

No. 68459-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

KOREY TAYLOR,

Appellant.

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

The Honorable Richard T. Okrent

2012 SEP 12 PM 4:39
COURT OF APPEALS
STATE OF WASHINGTON

BRIEF OF APPELLANT

THOMAS M. KUMMEROW
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. ASSIGNMENT OF ERROR

The trial court denied Mr. Taylor's Sixth Amendment and article I, section 22 rights to the counsel of his choice.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

A defendant has the constitutional right under the Sixth Amendment and article I, section 22 to the attorney of his choice. Courts cannot infringe this right absent a finding the substitution of retained counsel for court-appointed counsel would cause a significant delay. Here, on the first day of trial, Mr. Taylor sought additional time to retain counsel of his choice. The trial court failed to make an explicit finding the substitution would cause significant delay, instead focusing solely on whether court-appointed counsel's performance was competent, a factor which cannot be considered in this context. Did the trial court impermissibly infringe on Mr. Taylor's right to the counsel of his choice, requiring reversal of his conviction and remand for a new trial?

C. STATEMENT OF THE CASE

Korey Taylor was charged with one count of second degree assault with a deadly weapon enhancement, and in the alternative, one count of third degree assault with a deadly weapon enhancement. CP 320. On the first day of trial, Mr. Taylor moved to substitute retained counsel for his court-appointed attorney. 1/23/2012RP 4.

THE DEFENDANT: [] I would like to have a new attorney. One, because money has been given to me for an attorney from when I wasn't able to have one. Due to my judge saying the prosecutor is going to up the charge, which makes it more serious or something. That is the reason why my family wanted to assist me with the money. Also, because this is a matter that's dealing in the family. Other family members really didn't want to get involved, but because this is becoming such a serious thing with the charges being run up now, they feel that they need to come forward.

THE COURT: Who is the attorney that you wish to hire?

THE DEFENDANT: I don't know at this point in time because I haven't looked for an attorney. Like I said, this is something I spoke with my attorney on Saturday [sic] and he was representing me. But yesterday is when I was told that I could be given money to have an attorney represent me if I was going to be facing such serious charges going into trial.

1/23/2012RP 4.

Mr. Taylor did not make any allegations of deficient performance by his court-appointed attorney, nor did he allege a breakdown in the attorney-client relationship. 1/23/2012RP 4-5. Rather, Mr. Taylor merely expressed a desire to have the attorney of his choice at trial:

Going into trial also, I want to be confident. And one of the reasons when I was speaking with my family members, when they said they would assist me with an attorney, one of the biggest reasons that I expressed to Fred [Moll, current counsel] this morning was the fact that when I spoke with him this weekend, I had a ring over my head again that he told me we were going to lose the case. I do not want a lawyer that's going to tell me I'm going to lose a case before I even go into trial, and that sits with me right now, like I told Richard in the hallway, and I can't leave that out of my mind. I don't want to be told I'm going to lose.

1/23/2012RP 7.

The State objected to Mr. Taylor's request, contending it was untimely. 1/23/2012RP 5-6. In denying Mr. Taylor's request to hire his own attorney, the trial court focused primarily on the effectiveness of current counsel:

Reasons [for counsel] to withdraw include the failure of the client and attorney to cooperate. I haven't heard that. Disregard of the client of

counsel's advice. I haven't heard that. Failure of the client to honor his financial obligations. This is a court-appointed case, it's not one of those issues. Personal circumstances such as illness, antagonism between client and attorney. Doesn't exist. In fact, the attorney is ready to go, and it seems to be, with the exception of some tactical information, which is often done between attorney and client, attorney has advised the client of the best of his knowledge about outcomes. That does not create that kind of antagonism. And a conflict of interest. I don't see that.

This defendant has not, even though he's had an opportunity, engaged an attorney. If an attorney was here I might have a different reason. If someone had been already substituted I'd have a different reason. I don't have such a reason. I haven't had any of those enumerated reasons that would cause me at this point to delay this trial or to allow for counsel to withdraw, so we're going to go forward and I'm going to deny the withdrawal of the attorney at this time.

1/23/2012RP 8-9.

Following a jury trial, Mr. Taylor was convicted as charged. *Id.* at 289-92. Prior to sentencing, the trial court dismissed the third degree assault conviction and its attendant deadly weapon enhancement. CP 285.

D. ARGUMENT

MR. TAYLOR WAS DENIED HIS
CONSTITUTIONALLY PROTECTED RIGHT TO
THE COUNSEL OF HIS CHOICE AT TRIAL

1. The constitutional right to counsel guarantees that the accused be represented by counsel of his own choosing if he can afford to retain counsel. The Sixth Amendment to the United States Constitution guarantees the accused the right “to have the Assistance of Counsel for his defence.” Unless the accused is unable to afford an attorney, he has the constitutional right to be represented by counsel of his own choice. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 144, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006). Similarly, article I, section 22 of the Washington Constitution provides, “In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel. . .”

“[T]he Sixth Amendment guarantees a defendant the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire, or who is willing to represent the defendant even though he is without funds.” *Gonzalez-Lopez*, 548 U.S. at 144, *quoting Caplin & Drysdale, Chartered v.*

United States, 491 U.S. 617, 624-25, 109 S.Ct. 2646, 105 L.Ed.2d 528 (1989).

“Lawyers are not fungible, and often the most important decision a defendant makes in shaping his defense is his selection of an attorney.” *United States v. Gonzalez-Lopez*, 399 F.3d 924, 928 (8th Cir. 2005), *aff’d*, 548 U.S. 140 (2006). Thus, “defendants are free to employ counsel of their own choice and the courts are afforded little leeway in interfering with that choice.” *Id.* at 928, *quoting United States v. Lewis*, 759 F.2d 1316, 1326 (8th Cir.), *cert. denied*, 474 U.S. 994 (1985). The right to the choice of counsel is derived from the right of the defendant to determine the defense to be utilized. *Gonzalez-Lopez*, 399 F.3d at 928, *quoting United States v. Mendoza-Salgado*, 964 F.2d 993, 1014 (10th Cir. 1992). Thus, in general, a defendant who can afford to hire counsel may have the counsel of his choice unless a contrary result is compelled by “purposes inherent in the fair, efficient and orderly administration of justice.” *United States v. Rivera-Corona*, 618 F.3d 976, 979 (9th Cir.2010), *quoting, United States v. Ensign*, 491 F.3d 1109, 1115 (9th Cir.2007). Unless the substitution would cause significant delay

or inefficiency or run afoul of the other considerations, a defendant can fire his retained *or* appointed lawyer and retain a new attorney for any reason or no reason. *Rivera-Corona*, 618 F.3d at 979-80. As a consequence, the defendant must be given a reasonable opportunity to employ counsel of his own choice.

2. The trial court's denial of Mr. Taylor's request to proceed with counsel of his choice violated his Sixth Amendment and article I, § 22 rights to counsel. Courts have discretion on motions for continuances sought to preserve the right to counsel. *State v. Price*, 126 Wn.App. 617, 632, 109 P.3d 27, *review denied*, 155 Wn.2d 1018 (2005). A trial court's denial of a criminal defendant's motion for a continuance sought to preserve the right to counsel violates the defendant's right where it is "an unreasoning and arbitrary 'insistence [by the trial court] upon expeditiousness in the face of a justifiable request for delay.'" *State v. Roth*, 75 Wn.App. 808, 824, 881 P.2d 268 (1994), *review denied*, 126 Wn.2d 1016 (1995). "The trial court must balance the defendant's interest in counsel of his or her choice against the 'public's interest in prompt and efficient administration of justice.'" *Roth*, 75 Wn.App. at 824, *quoting*

Linton v. Perini, 656 F.2d 207, 209 (6th Cir.1981). The factors to be considered include (1) whether the court had granted previous continuances at the defendant's request, (2) whether the defendant had some legitimate cause for dissatisfaction with counsel, even though it fell short of likely incompetent representation, and (3) whether available counsel is prepared to go to trial. *Roth*, 75 Wn.App. at 825.¹

Here, in denying Mr. Taylor's request to retain counsel of his own choosing, the trial court improperly relied on the effectiveness of current counsel.

Where the right to be assisted by counsel of one's choice is wrongly denied . . . it is unnecessary to conduct an ineffectiveness or prejudice inquiry to establish a Sixth Amendment violation.

Deprivation of the right is "complete" when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of the representation he received. To argue otherwise is to confuse the right to counsel . . . with the right to effective counsel . . .

Gonzalez-Lopez, 548 U.S. at 148 (emphasis added).

¹ The fourth *Roth* factor—"whether the denial of the motion is likely to result in identifiable prejudice to the defendant's case of a material or substantial nature," *Roth*, 75 Wn.App. at 825, was disapproved in *Gonzalez-Lopez*, 548 U.S. at 148 (holding that "[w]here the right to be assisted by counsel of one's choice is wrongly denied, therefore, it is unnecessary to conduct an ineffectiveness or prejudice inquiry . . .").

The focus then cannot be on the effectiveness of current counsel, but must focus on the trial court's other rationale for denying Mr. Taylor the opportunity to retain counsel. The trial court provided no other reason. The trial court's focus was not on any delay granting Mr. Taylor his wish would engender, but focused solely on the effectiveness of Mr. Taylor's present appointed attorney.

Mr. Taylor also proffered some legitimate cause for dissatisfaction with his appointed counsel, even though it fell short of likely incompetent representation. Mr. Taylor felt that court-appointed counsel's telling him he was going to lose prior to the start of trial, was an indication that counsel did not have Mr. Taylor's best interests at the forefront. Further, before the initial day of trial, Mr. Taylor had been unable to contact an attorney due to insufficient funds; it was not until family members provided the additional funding did he have the money to attempt to retain counsel of his choice.

Since there was no finding that Mr. Taylor's request would result in an unreasonable delay in the start of trial, the

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KOREY TAYLOR,)	
)	
Appellant-Cross-respondent.)	

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COURT OF APPEALS
STATE OF WASHINGTON
DIVISION ONE

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 12TH DAY OF SEPTEMBER, 2012, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- | | | | |
|-----|---------------------------------------------------------------------------------------------------------|-------------------|-------------------------------------|
| [X] | LAURA E TWITCHELL, DPA
SNOHOMISH COUNTY PROSECUTOR'S OFFICE
3000 ROCKEFELLER
EVERETT, WA 98201 | (X)
()
() | U.S. MAIL
HAND DELIVERY
_____ |
| [X] | KOREY TAYLOR
753735
MCC-TWIN RIVERS UNIT
PO BOX 777
MONROE, WA 98272 | (X)
()
() | U.S. MAIL
HAND DELIVERY
_____ |

SIGNED IN SEATTLE, WASHINGTON, THIS 12TH DAY OF SEPTEMBER, 2012.

X _____
[Signature]

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
☎(206) 587-2711