74232-9

NO. 74232-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

BENJAMIN SMALLS,

Appellant.

FILED
Jun 21, 2016
Court of Appeals
Division I
State of Washington

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE VERONICA GALVÁN

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

JENNIFER P. JOSEPH
Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 477-9497

TABLE OF CONTENTS

Page

A. ISSUES PRESENTED 1

B. STATEMENT OF THE CASE 1

C. ARGUMENT 11

1. THE RESENTENCING COURT DID NOT VIOLATE SMALLS' RIGHT TO COUNSEL OF CHOICE 11

2. THIS COURT SHOULD DECLINE TO PREEMPTIVELY DENY APPELLATE COSTS 20

D. CONCLUSION 22

TABLE OF AUTHORITIES

Page

Table of Cases

Washington State:

State v. Aguirre, 168 Wn.2d 350,
229 P.3d 669 (2010) 12

State v. Blackwell, 120 Wn.2d 822,
845 P.2d 1017 (1993) 19

State v. Blank, 131 Wn.2d 230,
930 P.2d 1213 (1997) 21

State v. Hampton, 184 Wn.2d 656,
361 P.3d 734 (2015) 12, 13, 16, 19

State v. Sinclair, 192 Wn. App. 380,
367 P.3d 612 (2016) 20

State v. Smalls, 158 Wn. App. 1031,
2010 WL 4400088 (2010) 3

Constitutional Provisions

Federal:

U.S. CONST. amend. VI 12

Statutes

Washington State:

RCW 10.73.090 4

Rules and Regulations

Washington State:

CrR 7.8 4

Other Authorities

3 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE
§ 11.4(c) (3d ed. 2007) 13, 16

A. ISSUES PRESENTED

1. The trial court has wide latitude in deciding whether to grant a defendant's motion for continuance for the purpose of replacing his current attorney with new counsel, and may consider any relevant information necessary to make its decision. When Smalls moved to continue his resentencing on the day of that hearing, he had already obtained a 30-day continuance, the murder victim's family was present by phone, his counsel was prepared for the uncomplicated hearing, and Smalls had been aware of grounds he advanced for discharging his attorney for some time. Did the sentencing court reasonably deny Smalls' continuance?

2. The record contains insufficient information about Smalls' financial status for this Court to preemptively decide whether to grant or deny appellate costs. Should this Court decline to address costs until or unless the State actually requests them?

B. STATEMENT OF THE CASE

In September 2002, Benjamin Smalls shot and killed Stephen Kirk, who was attempting to defend his friend Toni King after Smalls threatened to assault her. CP 3-7. Smalls then

pointed the gun at King, who believed he was going to shoot and kill her. CP 6.

Although there were a number of witnesses to the shooting, detectives had extreme difficulty locating and interviewing them. CP 3. Witnesses, including Smalls' then-girlfriend, took measures to avoid detectives and expressed extreme concern for their safety and the safety of their families if they cooperated with the investigation. CP 3, 4, 6.

King and Smalls' former girlfriend eventually gave recorded statements to police in early 2008, identifying Smalls as the shooter. CP 4-6. Other eyewitnesses interviewed in 2002 confirmed that Smalls shot Kirk. CP 3-6.

In March 2008, the State charged Smalls with murder in the second degree while armed with a firearm. CP 1-2. By amended information, the State added one count of assault in the second degree while armed with a firearm. CP 9-10. Smalls pleaded guilty in November 2008 to second-degree murder with a firearm and second-degree assault. CP 11-20. In exchange for his guilty plea, the State dismissed the firearm allegation related to the assault, as well as charges under a separate cause number. CP 30.

Sentencing was continued for almost three months while Smalls retained substitute counsel, Craig McDonald, to pursue a motion to vacate his guilty plea. CP 162. Shortly before the next sentencing date, McDonald requested another four-week continuance based on concerns over Smalls' competency. CP 162. Smalls was found to be competent in two separate evaluations.[1] No motion to vacate the guilty pleas was filed. The trial court imposed a low-end, standard-range sentence of 358 months' confinement for the murder to be served concurrently with a high-end, standard-range sentence of 84 months for the assault, and consecutively to the 60-month firearm enhancement, for a total of 418 months' confinement. CP 38, 40. The court imposed 48 months of community custody, as well as the mandatory Victim Penalty Assessment (VPA) of $500 and the mandatory $100 DNA fee. CP 39. No restitution was imposed. CP 39.

McDonald represented Smalls in a successful appeal resulting in a reduction of the applicable community custody period from 48 to 36 months. CP 114-15; State v. Smalls, 158 Wn. App. 1031, 2010 WL 4400088 (2010).

---

[1] Although the trial record is not before this Court in this resentencing appeal, this Court noted the competency findings in its earlier unpublished opinion. State v. Smalls, 158 Wn. App. 1031, *1, 2010 WL 4400088 (2010).

In 2012, Smalls filed a pro se CrR 7.8(b) motion in the sentencing court, seeking to have his sentence vacated because his conviction on the second-degree assault was barred by the statute of limitations, to have the assault count dismissed for that reason, and to withdraw his plea to both counts. CP 115. This Court accepted transfer of the motion as a personal restraint petition and appointed counsel for Smalls. 3/11/2013 Order (No. 68740-9-I). The Court accepted the State's concession that the assault conviction violated the statute of limitations and concluded that this and the resulting erroneous offender score on the murder conviction rendered Smalls' judgment and sentence facially invalid and in need of correction. CP 113, 116-17. However, this Court also concluded that Smalls' challenges to his murder conviction and the plea bargain were time-barred under RCW 10.73.090(1). CP 115. "RCW 10.73.090 bars his three untimely collateral challenges to his murder conviction because none fit within any of the exceptions listed in chapter 10.73 RCW." CP 119. The court remanded for "further proceedings," noting that Smalls had not requested correction of the erroneous portion of his sentence but could make such a request in the trial court. CP 122.

The opinion was filed in July 2014 and the mandate issued May 22, 2015. CP 112.

A resentencing hearing was scheduled for September 18, 2015 before the Honorable Veronica Galván. CP 123. Smalls was transferred to the King County Jail on September 15 and met with his attorney, McDonald, on September 16. CP 123. Smalls sought a 30-day continuance in order to facilitate his fiancé's attendance, obtain documentation of achievements and completed courses from the Department of Corrections (DOC), and research whether the State was bound to recommend a mid-range sentence as part of the plea agreement. CP 123-24. The court granted a continuance to October 23, 2015. CP 126.

On the eve of the rescheduled resentencing, McDonald filed a "pre-sentence memorandum" in which he conveyed Smalls' wish to discharge counsel and continue the hearing again. CP 126-28. McDonald referenced this Court's decision in the PRP and indicated that Smalls wanted to "continue to pursue relief from personal restraint" and wanted "one attorney to pursue both further relief from collateral attack and resentencing." CP 126. McDonald asserted that he could not represent Smalls in that effort because he was "a witness to some of the events prior to the expiration of

the one year time bar[.]" CP 126. Additionally, McDonald asserted that he had not yet received certain documentation from DOC, including Smalls' GED and a certificate of completion of an anger management course. CP 126.

Nevertheless, McDonald offered a sentencing recommendation: a low-end, standard-range sentence of 276 months. CP 127. Counsel requested that the court waive all legal financial obligations except the VPA and restitution, arguing that the DNA fee should not be imposed because it was not imposed at the time of his original sentencing.[2] Counsel represented that Smalls had become a model inmate, earned his GED, completed 28 credits toward an Associate of Arts degree, completed mental health counseling and parenting classes, and had no drug or violence infractions in prison. CP 127-28.

At the October 23 hearing, the sentencing court asked for an offer of proof as to the grounds for further relief by personal restraint petition so that she could "consider the nature of the attack, [and] the likelihood of whether or not those legal issues have been addressed already in the underlying appeal" and PRP. RP 3-4.

---

[2] This is incorrect. The DNA fee was imposed on the original judgment and sentence. CP 39. Restitution was neither sought nor imposed. CP 39.

McDonald explained that he had represented Smalls when Smalls originally wished to withdraw his guilty plea and had overlooked the fact that the assault conviction was barred by the statute of limitations. RP 3. Counsel opined that his mistake, or the possibility of testifying about it in a reference hearing, gave him a conflict of interest with respect to Smalls' effort to continue to pursue relief by PRP. RP 3-4. McDonald candidly acknowledged that no further relief was likely, given this Court's conclusion that any challenge to the validity of his guilty plea and murder conviction was untimely. RP 3, 4. But Smalls wanted to pursue it, as well as unspecified "additional grounds he could state." RP 3, 4.

The court declined to continue sentencing:

> ... I think that the Court of Appeals was very clear that this was time barred. This does not mean that he cannot pursue it, but the Court's not going to continue the sentencing in order for him to do that, or stay the sentencing for that purpose. He still has a right to pursue it, he still has the right to put in a PRP, but we're not continuing the sentencing.

RP 4.

Smalls then addressed the court directly:

> May I address the Court, please? As of currently, my family is in the motion of hiring counsel for me to represent me at sentencing, and if you can just continue this for a week, the counsel can make the record within the week, like they can pay the

> lawyer. Everything, like we're just waiting on the paycheck to be delivered to counsel to represent me at sentencing, because Mr. McDonald, he represented me on appeal before, and like my family – like Craig's a good dude, but my family doesn't really have the trust and faith in Mr. McDonald as well as they've hired – they're paying an attorney, and within a week if you could just continue this for a week, for my new counsel to make the record, that will happen. And if not, then we could continue sentencing next week. But that's my, I guess, promise to the Court that new counsel will make a record, because they will be paid to represent me at sentencing.

RP 4-5 (emphasis added). Smalls did not name the attorney that he claimed his family was in the process of hiring.

The court pointed out that no other attorney had entered a notice of appearance and that there was little for a new attorney to do in this resentencing anyway.[3] RP 5. Smalls then argued for a two-day continuance, noting that his family was not present, he was in the process of "conjuring" letters from them, and his fiancé lives out of state. RP 5. "And if you give me a couple days, I can get the

---

[3] The court explained:

> And just so you're aware, Mr. Smalls, whether new counsel is appointed or not will not change the range that you're potentially looking at. Those are dictated by law. Change of counsel isn't going to change that range. Secondly, you did win your appeal and that's why we're here. You won a significant victory in your appeal, and one of the charges was completely dismissed and therefore your sentence was invalidated and it is substantially less at this point in terms of range than it was originally.

RP 5.

attorney here as well [as] letters from my mother as well as a letter from my kids and everything for trial on a record." RP 5.

The court explained that gathering materials to support his sentencing recommendation had been the point of the 30-day continuance he had already obtained. RP 5-6. And McDonald stated that he had in fact received some materials from DOC. RP 6. McDonald also indicated that he had been in touch with Smalls' family and had expected them to be present for sentencing on that day. RP 6. The court said, "everybody has known that this is coming. I continued it last time for that very purpose. For that very purpose. This was continued for that very purpose, so that we could have all of that information." RP 6.

Smalls acknowledged that new counsel would have little impact on the resentencing but maintained that he preferred to have private counsel "because of the conflict of interest with Mr. McDonald from before." RP 7. Later, when his family could not be reached by phone, Smalls stated, "They're at work right now and they're well aware that we're having this," and expressed his desire that they speak on his behalf. RP 14. The court responded, "We can't force them to be here. They were aware of it and you'll have an opportunity to speak." RP 14.

The State objected to continuing the resentencing for a second time and noted that the investigating detectives were present in court and that the victim's aunt, uncle, sister, and son were all present by phone for the hearing. RP 7. The court denied the continuance. RP 8. The victim's family members each made a statement. RP 9-13.

The State recommended a high-end, standard-range sentence of 376 months -- 100 months longer than the defense recommendation. RP 13. The State further recommended that Smalls pay restitution, court costs, and the mandatory VPA and DNA fee. RP 13.

McDonald made a sentencing presentation and submitted "some information from DOC." RP 14. He argued for a low-end sentence based on Smalls' efforts to educate and rehabilitate himself in prison. RP 15-16. Counsel represented that he had spoken with Smalls' wife[4] and mother and predicted that Smalls would have good family support when released. RP 16. Smalls addressed the court directly, took responsibility for the murder, apologized to his victim's family and to his own, and asked for a

[4] Presumably, the individual to whom counsel refers as Smalls' "wife" is the same person Smalls describes as his fiancé.

low-end sentence so that he could parent his children and become a pillar of his community. RP 17-19.

The sentencing court praised Smalls' efforts and opined "that you are not the same person that you were then." RP 19-20. The court imposed a sentence of 240 months plus 60 months for the firearm enhancement, for a total sentence of 300 months. RP 20; CP 143. This reflects a sentence below the mid-point of the standard range – 76 months less than the State requested and 24 months more than requested by the defense. See CP 127, 141, Supp. CP __ (Sub. No. 143). The court imposed only mandatory LFOs.[5] CP 142.

C. ARGUMENT

1. THE RESENTENCING COURT DID NOT VIOLATE SMALLS' RIGHT TO COUNSEL OF CHOICE.

Smalls contends that the resentencing court violated his constitutional right to counsel of choice by refusing to continue the hearing so that he could hire private counsel. Under the

[5] The judgment and sentence also purports to impose restitution in an amount to be later determined, but since no restitution had been sought in the original sentencing, the State's restitution request was later denied. Supp. CP __ (Sub. No. 164).

circumstances, the court's decision was reasonable. This Court should reject Smalls' claim.

The Sixth Amendment to the United States Constitution grants a criminal defendant who can afford it the right to private counsel of his or her choice. State v. Hampton, 184 Wn.2d 656, 662-63, 361 P.3d 734 (2015). However, the right is not absolute. Id. at 663. "The right to choose one's counsel does not, for example, permit a defendant to unduly delay the proceedings." State v. Aguirre, 168 Wn.2d 350, 365, 229 P.3d 669 (2010). Thus, when a defendant seeks a continuance for the purpose of replacing counsel, "the trial court must weigh the defendant's right to choose his counsel against the public's interest in the prompt and efficient administration of justice." Id. The court has "wide latitude" in reaching the proper balance, and its decision to deny a continuance will not be disturbed absent abuse of discretion. Hampton, 184 Wn.2d at 656.

The trial court may consider any relevant information necessary to decide the continuance request. Hampton, 184 Wn.2d at 669. Specifically, our supreme court endorsed consideration of the 11 factors described in a particular treatise. Id. at 669-70. These factors include:

(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 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 a material or substantial nature.

Hampton, 184 Wn.2d at 669-70 (quoting 3 WAYNE R. LAFAVE) ET AL., CRIMINAL PROCEDURE § 11.4(c) at 718-20 (3d ed.

2007)). "Not all factors will be present in all cases, and thus a trial court need not evaluate every factor in every case[.]" Id. at 670.

Here, several factors weigh in favor of denying Smalls' continuance motion. First, Smalls' motion for a second continuance came only one day before the rescheduled hearing, leaving the court little time to adjust its calendar. Second, the court had already granted a 30-day continuance at Smalls' request. Although Smalls sought only an additional one-week or two-day continuance, it was far from certain that such a delay would have been sufficient. The record indicates that Smalls' family had not yet successfully retained new counsel; they were still "waiting on the paycheck[.]" RP 4. No attorney but McDonald had entered a notice of appearance, and Smalls did not even identify the attorney who had allegedly agreed to take his case. It is unlikely that an attorney entirely new to the case would have been prepared for sentencing within the two-day or one-week delay Smalls had requested. Indeed, Smalls hinted that he would seek further continuances, stating that if new counsel did not "make the record" after a one-week continuance, "then we could continue sentencing next week." RP 5.

Third, any continuance would have inconvenienced the murder victim's family, several of whom had made time to appear by phone and gave statements during the hearing. Smalls suggests this factor is insignificant because the family did not appear in person or travel from out of state to attend the sentencing. But these four individuals presumably had to miss school or work for the hearing, and had probably also done so in advance of the original sentencing and the originally-scheduled resentencing. Continuing the hearing one or more times to accommodate substitute counsel would surely have caused them further inconvenience.

Fourth, defense counsel McDonald was prepared for sentencing. He had represented Smalls in the original sentencing, conferred with Smalls upon remand, obtained documentation of Smalls' prison achievements from DOC, and had spoken with Smalls' mother and wife/fiancé. He ably argued for a low-end sentence in recognition of Smalls' significant efforts toward rehabilitation. Smalls concedes that McDonald was at least "partially" prepared for sentencing, but faults the attorney for failing to arrange for Smalls' family to attend the hearing. The record is clear that McDonald had spoken with Smalls' family and they were

aware of the hearing. As the court noted, "[w]e can't force them to be here." RP 14. Further, McDonald represented that he had been in touch with Smalls' family and "was not aware that they weren't going to be here today." RP 6. Their absence from the hearing cannot reasonably be attributed to McDonald's lack of preparation.

Smalls' dissatisfaction with McDonald was probably legitimate. McDonald's failure to timely recognize that the assault conviction was barred by the relevant statute of limitations contributed to Smalls' inability to collaterally attack his guilty plea and murder conviction on that basis. But Smalls did not seek to replace McDonald promptly upon becoming aware of this mistake. The reason given for seeking to discharge McDonald was the possibility that McDonald would have to testify at a reference hearing pursuant to a successful PRP.[6] McDonald advised the court that such a conflict could arise because McDonald "was essentially participating as a lawyer after the entry of the plea, and at the time of the first sentencing, [so] I would be ... potentially a

[6] On appeal, Smalls argues that he promptly requested a continuance once he received confirmation that his family had hired private counsel. That may be a relevant consideration, but it is not one of the LaFave factors. The question is "whether the continuance request was made promptly after the defendant first became aware of the grounds advanced for discharging his or her counsel." Hampton, 184 Wn.2d at 669. Smalls' argument suggests that the reason for discharging counsel was simply the opportunity to hire someone else and thereby delay sentencing rather than legitimate dissatisfaction with current counsel.

witness to some of those matters, certainly." RP 2-3. But, as the sentencing court noted, this Court's decision in Smalls' PRP clearly precludes any further relief that could possibly necessitate McDonald acting as a witness in a reference hearing.

In any event, McDonald's failure to spot the issue and the impact of that mistake on the availability of collateral relief were apparent when this Court issued its decision in Smalls' PRP in July 2014. Smalls did not indicate any interest in replacing counsel until the eve of his resentencing in October 2015.[7] Thus, the continuance request was not made promptly after Smalls became aware of the grounds advanced for discharging McDonald; instead, Smalls' negligence in failing to promptly replace unsatisfactory counsel put him in a situation where he needed a continuance to obtain new counsel at the last minute.

[7] On appeal, Smalls asserts that he "could not be expected, [at the time of his first continuance request], to know he would be hiring private counsel or how long that process might take." Brief of Appellant at 13. Since the expressed basis for Smalls' dissatisfaction with McDonald related to McDonald's conduct in 2009, it is not at all clear why Smalls could not be expected to have contemplated replacing counsel before the eve of his resentencing.

Further, denying the motion was not likely to result in substantial identifiable prejudice to Smalls' case. McDonald was not operating under any actual conflict of interest; any such conflict was a remote future possibility. Smalls was subject to a sentencing range dictated by statute. McDonald was prepared to argue for a sentence at the low end of that range based upon Smalls' rehabilitation in prison. And that argument substantially prevailed -- the court hewed much closer to the defense recommendation than to the State's request for a sentence at the high end of the range. Smalls argues that he was prejudiced because he was "forced to proceed without the benefit of family members' statements" and because McDonald "may not have obtained all documents demonstrating his rehabilitation in prison." Brief of Appellant at 13. But the issue is whether the refusal to grant a second continuance violated his right to counsel of choice, not whether he might have been better prepared with additional time.

Finally, there is reason to believe that Smalls sought to change counsel primarily for the purpose of delay. Although Smalls identified McDonald's potential conflict of interest as the reason for wanting to replace him, it appears that his primary motivation for the continuance was to gain more time to obtain materials in

support of a low-end sentence and to give his family another chance to attend the hearing. RP 5. But as the sentencing court observed, the resentencing had already been continued for 30 days "for that very purpose." RP 6.

This Court will not reverse the sentencing court's denial of a continuance to replace defense counsel absent abuse of discretion. Hampton, 184 Wn.2d at 670. "A trial court abuses its discretion when its decision 'is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons.'" Id. (quoting State v. Blackwell, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993)). "'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.'" Hampton, 184 Wn.2d at 670 (internal quotation omitted). "'A decision is manifestly unreasonable if the court, despite applying the correct legal standard to the supported facts, adopts a view that no reasonable person would take, and arrives at a decision outside the range of acceptable choices.'" Id. at 670-71 (internal quotation omitted). Smalls has not demonstrated that the sentencing court abused its

discretion in denying his continuance motion. This Court should affirm.

2. THIS COURT SHOULD DECLINE TO PREEMPTIVELY DENY APPELLATE COSTS.

Pursuant to State v. Sinclair, 192 Wn. App. 380, 367 P.3d 612 (2016), Smalls asks this Court not to impose appellate costs. He points out that he is serving a lengthy sentence and that the sentencing court found him indigent for purposes of appointing appellate counsel at public expense.

The State respectfully disagrees with this Court's approach to costs on appeal set forth in Sinclair. A decision on the State's petition for review of Sinclair is now expected on June 30, 2016.

As in most cases, Smalls' ability to pay was not litigated in the trial court because it was not relevant to the issues at trial. As such, the record contains little information about Smalls' financial status. And of course, the State had no right to obtain information about Smalls' financial situation.

The declaration that Smalls filed when he requested the appointment of appellate counsel addressed only his present financial circumstances and his ability to pay appellate costs up front. It did not address his future ability to pay or his ability to pay over time. It is a defendant's future ability to pay, instead of simply his current ability, that is most relevant in determining whether the imposition of financial obligations is appropriate. See State v. Blank, 131 Wn.2d 230, 241, 930 P.2d 1213 (1997) (indigence is a constitutional bar to the collection of monetary assessments only if the defendant is unable to pay at the time the government seeks to enforce collection of the assessments).

The only other information about Smalls' ability to pay is what he presented at sentencing: he is still a young man, has been "engaged in work programs" while incarcerated, and has completed 28 credits towards a college degree "with course work in business ethics, business writing and entrepreneurship." CP 127. Despite his lengthy sentence, there is no reason to believe that Smalls will not be able to contribute something to legal financial obligations in the future.

D. CONCLUSION

For the reasons expressed above, the State respectfully asks this Court to affirm Smalls' judgment and sentence.

DATED this 21st day of June, 2016.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By:
JENNIFER P. JOSEPH, WSBA #35042
Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to David Koch, the attorney for the appellant, at Kochd@nwattorney.net, containing a copy of the Brief of Respondent in State v. Benjamin Lee Smalls, Cause No. 74232-9, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 21st day of June, 2016.

U Brame

Name:
Done in Seattle, Washington