitution contemplates the services of an attorney devoted solely to the interests of his client." Mickens v. Taylor, 535 U.S. 162, 183, 122 S. Ct. 1237, 152 L. Ed. 2d. 291 (2002) (quoting Von Moltke v. Gillies, 332 U.S. 708, 725, 68 S. Ct. 316, 92 L. Ed. 309 (1948)).

3. Hernandez was Denied the Right to Conflict-Free Counsel

Where an actual conflict of interest adversely affected counsel's performance, reversal is required even without a showing of prejudice. Cuyler v. Sullivan, 446 U.S. 335, 349-50, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980); Regan, 143 Wn. App. at 427; 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). In order to show adverse effect, an accused need only demonstrate “that some plausible alternative defense strategy or tactic might have been pursued but was not and that the alternative defense was inherently in conflict with or not undertaken due to the attorney’s other loyalties or interests.” Regan, 143 Wn. App. at 428 (quoting United States v. Stantini, 85 F.3d 9, 16, (2nd Cir. 1996)). Whether a conflict exists is a question of law subject to de novo review. Regan, 143 Wn. App. at 428.

Such conflict is not limited to joint representation of codefendants. The problem arises in any situation where defense counsel represents conflicting interests. Regan, 143 Wn. App. at 426-27 (citing Richardson, 100 Wn.2d at 677-78.)

The Washington Rules of Professional Conduct recognize a conflict of interest when a lawyer's responsibilities to another client or third party are directly adverse or materially limit the lawyer's representation. RPC 1.7(a). RPC 1.7(a) provides that a concurrent conflict of interest exists if:

1. the representation of one client will be directly adverse to another client; or
2. there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's

responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

In evaluating possible conflicts of interest, members of a law firm are treated as a single attorney. RPC 1.10(a).³ Though RPC 1.7(b)(4) provides that a lawyer may represent clients with conflicting interests if each client gives informed written consent, nothing here shows Hernandez or Stock were advised of, or waived the conflict.

Counsel's research has shown no Washington cases that would allow trial counsel to represent both the accused and the informant who supplied the incriminating evidence against the accused. See State v. Santacruz-Hernandez, 109 Wn. App. 328, 40 P.3d 672 (2001), review denied, 146 Wash.2d 1019 (2002) (reversible error where trial court failed to grant a continuance to allow defense counsel to adequately address whether a confidential informant who participated in the transaction against Santacruz-Hernandez had been a client of hers in other unrelated matters).

³ RPC 1.10(a) provides: "Except as provided in paragraph (e), while lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm."

Other courts recognize a per se conflict of interest requiring reversal, where defense counsel's professional relationship with an informant is contemporaneous with counsel's representation of the accused and involves a matter of significant relevance to the accused's trial. Rael v. Blair, 141 N.M. 232, 153 P.3d 657 (2007); People v. Daly, 341 Ill. App. 3d 372, 275 Ill. Dec. 215, 792 N.E.2d 446 (2003), appeal denied, 209 Ill.2d 587 (2004). "In such a case, certain facts about the defense counsel's status, by themselves, engender a disabling conflict." Daly, 792 N.E.2d at 450. In Daly, a confidential informant had been previously represented by defense counsel on charges that caused him to become an informant against appellant. Daly, 792 N.E.2d at 448. Defense counsel's previous representation of the informant, who later became a witness in Daly's case, was of significance to Daly's case because the charges against the informant were dismissed as a result of his favorable testimony. Daly, 792 N.E.2d at 451. Finding that the per se conflict of interest endangered Daly's constitutional rights, Daly's conviction was reversed. Daly, 792 N.E.2d at 452.

Similarly, Rael was convicted of selling heroin and cocaine to an undercover agent. Rael, 153 P.3d at 658. The investigation involved a confidential informant, who introduced Rael to the undercover agent. Rael, 153 P.3d at 658. When the informant became an informant, criminal

charges were pending against him in two separate matters. Rael, 153 P.3d at 659. In exchange for becoming an informant, at least one of his charges was dismissed. The same attorney who represented Rael was also appointed to represent the informant in his cases. Rael, 153 P.3d at 659. Concluding that defense counsel was operating under a conflict of interest in representing both the informant and Rael, the New Mexico Supreme Court reversed Rael's conviction. Rael, 153 P.3d at 663-64.

As with Daly and Rael, while the public defender represented Hernandez there was an ongoing representation between the public defender and Stock, requiring a duty of loyalty and protection of Stock's interests. Further, the public defender's representation of Stock was significant to Hernandez's case because Stock sought to have his case dismissed or reduced in exchange for gathering the incriminating evidence against Hernandez.

Defense counsel's attempt to serve the interests of both Stock and Hernandez, caused a lapse in representation contrary to Hernandez's interest. Stock had an interest in avoiding arrest for the warrant in the case in which he was represented by the public defender's office. 2RP 130-131. Similarly, Stock had an interest in continuing to help the State as an informant which necessarily required that he not be placed in a position where he might perjure himself. In contrast, Hernandez had an interest in

avoiding culpability which required the jury to see how Stock was biased, unreliable, and had framed Hernandez. Yet, despite defense counsel's acknowledgment that the case would "rise or fall" on Stock's credibility, defense counsel did not attempt to call Stock as a witness. 1RP 4-5. As the State noted, the public defender's office had open case files on Stock, and defense counsel was in a position to contact Stock using any information Stock provided to the public defender's office.

Defense counsel's failure to call Stock as a witness did not serve Hernandez's best interests. The State relied almost exclusively on evidence gathered by Stock. Without Stock, defense counsel could not question him about facts relevant to show how Hernandez had been framed, such as who suggested the controlled buy occur at Fred Meyer or why Stock had used a pay phone rather than a cell phone to contact Hernandez. Likewise, counsel could not attack Stock's credibility by questioning him about his motives and whether he had received leniency for his cooperation.

Defense counsel served Stock's best interests rather than Hernandez's. By not being compelled to testify, Stock neither had to fear testifying against Hernandez, perjuring himself, nor risk being arrested for the outstanding warrant on the case in which he was represented by the public defender.

Furthermore, the public defender's simultaneous representation of Hernandez and Stock adversely affected Hernandez's opportunity to receive a missing witness instruction. Defense counsel requested a missing witness instruction on numerous occasions. 1RP 5, 43; 2RP 152-53. Relying on the State's argument that a missing witness instruction was improper because Stock was equally available to both parties, the trial court noted, "the only evidence in the record is that he is on the lam with a warrant for his arrest outstanding. The witness is not within the control of or peculiarly available to the State in this case." 2RP 154.

An analogous situation arose in Self v. State, 564 So.2d 1023 (Ala. Cr. App. 1989), cert. quashed by, 564 So.2d 1035 (1990), involving the drug prosecution of Self and Clayton. Self's trial attorney (S.S.) and Clayton's trial attorney (G.W.) had represented the informant (Renee) in previous criminal proceedings. Self, 564 So.2d at 1034. As a condition of her plea to a separate cocaine possession charge, Renee cooperated with police in drug investigations involving Self and Clayton. Self, 564 So.2d at 1029-30. G.W. had encouraged Renee to assist the police. Self, 564 So.2d at 1034.

Prior to trial, both S.S. and G.W. became suspicious that Renee was the informant police relied upon in alleging that Self and Clayton possessed cocaine, but neither attorney declined representation of Self or

Clayton. Self, 564 So.2d at 1029, 1034. S.S. and G.W. also became suspicious that the police allegations were untrue because Self was in the hospital at the time the possession was alleged to have occurred. Self, 564 So.2d at 1030. Renee was not called as a witness at trial.

In a motion for a new trial brought by different attorneys, both G.W. and S.S. admitted Renee was not called as a witness because they feared her case might suffer if she testified that facts contained in the police affidavit were false, and because they felt they could not question her about matters they had learned in confidence. Self, 564 So.2d at 1029, 1034.

Finding that S.S. and G.W. had actual conflicts of interest that denied Self and Clayton effective assistance of counsel, the Court of Appeal noted that G.W.'s and S.S.'s loyalties to Renee, caused them to refrain from taking action which would have been helpful to Self and Clayton, but harmful to Renee. Clayton and Self's convictions were reversed. Self, 564 So.2d at 1034

As with Self, defense counsel's loyalties to Stock prevented him from calling and questioning Stock about information that would have supported Hernandez's defense that Stock was biased and unreliable. Without Stock's testimony, defense counsel had no opportunity to ask questions about any agreement Stock had with prosecutors in exchange for

his cooperation. Defense counsel was likewise prohibited from questioning Stock about facts relevant to whether Hernandez had been framed, such as who suggested the controlled buy occur at Fred Meyer or why Stock had used a pay phone rather than a cellular phone to contact Hernandez.

Defense counsel and the Public Defender's Office had an ongoing relationship and duty of loyalty towards Stock that conflicted with Hernandez's interests. Had Stock's interests as an informant not conflicted with Hernandez's interests in avoiding guilt, counsel would have pursued calling Stock as a witness to support Hernandez's theory of the case. Instead, counsel's efforts to serve Stock's interests adversely affected counsel's representation and deprived Hernandez of effective, conflict-free counsel.

4. The Trial Court Erred by Failing to Inquire into Counsel's Conflict

Where the trial court knows or reasonably should know a conflict exists, the court must inquire further.⁴ Cuyler, 446 U.S. at 347; Regan, 143 Wn. App. at 425-426. The court should also determine whether there has been a waiver of the conflict, whether the waiver was effective, or

⁴ In State v. Martinez, 53 Wn. App. 709, 715, 770 P.2d 646 (1989), review denied, 112 Wn.2d 1026 (1989), the court suggested in dictum that a court should inquire only when the conflict involves a witness who is presented to be sworn and expected to give testimony.

whether a waiver was possible. Virgin Islands v. Zepp, 748 F.2d 125, 139 (1984) (citing Glasser v. United States, 315 U.S. 60, 71, 62 S. Ct. 467, 86 L. Ed. 680 (1942)). This rule applies in any circumstance where defense counsel represents conflicting interests. McDonald, 143 Wn.2d at 513.

In Regan, the conflict of interest was brought to court's attention in a pretrial hearing when Regan's primary trial counsel explained that agreeing to a trial continuance in order to accommodate the vacation of her supervising attorney (White) would result in Regan's extended pretrial detention. Regan, 143 Wn. App. at 428-29. The State wanted to compel White to testify against Regan concerning a bail jumping charge to show that White told Regan to arrive early for court. Regan, 143 Wn. App. at 424. Primary trial counsel agreed to the continuance, "to the consternation of Regan." Regan, 143 Wn. App. at 429. Reversing, this court held the trial court erred in compelling White to testify without first seeking a waiver or making any inquiry into the conflict. Regan, 143 Wn. App. at 430.

In Hernandez's case, the trial court was made aware of the conflict created by the public defender's simultaneous representation of both Hernandez and Stock. The prosecutor mentioned it four times, and went so far as to point out that defense counsel was in no position to dispute the State's opposition to the missing witness instruction. 2RP 154. Defense

counsel's silence admitted the State's assertions. There is no reason to believe, however, Hernandez was aware of the conflict or its potential implications. Under these circumstances, the trial court had a duty to protect Hernandez's right to effective counsel. The trial court erred by failing to fulfill this duty.

5. Conclusion

The Public Defender's ongoing relationship and duty of loyalty towards Stock materially limited counsel's representation of Hernandez. The State's repeated mention of the conflict, defense counsel's silent admission coupled with a continued refusal to address the issue, the trial court's failure to inquire into counsel's conflict, and counsel's failure to attempt to call Stock as a witness despite the defense theory of the case, demonstrates an actual conflict that adversely affected counsel's performance. Hernandez was deprived not only of the knowledge of the conflict but also the opportunity to waive the conflict. By failing to withdraw when he learned of the conflict of interest, defense counsel deprived Hernandez of his constitutional right to effective, conflict-free counsel. Hernandez's conviction should be reversed. Regan, 143 Wn. App. at 426-32.

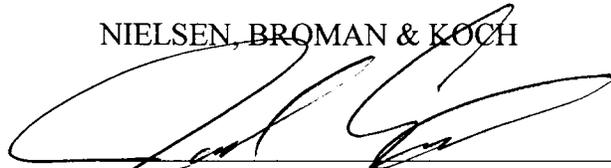
D. CONCLUSION

For the above reasons, Hernandez's conviction should be reversed and the case dismissed.

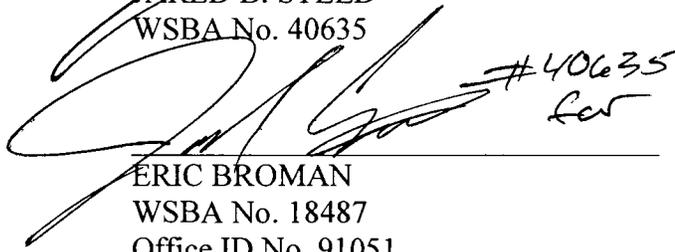
DATED this 11th day of December, 2009.

Respectfully submitted,

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 63997-8-1
)	
ROBERTO HERNANDEZ,)	
)	
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 11TH DAY OF DECEMBER, 2009, 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] CRAIG CHAMBERS
WHATCOM COUNTY PROSECUTOR'S OFFICE
WHATCOM COUNTY COURTHOUSE
311 GRAND AVENUE
BELLINGHAM, WA 98227

[X] ROBERTO HERNANDEZ
DOC NO. 304019
WASHINGTON CORRECTIONS CENTER
P.O. BOX 900
SHELTON, WA 98584

SIGNED IN SEATTLE WASHINGTON, THIS 11TH DAY OF DECEMBER, 2009.

X *Patrick Mayovsky*