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Washington State
Court of Appeals
Division Two

August 9, 2016

# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

| STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>LEMAR WALLER,<br><br>Appellant. | No. 45939-6-II<br><br>UNPUBLISHED OPINION |
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BJORGEN, C.J. — Lemar Waller appeals his conviction and sentence for unlawful delivery of a controlled substance—cocaine. He argues that (1) the trial court erred by denying his motion to substitute new appointed counsel; (2) his attorney provided ineffective assistance of counsel by failing to fully investigate the case, misrepresenting facts to the trial court, failing to ensure an adequate record for appeal, and declining to renew the motion for substitute counsel; and (3) the trial court improperly imposed discretionary legal financial obligations (LFOs) without first inquiring into his ability to pay.

We hold that the trial court did not err in denying the motion for substitute counsel and that Waller received effective assistance of counsel. Accordingly, we affirm Waller's convictions. We exercise our discretion to review the imposition of discretionary LFOs and remand for the sentencing court to make an individualized inquiry into Waller's present and future ability to pay those LFOs consistently with *State v. Blazina*, 182 Wn.2d 827, 832-33, 839, 344 P.3d 680 (2015).

FACTS

In March 2013, the Tacoma Police Department conducted a "hot pop" operation, in which a confidential informant was sent to purchase controlled substances with traceable money

while under audio and video surveillance. The informant purchased crack cocaine from Waller, and the transaction was captured on video. The informant then signaled officers and delivered the cocaine to them. The officers pursued and arrested Waller. At the time of arrest, Waller had in his possession the money given to the informant for the purchase.

The State charged Waller with unlawful delivery of cocaine and unlawful possession of heroin with intent to deliver.[1] Waller's appointed counsel moved for continuances five times, requesting more time for trial preparation and to perform necessary discovery, and the trial court granted each requested continuance. On December 9, 2013, Waller's counsel moved for a sixth continuance, expressing to the trial court that personal problems prevented him from effectively preparing Waller's defense. The trial court granted this continuance as well, setting the case for trial on January 7, 2014.

On the morning of trial, the parties appeared before the presiding judge of the superior court. Waller moved to substitute his appointed counsel because his communication with his attorney had broken down, his attorney's trial preparation had been inadequate, and he no longer had faith that his attorney could effectively represent him. The presiding judge denied the request and ordered that the case proceed to trial. Waller's attorney requested substitution again before the trial judge, who denied the request because the presiding judge had already ruled on matter.

Following trial, the jury found Waller guilty of delivering cocaine but not guilty of possessing heroin. The trial court sentenced Waller to 75 months in prison and imposed LFOs amounting to $2,300, of which $1,500 were discretionary LFOs for court-appointed attorney fees and defense costs. Waller did not object to the imposition of the LFOs or argue that he was or

[1] Waller allegedly dropped a bag containing heroin as officers pursued him.

would be unable to pay them. The trial court did not inquire into Waller's ability to pay, but made a finding that he had that ability.

Waller appeals his conviction and sentence.

## ANALYSIS

### I. DENIAL OF WALLER'S MOTION TO SUBSTITUTE COUNSEL

Waller argues that the presiding judge erred by denying his motion to substitute counsel. We disagree.

A defendant has a constitutional right to counsel, which includes a right to be represented by an effective advocate. *Wheat v. United States*, 486 U.S. 153, 159, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988). However, a defendant does not have an absolute constitutional right to representation by the advocate of his choice. *State v. Stenson*, 132 Wn.2d 668, 733, 940 P.2d 1239 (1997). A defendant who wishes to substitute appointed counsel must move before the trial court and show good cause for the substitution, "'such as a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant.'" *State v. Varga*, 151 Wn.2d 179, 200, 86 P.3d 139 (2004) (quoting *Stenson*, 132 Wn.2d at 734). A defendant's general loss of confidence in defense counsel by itself is not sufficient cause for substitution. *Stenson*, 132 Wn.2d at 733-34.

We review a trial court's denial of a motion to substitute appointed counsel for an abuse of discretion. *Varga*, 151 Wn.2d at 200. When reviewing such a decision, we consider (1) the extent of any conflict between the defendant and counsel, (2) the adequacy of the trial court's inquiry into the grounds for the motion, and (3) the timeliness of the motion and potential effects on the trial schedule. *State v. Cross*, 156 Wn.2d 580, 607, 132 P. 3d 80 (2006).

1. Extent of the Conflict

Waller argues that his attorney's failure to adequately prepare for trial presented a conflict sufficient to undermine the fairness of the trial. We disagree.

"Attorney-client conflicts justify the grant of a substitution motion only when counsel and defendant are so at odds as to prevent presentation of an adequate defense." *Stenson*, 132 Wn.2d at 734. A complete breakdown in communication is grounds for substitution of appointed counsel, but a defendant's loss of confidence in his counsel is not. *Varga*, 151 Wn.2d at 200.

Waller's attorney told the court:

> I have not been able to provide the level of assistance to Mr. Waller I would prefer to be providing. Mr. Waller is dissatisfied.
>
> . . . Mr. Waller prefers that I be dismissed from his case and that new counsel be appointed. He feels he is not receiving effective assistance, and I respect that. The reality and the perception are the same: If a person feels that they're not getting the full effort, then they're not, because that perception is supreme, in my opinion.
>
> . . . His address is stable, telephone number stable. I would ask that he be allowed this request. . . . It's important to me that he always receive full and effective assistance of counsel, and I feel that I have not done everything that I could have and, certainly, in his opinion, and I value his opinion. . . . At this point, obviously, our communication has broken down. He'll have no difficulty working with another attorney.
>
> [A]fter getting the DVDs [digital video disks] in this case—this involves an alleged unlawful delivery of controlled substance under video surveillance, and after receiving the DVDs [with the video files], I'd really meant to sit down with him to review those. I did not. I should have. It would be helpful to him.

Report of Proceedings (RP) (Jan. 7, 2014) at 3-5. Waller also elaborated:

> Within the past 24 hours, it's the only communication between me and Mr. Germano, between the phone line and the other communication that's been outside the hallway of the courts. . . . It's just been between me and him out of the courtroom and me signing some paperwork. . . . I believe that whatever turmoil he might be going through with his family or other issues is affecting counsel on my behalf.

RP (Jan. 7, 2014) at 5.

From these remarks, it is clear that communication had become infrequent and representation had fallen short of what Waller's counsel intended to provide. It is similarly clear that Waller had lost faith in his attorney and felt he was being inadequately represented. But communication had not broken down entirely, and lines of communication between attorney and client remained open and available. Nothing in the record indicates that Waller and his attorney were at odds regarding the presentation of his defense or that Waller or his attorney refused to cooperate. The record reflects only that Waller's attorney had not performed in the manner he and Waller preferred. While Waller may have reasonably lost confidence in his attorney, there was no particular conflict between them that jeopardized presentation of his defense.

2. Adequacy of the Trial Court's Inquiry

Waller argues that the trial court failed to adequately inquire into his reasons for moving to appoint new counsel. We disagree.

"[A] trial court conducts adequate inquiry by allowing the defendant and counsel to express their concerns fully." *State v. Schaller*, 143 Wn. App. 258, 271, 177 P.3d 1139 (2007); *see also In re Pers. Restraint of Stenson*, 142 Wn.2d 710, 731, 16 P.3d 1 (2001) (noting that the trial court's inquiry appeared adequate because the defendant's in camera and deposition testimony showed no breakdown in communication). This may, but need not, be a formal inquiry. *Schaller*, 143 Wn. App. at 271. However, the defendant must at least state the reasons for his dissatisfaction with counsel, and the record on appeal must show that the trial court had before it the information necessary to assess the merits of the defendant's request. *See id.*; *Varga*, 151 Wn.2d at 200-01.

Here, the presiding judge heard argument from Waller, his attorney, and the prosecutor regarding the grounds for the motion. Waller and his attorney told the presiding judge that they

had not reviewed the video evidence together and had not been communicating much recently. Further, both expressed that Waller believed he was receiving ineffective assistance of counsel. After hearing from all parties, the presiding judge summarily denied the motion:

> I've had several cases with [counsel.] I have never seen him not to produce high quality work. I'm going to deny the motion. You don't get to lawyer shop. At this point, you're going to trial in Judge Hickman's courtroom today.

RP (Jan. 7, 2014) at 7. When the defendant protested, the presiding judge said only: "You're going to trial in Judge Hickman's court. I believe it's 211. Enjoy." RP (Jan. 7, 2014) at 7. The presiding judge did not provide any specific grounds for denying the motion.

The record shows that both Waller and his attorney presented the grounds for the motion to the presiding judge. However, the presiding judge did not engage in any formal inquiry or assess Waller's arguments in any detail. Still, though the presiding judge's decision not to question Waller or his counsel further and his somewhat glib commentary convey the impression that his inquiry was less than thorough, Waller and his counsel fully informed the presiding judge of the grounds for the motion. Although the presiding judge's inquiry was not ideal, we conclude that it was legally adequate.

3. Timeliness

The State argues that Waller failed to timely move for substitution. We agree.

Waller moved to substitute counsel only on the morning of trial. If the presiding judge had granted the motion, he would have needed to grant a seventh continuance to appoint new counsel and allow time for trial preparation. The case had been pending for 10 months, and another continuance would have delayed trial further and introduced the possibility that new appointed counsel would need further continuances. The State expressed that it expected to go to

trial and did not want to continue the case again. Given these circumstances, the timing of the motion weighs heavily in favor of denial.

4. Conclusion

The record does not support Waller's contention that the presiding judge abused his discretion by denying Waller's motion to substitute counsel. While Waller was clearly dissatisfied with his representation, neither he nor his attorney indicated that they would be unable to effectively communicate or cooperate in his defense. Waller and his counsel fully expressed Waller's concerns to the presiding judge, allowing the court to make an informed ruling on the motion. Waller brought the motion on the morning of trial, when both parties were otherwise ready to proceed. In light of these considerations, we hold that the presiding judge did not abuse his discretion in denying the motion.

## II. Ineffective Assistance of Counsel

Waller argues that he received ineffective assistance of counsel because his attorney failed to adequately prepare for trial, misrepresented facts to the trial court in moving to substitute counsel, failed to ensure production of an adequate record for appeal, and declined to renew the motion for substitute counsel. We hold that the investigation by Waller's attorney was deficient, but that Waller was not prejudiced by it. On the claimed inadequate record, we assume deficiency without deciding and hold that Waller was not prejudiced by it. We hold also that Waller's attorney did not perform deficiently in the other instances Waller raises.

A criminal defendant's constitutional right to counsel includes a right to effective representation. *State v. Grier*, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011), *cert. denied*, 135 S. Ct. 153 (2014). Representation is ineffective if (1) counsel's performance is deficient and (2) the deficiency prejudiced the defense. *Id*. at 32-33. A defendant's claim that he received ineffective

assistance of counsel presents a mixed question of law and fact, which we review de novo. *State v. Jones*, 183 Wn.2d 327, 338, 352 P.3d 776 (2015).

Counsel's performance is deficient if it falls below an objective standard of reasonableness. *Grier*, 171 Wn.2d at 33. We presume that counsel's performance was not deficient, but the defendant may overcome that presumption by showing that "'no conceivable legitimate tactic'" explains counsel's performance. *Id.* (quoting *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)). Strategic or tactical actions are not deficient as long as they are reasonable. *Id.* at 134.

Counsel's deficiency prejudices the defense only if there is a "'reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different.'" *Grier*, 171 Wn.2d at 34 (quoting *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009)). A reasonable probability is one "'sufficient to undermine confidence in the outcome.'" *Grier*, 171 Wn.2d at 34 (quoting *Strickland*, 466 U.S. at 694).

1. <u>Failure to Investigate</u>

Waller argues that his attorney ineffectively represented him by failing to discuss the case with him and to identify potential witnesses before trial. Although we agree that Waller's attorney's performance was deficient in this regard, we hold that the deficiency did not prejudice Waller.

A. Deficiency

"To provide constitutionally adequate assistance, 'counsel must, at a minimum, conduct a reasonable investigation enabling [counsel] to make informed decisions about how best to represent [the] client.'" *In re Pers. Restraint of Brett*, 142 Wn.2d 868, 873, 16 P.3d 601 (2001) (emphasis omitted) (alterations in original) (quoting *Sanders v. Ratelle*, 21 F.3d 1446, 1456 (9th

Cir.1994)). Such an investigation must include a "'full and complete'" examination of the relevant facts and law. *State v. Burri*, 87 Wn.2d 175, 180, 550 P.2d 507 (1976) (quoting *Shaw v. State*, 79 Miss. 21, 24-25, 30 S. 42 (1901)). However, a defendant claiming ineffective assistance on grounds that his counsel failed to adequately investigate the case must show at least "a reasonable likelihood that the investigation would have produced useful information not already known to defendant's trial counsel." *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 739, 101 P.3d 1 (2004).

The record in this case establishes that Waller's counsel did not perform a full and adequate investigation. Counsel told the court that he reviewed the video evidence on his own but did not discuss it with Waller. Waller then told the trial court that he could have identified potential witnesses had his counsel reviewed the video with him. Although the evidence against Waller was strong, there was at least a reasonable likelihood that identifying and investigating these potential witnesses would have produced useful information not already known to counsel. Counsel acknowledged that his failure to review the video with Waller and discuss potential witnesses was not due to any strategic or tactical decision, but was merely something he "did not get around to doing." RP at 4. This failure to fully investigate possible defense testimony amounted to deficient performance.

B. Prejudice

"In evaluating prejudice, 'ineffective assistance claims based on a duty to investigate must be considered in light of the strength of the government's case.'" *Davis*, 152 Wn.2d at 739 (quoting *Rios v. Rocha*, 299 F.3d 796 (9th Cir. 2002). In this case, the State had very strong evidence against Waller. Video evidence showed him engaging in an apparent drug transaction with a confidential informant. Officer testimony established that the informant purchased

cocaine, and that Waller was identified as the seller and arrested immediately after the transaction while still in possession of the money used to buy that cocaine. To show that his counsel's failure to fully investigate potential witnesses prejudiced him, Waller would need to show that such an investigation would have uncovered evidence sufficient to overcome the State's strong case and produce a reasonable doubt in the minds of the jurors.

Nothing in the record indicates that any potential witness would have contested the officers' accounts of the relevant events or provided other exculpatory testimony. In fact, we can infer from the record that no such witnesses existed. Waller and his counsel reviewed the video evidence together during a recess in the trial in order to identify potential witnesses. Following this recess, Waller made no attempt to disclose any new witnesses to the court. He ultimately presented no witnesses in his defense. The record does not show whether Waller ever identified any potential witnesses to his counsel during or after review of the video, but it does indicate at least that any such identification did not alter Waller's defense strategy.

Because the record suggests no probability that the outcome of the trial would have differed if Waller's counsel had reviewed the video and discussed potential witnesses with Waller before trial, Waller was not prejudiced by his counsel's deficient performance. Therefore, the actions of Waller's counsel did not violate Waller's right to effective assistance of counsel.

2. Misrepresentation of Grounds for Continuance

Waller argues that he received ineffective assistance because his attorney in moving for substitute counsel misrepresented the extent to which his personal problems led Waller to seek new counsel, as well as prior difficulties with case management, and that these misrepresentations led the trial court to deny that motion. We disagree.

Waller has failed to establish that his attorney performed deficiently. Waller claims that his attorney "minimized the situation so much that he led the presiding judge to believe Mr. Waller was simply trying to 'attorney shop.'" Br. of Appellant at 24. However, while Waller's attorney did not describe to the presiding judge in detail the personal problems that had impeded his ability to prepare Waller's defense, he made it clear that he "was stressed out and overwhelmed because of a lot of things that had happened in [his] personal life, [his] family life." RP (Jan. 7, 2014) at 3. Waller's attorney further explained that due to these personal issues he and Waller had not been communicating. Waller's attorney made it clear that Waller had good reason to be dissatisfied with his representation and provided the presiding judge with the information necessary to evaluate the motion. He did not mischaracterize or minimize the circumstances.

Waller also argues that his attorney misrepresented facts by claiming that in 20 years as a public defender he had never requested that he be removed from a case until that morning. Waller argues that this was a misrepresentation "to the extent it implied that counsel has never had a problem with his caseload or unhappy clients." Br. of Appellant at 24. Waller notes that his attorney's license to practice law in Washington had been suspended years earlier for case management difficulties and poor communication with clients. However, this fact was unrelated to whether Waller's attorney had ever asked a court to remove him from a case. Waller's attorney did not tell the trial court that he had never had dissatisfied clients before or had never been subject to professional discipline; instead, he explained that Waller was dissatisfied and deserving of new counsel. He did not misrepresent the facts to the presiding judge, and Waller therefore did not receive ineffective assistance on this basis.

3. Failure to Create Adequate Record

Waller argues that he received ineffective assistance because his attorney failed to produce an adequate record for appeal when moving for the sixth continuance. We disagree.

Waller contends that his attorney was deficient in asking the court not to file a copy of an e-mail he sent describing personal problems that had prevented him from working on Waller's case. Even if we assume arguendo that his attorney's request was deficient, Waller suffered no prejudice from the request. Waller does not argue that the filing of the e-mail would have changed the trial court's decision as to the sixth continuance or his later motion to substitute counsel, and he later filed the e-mail with the trial court. He suffered no prejudice before this court either, as we granted his motion to supplement the record with the e-mail and related documents. The e-mail in question was before us on appeal, and the record was complete. Therefore, we hold that Waller's attorney's request not to file the e-mail did not render his assistance ineffective.

4. Failure to Renew Motion for Substitute Counsel

Waller argues that he received ineffective assistance because his attorney declined to renew the motion for substitute counsel before the presiding judge after the trial court indicated he may do so. We disagree.

In refusing to second guess the presiding judge, the trial court told Waller's attorney that

> [i]f someone wanted to have another bite at the apple, so to speak, then it would have to be in front of [the presiding judge] in terms of asking him to reconsider, but I don't typically independently review or second-guess the presiding when they make these kind of decisions on a motion for continuance.
>
> Sometimes there's a rare occasion where the presiding judge may not know a situation about a witness or a jury issue that would require us to continue the case

> or a conflict that wasn't disclosed before the presiding judge in terms of a trial schedule, but, Mr. Germano, I just—I didn't hear the original motion, and it would have to be reconsidered by Judge Cuthbertson.

RP at 5-6.

Nothing in the record indicates that the presiding judge might have changed his mind and ruled in Waller's favor on renewal. Both Waller and his attorney adequately informed the presiding judge that their communication had broken down and they had not met to discuss the video evidence and potential witnesses. No new information emerged pretrial before the trial court that would have warranted reconsideration of the presiding judge's ruling. Consequently, the record before us shows neither that Waller's attorney performed deficiently nor that Waller suffered any prejudice.

In none of the instances claimed by Waller did he receive ineffective assistance of counsel.

## III. Imposition of Discretionary LFOs

Waller argues that the trial court erred by imposing discretionary LFOs without first considering his ability to pay. Although we need not review this issue because Waller has failed to preserve it for appeal, we review it in our discretion and remand to the sentencing court for further proceedings.

We may exercise our discretion to review errors raised for the first time on appeal. RAP 2.5(a). "This rule exists to give the trial court an opportunity to correct the error and to give the opposing party an opportunity to respond." *Blazina*, 182 Wn.2d at 832-33.

Our Supreme Court decided in *Blazina* that a trial court errs by imposing discretionary LFOs without first making an individualized inquiry into the defendant's present and future ability to pay them. 182 Wn.2d at 834-35, 839. The court in *Blazina* affirmed that a defendant

must object to discretionary LFOs below to preserve the issue for appellate review, but indicated that review of unpreserved challenges will often be appropriate due to systemic problems related to the imposition of LFOs. 182 Wn.2d at 834-35. In light of *Blazina,* as well as our Supreme Court's decision to review unpreserved challenges to LFOs, in *State v. Lyle*, ___ Wn.2d ___, 365 P.3d 1263 (2016), and *State v. Marks*, 185 Wn.2d 143, 368 P.3d 485 (2016), we exercise our discretion and review Waller's challenge to his discretionary LFOs.

Waller at sentencing did not raise any issue regarding his ability to pay LFOs in the future, but the trial court found Waller indigent. While present indigency does not necessarily indicate a future inability to pay, our Supreme Court noted in *Blazina* that where a trial court finds a defendant indigent, "courts should seriously question that person's ability to pay LFOs." 182 Wn.2d at 839. Once an order of indigency has issued, continued indigency will be presumed throughout appellate review. RAP 15.2(f).

The trial court found Waller indigent, and the record does not indicate that this status has changed. In addition, nothing in the record indicates that Waller's decision not to object to discretionary LFOs was strategic. For these reasons and in view of the systemic problems highlighted in *Blazina*, we remand for the sentencing court to make an individualized inquiry into Waller's ability to pay discretionary LFOs consistently with *Blazina* before deciding whether to impose any of them.

## CONCLUSION

We conclude that the trial court did not err by denying Waller's last minute request to substitute counsel and that Waller did not receive ineffective assistance of counsel. Therefore, we affirm Waller's convictions. However, we remand for the sentencing court to make an

individualized inquiry consistently with *Blazina* into Waller's ability to pay discretionary LFOs before deciding whether to impose them.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Bjorgen, C.J.
BJORGEN, C.J.

We concur:

Maxa, J.
MAXA, J.

Sutton, J.
SUTTON, J.