Sheri's Sidebar Edition # 22 1/12/2024

HAPPY NEW YEAR And Happy Friday everyone.

I hope every one had a wonderful and happy holiday season! If this is your client below, that is awesome! I just want to know how they identified the guy to arrest him/her/they/them. 😊

I am back again with things I wish I had known during practice, things that have changed, interesting tidbits, and random tips for practice. Welcome back to:

SHERI'S SIDEBAR

It's 2024 what shall we start off with? Sentencing?

"Next time the prosecutor shows you pictures of the crime scene, try not to blurt out, 'Been there, done that.'"

1. **Are you aware that Community Custody Conditions are not presumed to be constitutional?** *State v. Irwin*, 191 Wn. App. 644, 652, 364 P.3d 830 (2015).

2. **Do you know that when calculating an offender score, when a Class C conviction can be included in an offender score if there is an intervening misdemeanor? Does it matter if the misdemeanor was a conviction or probation violation? How do you figure it out with the wash out period?**

RCW 9.94A.525(2)(c) Offender Score

(c) Except as provided in (e) of this subsection, class C prior felony convictions other than sex offenses shall not be included in the offender score if, since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent five consecutive years in the community without committing any crime that subsequently results in a conviction.

- **The first part of the clause is called the triggering clause, and it speaks to *felony* convictions**. *State v. Ervin*, 169 WN.2d 815, 826-27, 239 P.3d 354 (2010).
- **The second part of the clause is called the Continuity or interrupting clause**, which sets for the substantive requirements which a defendant must satisfy during the 5 years in the community, **not committing any crime which subsequently result in a conviction**. *Id*.

    - In this example, there is a C felony conviction, and the client is released from confinement.

    - The triggering clause starts the 5 years, on the last date of release from confinement pursuant to a *felony* conviction.
    - If later there is a misdemeanor *conviction*, it does not implicate the triggering clause, starting the 5 years over from release from the confinement because it was not pursuant to a *felony* conviction.
        - It does implicate the interrupting clause because a crime was committed which *subsequently resulted in a conviction*.
        - This effectively restarts the 5 year clock *from the date of the conviction*, not from the release from confinement pursuant to a *felony* conviction, because it was not a felony conviction. *Id*., at 821, *See State v. Hall,* 45 Wn. App. 766, 769, 728 P.2d 616 (1986).
    - If later, on that misdemeanor, there is time served on a probation violation, does that interrupt the washout period for the C felony conviction?
        - Check the triggering clause: The time is not pursuant to a felony conviction, so that clause does not apply.
        - Check the interrupting clause: The probation violation did not subsequently result in a conviction, so that clause does not apply

- **Result, the misdemeanor probation violation and time spent in jail does not interrupt the C Felony wash out time – only the prior conviction did.**

3. **Don't you hate it when you find the best authority and the opposing party argues it must be dicta? It is so frustrating. However, I found it interesting, even though this is a civil case, that trial courts do not make dicta.** *Gabelein v. Diking Dist. No. 1 of Island Cnty. of State*, 182 Wn. App. 217, 239, 328 P.3d 1008, 1019 (2014).

   The concept of dicta has no application in a trial court to whom the trial court's language was directed, because that language is binding authority and therefore the party is not free to ignore it. That makes sense.

4. **There were a few requests and clarifications that I wanted to address from the WDA Ethics Conference that were raised there and brought to my attention afterward as well:**

   First, I initially expressed the belief that an illegal offer was not required to be presented to a client but that it was best practice to do so, citing the court's lack of authority to accept an illegal offer, and the likelihood of rejection by the Department of Corrections. I spoke with Professor Strait who highlighted the RPCs regarding clients' pursuit of potentially illegal actions and communication requirements of plea offers generally. **It is now clear that, even in cases of illegal offers, they must be presented to the client**, accompanied by a thorough explanation of the associated risks of accepting any improper or illegal offer, which should include: the court lacking the authority to accept the offer, but potentially doing it out of lack of knowledge; the likelihood that DOC will catch the error and return the J&S for amendment to full sentence under the SRA, which they have legal authority to do; and the ethical requirement of you as the attorney to withdraw if the client intends to proceed with illegal behavior after being advised it is illegal to do so.

   It is not just a Best Practice to communicate an illegal offer to a client. The attorney can then also discuss the option to negotiate with the prosecutor for a valid offer, or if the client intends to try to accept the illegal plea and hope the court and DOC miss the illegality, the attorney will need to evaluate RPC 1.16(b)(2) whether the attorney would need to withdraw if the client persisted in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent. **I acknowledge my earlier misconception and appreciate the audience members who brought this to my attention. It underscores the importance of continuous learning in our profession. I always enjoy learning new things as well.**

The second thing to address is the apparent initial discrepancy between two presentations regarding whether an indigent client has a right to dismiss appointed counsel. There was no need for any escalation of the topic or otherwise, as was reported post-event, given the straightforward resolution with legal authority; and the concession during the second presentation that substitution of counsel is required.

A request to discharge a public defense attorney is viewed as a request for substitution of counsel since another public defense attorney would have to take that attorney's place. *See e.g. State v. Calvin*, 16 Wn. App. 2d 1069 (unpublished but can cite under GR 14.1(a)), review denied, 197 Wn. 2d 1023, 492 P.3d 172 (2021**). Substitution of counsel has requirements other than a defendant's choice.** "To justify appointment of new counsel, a defendant must show good cause to warrant substitution of counsel, such as a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant." *Id*., citing *State v. Varga*, 151 Wn.2d 179, 200, 86 P.3d 139 (2004). **An indigent defendant does not get an attorney of their own choosing** under the Sixth Amendment. *Varga*, at 200.

Finally, there was a request for the authority related to when an indigent defendant may lose the right to appointed counsel. A defendant may waive the right to counsel by his/her/their conduct.

> " '[T]he Sixth Amendment right to counsel, while fundamental, is not a right without limitation. Specifically, it is not a right subject to endless abuse by a defendant.' "
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> *State v. Afeworki*, 189 Wn. App. 327, 330, 358 P.3d 1186, 1190 (2015)(citing *Bailey v. Commonwealth,* 38 Va.App. 794, 803, 568 S.E.2d 440 (2002) (alteration in original) (quoting *McNair v. Commonwealth,* 37 Va.App. 687, 695, 561 S.E.2d 26 (2002) (en banc)).
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> A defendant in a criminal prosecution has a right to the assistance of counsel. *Afeworki*, at 344. The right to which, may be affirmatively waived. A valid waiver to the right to counsel requires that the defendant be made aware of the risks and disadvantages of self-representation, with an indication on the record that " 'he knows what he is doing, and his choice is made with eyes open.' " *Acrey,* 103 Wn.2d at 209, 691 P.2d 957 (quoting *Faretta v. California,* 422 U.S. 806, 835, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975)). "Preferably, there [will] be a colloquy on the record informing the defendant of the nature of the charge, the maximum penalty, and technical rules he must follow in presenting his case." *City of Tacoma v. Bishop,* 82 Wn.App. 850, 856, 920 P.2d 214 (1996) (citing *Acrey,* 103 Wn.2d at 211, 691 P.2d 957). "In the absence of a colloquy, the record must otherwise indicate that the defendant was aware of the risks of self-representation." *345 *Bishop,* 82 Wn.App. at 856, 920 P.2d 214 (citing *Acrey,* 103 Wn.2d at 211, 691 P.2d 957).

"The Sixth Amendment, however, is not absolute. A defendant may lose his or her right to counsel through forfeiture or waiver [by conduct]." *United States v. Thomas,* 357 F.3d 357, 362 (3d Cir.2004); *see also State v. DeWeese,* 117 Wn.2d 369, 379, 816 P.2d 1 (1991) ("What the defendant cannot obtain because of a lack of a valid reason, that defendant should not be able to obtain through disruption of trial or a refusal to participate. *A defendant may not manipulate the right to counsel for the purpose of delaying and disrupting trial.*" (emphasis added)).

State v. Afeworki, 189 Wn. App. 327, 344–45, 358 P.3d 1186, 1197 (2015).

Our case law has recognized that *United States v. Goldberg,* 67 F.3d 1092 (3rd Cir.1995), "is instructive" in its explanation of the distinctions between the concepts of affirmative waiver, forfeiture, and waiver by conduct with regard to the right to counsel. *Bishop,* 82 Wn. App. at 857, 920 P.2d 214. As explained above, "[a] waiver is an intentional and voluntary relinquishment of a known right. The most commonly understood method of 'waiving' a constitutional right is by an affirmative, verbal request." *Goldberg,* 67 F.3d at 1099 (citations omitted). Conversely, "[a]t the other end of the spectrum is ... 'forfeiture.' Unlike waiver, which requires a knowing and intentional relinquishment of a known right, forfeiture results in the loss of a right regardless of the defendant's knowledge thereof and irrespective of whether the defendant intended to relinquish the right." *Goldberg,* 67 F.3d at 1100. "A court may find that a defendant has forfeited his or her right to counsel after having engaged in 'extremely dilatory conduct' or 'extremely serious misconduct.' " **1198 *Thomas,* 357 F.3d at 362 (quoting *Goldberg,* 67 F.3d at 1101–02.)

In addition, a middle ground doctrine exists. This doctrine, waiver by conduct, is sometimes referred to as a "hybrid situation" because it combines elements of waiver and forfeiture. *Goldberg,* 67 F.3d at 1100. **"Once a defendant has been warned that he will lose his attorney if he engages in dilatory tactics, any misconduct thereafter may be treated as an implied request to proceed *pro se* and, thus, as a waiver of the right to counsel."** *Goldberg,* 67 F.3d at 1100. "[A] 'waiver by conduct' [can] be based on conduct less severe than that sufficient to warrant a forfeiture." *Goldberg,* 67 F.3d at 1101; *accord Bishop,* 82 Wn. App. at 859, 920 P.2d 214 (" '[W]aiver by conduct' requires that the defendant be warned about the consequences of his actions, including the risks of proceeding pro se, and can be based upon conduct less severe than that constituting forfeiture.").

State v. Afeworki, 189 Wan. App. 327, 345–46, 358 P.3d 1186, 1197–98 (2015).

5. **The State has been amending charges late frequently, right before and during trial. The State always tells the court they are allowed to. They are correct, they are allowed to. Did you know the Court does not have to allow the State to Amend?**

Cassie T. reminds us that the Court does not have to allow it. Just because the State can amend, does not make it an abuse of discretion for the Court to stop them from doing it. Thanks Cassie!

The important thing to stress on the issues of amended information is that the court MAY amend the info but doesn't HAVE to. There's good caselaw about prejudice being the ceiling to allow late amendment but the floor is just abuse of discretion. Check out *Rapozo* and *Lamb* for good language.
The Court has the discretion to deny a state's motion to amend the information and the defendant need not show prejudice for the court to deny a state's motion to amend a complaint. *State v. Rapozo*, 114 Wn. App. 321 (2002). A trial court may deny a motion to amend an information irrespective of prejudice to a defendant. *State v. Lamb*, 175 Wn.2d 121 (2012).

TRAINING:

- ✓ ****I am planning on putting on a Practical Skills & Application CLE on Offender Score Calculations, which has been requested of me from the felony project by several members over the past few months.**
  There are some specific complex areas to provide examples about how to interpret and apply the statutes, how to correctly calculate washout periods, and maybe how to review out of state comparisons – or that may be separate. This will be walking through case examples with an experienced presenter. I will keep you posted. 😉

- ✓ **Navigating the Complexities of Defending Sex Offense Cases: Motions and Case Law Training has been Rescheduled to February 14, 2022 @ 12-1pm**

  - Edwin Aralica is a great presenter who has provided a myriad of resources as well. If you haven't yet registered, please do so by emailing wda@defensenet.org with "Motions and Caselaw" in the subject line to start the registration process. You will then receive an email with a link to complete your registration process.

- Edwin has the motions and strategy to show you how to suppress evidence of leading questions and maybe anatomical cow dolls too!

Here is to the start of a great new year!
Best,
Sheri

Sheri's Sidebar is archived here: https://defensenet.org/resource-category/sheris-sidebar/