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May 14, 2015

Court of Appeals

Division I

State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

No. 71798-7-I

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

LA'RYAN HOLMES,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

1. Reversal is required because the trial court applied the wrong legal standard and violated Mr. Holmes's Sixth Amendment right to counsel of choice.

On a Monday morning during trial, Mr. Holmes learned from the court that his privately retained defense attorney had been arrested the previous Friday on a charge of driving under the influence. 2/3/14 RP 3. Expressing concern both that his counsel had been charged with a crime and that his counsel had withheld this information from him, Mr. Holmes moved to fire his private counsel and for a mistrial. 2/3/14 RP 71.

In its response, the State argues the trial court properly applied the standard described in *State v. Stenson* to deny Mr. Holmes's motion. 132 Wn.2d 668, 734, 940 P.2d 1239 (1997); Resp. Br. at 12. This is incorrect. As the State's briefing demonstrates, the standard in *Stenson*, that the defendant must show "a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant," applies to defendants who are "dissatisfied with *appointed* counsel." 132 Wn.2d at 734 (emphasis added). Mr. Holmes was not seeking to substitute his appointed

counsel. He was seeking to fire his private counsel and retain new counsel.

As the Ninth Circuit recently reiterated in *United States v. Brown*, “The Sixth Amendment’s right to counsel encompasses two distinct rights: a right to adequate representation and a right to choose one’s own counsel.” ___ F.3d ___, 2015 WL 2215899 at *4 (No. 13-10354, May 13, 2015) (quoting *United States v. Rivera-Corona*, 618 F.3d 976, 979 (2010)). All criminal defendants are entitled to effective counsel, but defendants who can afford to hire private counsel are also entitled to their counsel of choice. *Brown*, 2015 WL 2215899 at *4. The right to select counsel of one’s choosing is “the root meaning of the constitutional guarantee” found in the Sixth Amendment. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 147-48, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006). It means that a defendant has a right to fire his retained lawyer for *any* reason or for *no* reason. *Brown*, 2015 WL 2215899 at *5.

When the trial court considered Mr. Holmes’s motion, it failed to give any consideration to his Sixth Amendment right to be represented by the counsel of his choice. 2/3/14 RP 73. Instead, it only examined the adequacy of Mr. Holmes’s current counsel, finding that it

did not appear the attorney-client relationship had “broken down to the point where it would be appropriate to grant a mistrial.” 2/3/14 RP 73. This analysis was not appropriate given Mr. Holmes’s constitutional right to be represented by his counsel of choice. *See Gonzalez-Lopez*, 548 U.S. at 146; *State v. Hampton*, 182 Wn. App. 805, 822, 332 P.3d 1020, *rev. granted* 182 Wn.2d 1002 (2014); *Brown*, 2015 WL 2215899 at *5.

The State claims there is no authority for Mr. Holmes’s statement that the basis for his dissatisfaction with counsel was an irrelevant consideration. Resp. Br. at 16. This contention is puzzling, given the State’s acknowledgement of *Gonzalez-Lopez* and *Hampton*, and the supporting cites provided in Mr. Holmes’s opening brief. *See Op. Br.* at 15. In *Gonzalez-Lopez*, and this Court’s and the Ninth Circuit’s subsequent opinions, the courts held that a trial court may not consider a defendant’s dissatisfaction with counsel when his right to counsel of choice is at stake. *Gonzalez-Lopez*, 548 U.S. at 146; *Hampton*, 182 Wn. App. at 822; *Brown*, 2015 WL 2215899 at *5. The State’s assertion to the contrary is plainly incorrect.

Whether the State’s confusion stems from its claim that Mr. Holmes “already had counsel of choice” is unclear. Resp. Br. at 16.

The trial court appeared similarly confused about this issue when it stated that Mr. Holmes “already has” his counsel of choice because his current attorney had been retained. 2/3/14 RP 72. However, the fact that Mr. Holmes had retained counsel did not limit his ability to select new counsel. To the contrary, it indicated he had the ability to retain private counsel and was entitled to fire his counsel for no reason or for any reason. *Brown*, 2015 WL 2215899 at *5; *see also Hampton*, 182 Wn. App. at 822.

As the State later appears to acknowledge, the only limitation placed on a defendant’s right to counsel of choice is the prompt and efficient administration of justice. *Gonzalez-Lopez*, 548 U.S. at 152; *Hampton*, 182 Wn. App. at 826. Trial courts are not precluded from limiting a defendant’s right to counsel of his choosing when it would unduly delay the proceedings. *Id.* But the trial court did not analyze this factor here. Rather than considering the degree of the delay attributable to Mr. Holmes and what additional delay would result from granting his request, as required by *Hampton*, the Court disregarded Mr. Holmes’s Sixth Amendment right to his counsel of choice and considered only the adequacy of Mr. Holmes’s counsel. 182 Wn. App. at 820-21.

Of course, additional delay in Mr. Holmes's case was inevitable, given that the issue arose during trial. However, several witnesses had yet to testify, and counsel still had to present closing arguments. 2/3/14 RP 16, 45, 55; 2/4/14 RP 8, 39, 75. Moreover, while the court stated that a mistrial "would be an extraordinary thing to do" it never analyzed the expected delay from granting the motion. 2/3/14 RP 71-73. It also gave no consideration to the fact that Mr. Holmes moved swiftly to secure private counsel after his arraignment and then moved just as quickly to fire his counsel after his attorney was charged with a crime. CP 131-33; 2/3/14 RP 70. The trial court's analysis of the adequacy of Mr. Holmes's counsel, rather than his right to counsel of choice, violated Mr. Holmes's Sixth Amendment rights. Because the trial court applied the wrong legal standard, it necessarily abused its discretion. *Hampton*, 182 Wn. App. at 827. This error is structural, and reversal is required. *Id.*

2. Improper argument during the State's closing denied Mr. Holmes a fair trial.

In its response, the State argues the prosecutor's comments were not improper because they were "in response to a lengthy attack by defense counsel in his own closing argument" and relied on the detective's testimony at trial. Resp. Br. at 19. It claims that when

taken in context, the comments are understood as intended and proper.

Resp. Br. at 18.

However, the detective's testimony and the statements by the prosecutor were different in important ways. During the detective's testimony, he justified his investigatory tactics by claiming his motives were noble. 2/3/14 RP 113-14. His statements related only to his focus during the investigation, as he explained that he would not want the real perpetrator to hurt more people if he charged the wrong person. 2/3/14 RP 113-14. The deputy prosecutor used these statements more generally to appeal to the passion and prejudice of the jury, arguing that the real shooter would be out there doing it again, "and nobody wants that." 2/5/14 RP 78.

A deputy prosecutor "owes a duty to defendants to see that their rights to a constitutionally fair trial are not violated" because the defendant is among the people the prosecutor represents. *State v. Monday*, 171 Wn.2d 667, 676, 256 P.3d 551 (2011). Because the deputy prosecutor's statements were improper and prejudicial, this Court should reverse. *See Op. Br.* at 18-21.

B. CONCLUSION

For the reasons stated above and in his opening brief, this Court should reverse.

DATED this 14th day of May, 2015.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Kathleen A. Shea".

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DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 71798-7-I
)	
LA'RYAN HOLMES,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 14TH DAY OF MAY, 2015, I CAUSED THE ORIGINAL **REPLY 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:

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