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State v. Lippert Respondent's Brief Dckt. 38613

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IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

STATE OF IDAHO,)	
)	
Plaintiff-Respondent,)	NO. 38613
)	
vs.)	
)	
ROBERT SCOTT LIPPERT,)	
)	
Defendant-Appellant.)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

HONORABLE CARL B. KERRICK
District Judge

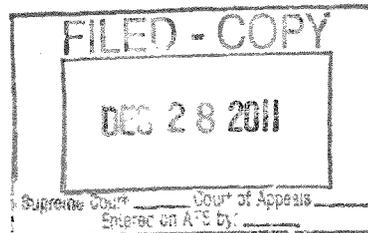
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STATUTES

I.C. § 19-8565, 6

STATEMENT OF THE CASE

Nature of the Case

Robert Scott Lippert appeals from the judgment of conviction entered upon the jury verdict finding him guilty of sex abuse of a child under the age of 16.

Statement of the Facts and Course of the Proceedings

Lippert's adult daughter reported to the authorities that Lippert had sexually abused her when she was a teenager. (#33028 R., pp.10-11.¹) Following an investigation, the state arrested Lippert and charged him with sex abuse of a child under 16. (#33028 R., pp.10-11, 43.) The district court appointed the public defender to represent Lippert. (#33028 R., pp.32-34.)

At a pre-trial hearing, Lippert expressed dissatisfaction with his attorney, and requested substitute counsel be appointed. (#33028 Tr., Vol. II,² p.18, L.13 - p.20, L.7.) Specifically, Lippert told the district court that he was dissatisfied with the lack of "substantial discussion" with his appointed counsel about his case,

¹ The Idaho Supreme Court ordered that the appellate record in this case be augmented with the clerk's records and transcripts filed in Lippert's prior appeal, State v. Lippert, Docket No. 33028. (3/6/11 Order.)

² The appellate record from Lippert's prior appeal, Docket No. 33028 contains two reporter's transcripts. Volume I contains transcripts of pre-trial hearings held on October 19, 2005, and the afternoon of November 16, 2005. (See #33028 Tr., Vol. I.) Volume II contains transcripts of a pre-trial hearing held on the morning of November 16, 2005; pre-trial motion hearings of January 4th and 6th 2006; the four-day jury trial from January 23-26, 2006; and the sentencing hearing from April 27, 2006. (See #33028 Tr., Vol. II.) The state cites these transcripts as "Vol. I," and "Vol. II," respectively. The appellate record in the Lippert's current appeal, Docket No. 38613 contains only one transcript, from a September 15, 2008 motion hearing. (See Tr.) The state cites this transcript simply as "Tr."

and that he did not agree with his counsel on how his case was to be handled. (Id.) Lippert's counsel told the court that he did not think the attorney-client relationship had broken down, but that he did not object to substitute counsel being appointed. (#33028 Tr., Vol. II, p.19, Ls.4-9.) The district court denied Lippert's request for substitute counsel. (#33028 Tr., Vol. II, p.20, L.8 – p.21, L.14.)

On the scheduled day of trial, Lippert initially refused to leave his jail cell. (#33028 Tr., Vol. I, p.166, L.15 – p.169, L.18.) After the district court directed the jailors to bring Lippert to court (#33028 Tr., Vol. I, p.172, L.19 – p.173, L.1), Lippert explained that he had not been given notice of the trial date, that he had a severe headache, and that he was dissatisfied with his appointed counsel (#33028 Tr., Vol. I, p.174, L.5 – p.179, L.2). He also continuously asserted that he was unrepresented. (Id.) Eventually, the trial commenced with Lippert's participation. (See generally, #33028 Tr., Vol. I.)

The jury found Lippert guilty of sex abuse of a child under 16. (#33028 R., pp.176-177.) Lippert's appointed attorney continued to represent him through sentencing, where the district court imposed a unified fifteen year sentence with six years fixed. (#33028 R., pp.184-185; #33028 Tr., Vol. II, p.479, L.5 – p.547, L.18.) Lippert timely appealed. (#33028 R., pp.186-188.)

On appeal, Lippert argued that the district court erred in admitting certain I.R.E. 404(b) evidence of Lippert's prior sexual misconduct, and that the district court failed to conduct an adequate inquiry regarding Lippert's request for substitute counsel. See State v. Lippert, 145 Idaho 586, 181 P.3d 512 (Ct. App.

2007). The Idaho Court of Appeals affirmed Lippert's conviction, holding that the probative value of the evidence of uncharged incidents of sexual misconduct was not outweighed by its prejudicial effect. Id. at ____, 181 P.3d at 515-518. However, a majority of the Court also held that the district court failed to give Lippert a full and fair opportunity to present facts and reasons in support of his motion for substitute counsel. Id. at ____, 181 P.3d at 518-523. The Court remanded the case for a determination of whether Lippert had good cause for appointment of new counsel, and instructed the district court to grant Lippert a new trial if it found such good cause. Id.

On remand, the district court conducted a hearing, and considered briefing and argument on the issue of Lippert's request for substitute counsel. (R., pp.20-35; see generally, Tr.) Lippert (who was at this point represented by private counsel), and his formerly appointed trial counsel testified at the hearing. (Tr., p.8, L.14 – p.76, L.5.) In a memorandum opinion, the district court concluded that Lippert failed to show good cause for substitution of counsel, and denied Lippert's motion. (R., pp.36-52.) Lippert timely appealed. (R., pp.70-72.)

ISSUE

Lippert states the issue on appeal as:

Did the district court abuse its discretion when it failed to appoint substitute counsel to represent Mr. Lippert because a complete, irrevocable breakdown of communication between Mr. Lippert and his counsel existed?

(Appellant's brief, p.4.)

The state rephrases the issue on appeal as:

Has Lippert failed to show that the district court abused its discretion in denying his motion for substitute counsel?

ARGUMENT

Lippert Has Failed To Show That The District Court Abused Its Discretion In Denying His Motion For Substitute Counsel

A. Introduction

Lippert contends that the district court abused its discretion in denying his motion for substitute counsel. (See generally, Appellant's brief.) Specifically, Lippert contends that the district court abused its discretion in concluding that Lippert failed to show good cause in the form of a "complete, irrevocable breakdown of communication" with his appointed counsel.³ (Id.) A review of the record reveals that the district court considered the proper factors in considering Lippert's request and properly exercised its discretion in denying Lippert's motion.

B. Standard Of Review

The decision whether to appoint substitute counsel for an indigent defendant lies within the sound discretion of the trial court. I.C. § 19-856; State v.

³ Lippert also alleged, for the first time during the hearing on his motion for substitute counsel after remand from the Idaho Court of Appeals that there was an actual conflict between himself and his appointed counsel. (Tr., p.10, L.2 – p.12, L.25.) Specifically, Lippert alleged that his aunt had retained and then fired his appointed counsel in a divorce proceeding in the late 1970s or early 1980s, and his appointed counsel had also previously represented an opposing party in a property dispute involving Lippert. (Id.) In response, Lippert's appointed counsel testified that he had never heard of Lippert's aunt and did not start practicing law until 1987, and that he could not recall ever representing an opposing party to Lippert in any property dispute. (Tr., p.51, L.7 – p.52, L.19.) The district court concluded that Lippert failed to show an actual conflict of interest. (R., pp.39-40.) While Lippert references his allegations of an actual conflict in his statement of facts in his Appellant's brief (Appellant's brief, pp.1-2), he does not allege on appeal that the district court erred in finding that no actual conflict existed.

Nath, 137 Idaho 712, 714-715, 52 P.3d 857, 859-860 (2002); State v. Clayton, 100 Idaho 896, 897, 606 P.2d 1000, 1001 (1980).

Credibility of witnesses, the weight to be given to their testimony, and the inferences to be drawn from the evidence are all matters solely within the province of the district court. Peterson v. State, 139 Idaho 95, 97, 73 P.3d 108, 110 (Ct. App. 2003).

C. Lippert Failed To Show A "Complete, Irrevocable Breakdown Of Communication" With His Appointed Counsel

The Sixth Amendment to the United States Constitution and Article I, § 13 of the Idaho Constitution guarantee the right to counsel, though not necessarily the right to the attorney of one's choice. State v. Clark, 115 Idaho 1056, 1058, 772 P.2d 263, 265 (Ct. App. 1989). While the Sixth Amendment guarantees counsel who "function[s] in the active role of an advocate," Entsminger v. Iowa, 386 U.S. 748, 751 (1967), it does not guarantee a "meaningful relationship" between an accused and his counsel. Morris v. Slappy, 461 U.S. 1, 12-15 (1983).

A trial court may, in its discretion, appoint a substitute attorney for an indigent defendant for "good cause." I.C. § 19-856; Clayton, 100 Idaho at 897, 606 P.2d at 1001; State v. Peck, 130 Idaho 711, 713, 946 P.2d 1351, 1353 (Ct. App. 1997). Mere lack of confidence in otherwise competent counsel is not necessarily grounds for substitute counsel in the absence of extraordinary circumstances. State v. McCabe, 101 Idaho 727, 729, 620 P.2d 300, 302 (1980); Peck 130 Idaho at 713, 946 P.2d at 1353. Instead, "good cause" for the

appointment of substitute counsel generally requires either an actual conflict of interest; a complete, irrevocable breakdown of communication; or an irreconcilable conflict which leads to an apparently unjust verdict. Lippert, 145 Idaho at ___, 181 P.3d at 522-523 (citing Smith v. Lockhart, 923 F.2d 1314, 1320 (8th Cir. 1991); McKee v. Harris, 649 F.2d 927, 931 (2nd Cir. 1981); United States v. Lott, 310 F.3d 1231, 1250 (10th Cir. 2002)). The trial court must afford the defendant a full and fair opportunity to present the facts and reasons in support of a motion for substitution of counsel having been made aware of the problems involved. Clayton, 100 Idaho at 898, 606 P.2d 1002. A court must also balance a defendant's choice of counsel against the "need for the efficient and effective administration of criminal justice." United States v. Weninger, 624 F.2d 163, 166 (10th Cir. 1980).

In Lott, a case cited in the Idaho Court of Appeals' opinion in this case, the Tenth Circuit Court of Appeals set forth factors to be used in examining constitutional implications of a total breakdown in communication: "(1) whether the defendant's motion for new counsel was timely; (2) whether the trial court adequately inquired into defendant's reasons for making the motion; (3) whether the defendant-attorney conflict was so great that it led to a total lack of communication precluding an adequate defense; and (4) whether the defendant substantially and unreasonably contributed to the communication breakdown." Lippert, 145 Idaho at ___, 181 P.3d at 523 (citing Lott, 310 F.2d at 1250); see also Romero v. Furlong, 215 F.3d 1107, 1113-1114 (10th Cir. 2000) (discussing the

four factors used to examine constitutional implications of lawyer/defendant communication breakdown relied upon in Lott).

It is difficult for a defendant to show a “total breakdown in communication,” whether or not a court specifically utilizes the Lott factors. See United States v. Hutchinson, 573 F.3d 1011, 1025 (10th Cir. 2009) (recognizing the “defendant's burden to meet [the Lott] standard,” and holding that “without any evidence precluding the possibility of mere strategic disagreement or suggesting such a ‘total breakdown in communication,’ we cannot say the district court abused its discretion in denying [the defendant's] motions.”); United States v. John Doe #1, 272 F.3d 116, 122-126 (2nd Cir. 2001) (holding that a total breakdown in communication had not occurred when the defendant made threats of physical violence to his counsel and his counsel’s family, and when he alleged that his defense counsel had repeatedly lied to him, because while the rift between defendant and counsel was “at times intense,” defense counsel was able to carry out his duties and some communication did take place); LaGrand v. Stewart, 133 F.3d 1253, 1276-1277 (9th Cir. 1998) (substitution of counsel not warranted where record showed counsel and defendant communicated, although defendant complained about inadequate time meeting with counsel and counsel’s “gloomy predictions.”). Such a high standard is necessary to prevent a defendant from paralyzing the criminal proceedings against him based on circumstances falling short of a Sixth Amendment right to counsel violation.

Upon remand from the Idaho Court of Appeals, the district court recognized and applied the four factors from Lott. (R., pp.38-48.) The district

court then properly utilized its discretion in concluding that Lippert failed to show good cause for the substitution of appointed counsel. (R., pp.36-52.)

First, the district court concluded that Lippert's request for substitute counsel, made on the morning of his jury trial, was timely. (R., p.38 n.3) The district court cited State v. Reber, 138 Idaho 275, 277, 61 P.3d 632, 634 (Ct. App. 2002), in which the Idaho Court of Appeals held that a motion for self-representation was timely when it was made any time prior to the commencement of meaningful trial proceedings, including prior to the empanelment of a jury. (R., p.38, fn.3.) The state asserts that a motion for substitute counsel is not analogous to a motion for self-representation. On the contrary, a motion for substitute counsel that would necessitate a continuance if granted, such as a motion made for the first time on the day of trial, is not "timely" in a Lott analysis. See State v. Clark, 698 N.W.2d 173, 178 (Minn. 2005) (defendant's motion for substitute counsel made on the morning of trial, on the second day of jury voir dire, was untimely); U.S. ex rel. Guillen v. DeRobertis, 580 F.Supp. 1551, 1554-1555 (N.D. Ill. 1984) (when defendant made request for new counsel on the day trial was to begin, and he had not indicated his dissatisfaction with counsel prior to that time, trial court did not abuse discretion in denying request, because it was likely motion was made to delay); U.S. v. Reyes-Bosque, 596 F.3d 1017, 1034-1035 (9th Cir. 2010) (regardless of when defendant makes motion for substitution of counsel, "the court must make a balancing determination, carefully weighing the resulting inconvenience and delay against the, defendant's important constitutional right to counsel of his

choice.” (citations omitted)). However, in this case, Lippert initially requested substitute counsel at a pre-trial hearing approximately six weeks prior to the jury trial (#33028 Tr., Vol. II, p.18, L.13 - p.20, L.7).⁴ On the basis of that prior request, the state agrees with Lippert and the district court that his motion for substitute counsel was timely.

Second, the district court adequately inquired into the grounds for Lippert’s motion for substitute counsel by conducting a hearing specifically on that issue, and by considering briefing and argument from both parties before issuing a memorandum decision. (R., pp.20-52; see generally, Tr.) Lippert concedes on appeal, as he did below, that the district court’s inquiry was adequate. (R., p.23, Appellant’s brief, p.7.) Indeed, in gaining the opportunity to fully prepare for, testify at, and cross-examine his former appointed attorney at a dedicated hearing on his motion for substitute counsel, Lippert enjoyed more extensive protections than are required by the law in ordinary circumstances. Rios-Lopez v. State, 144 Idaho 340, 343-344, 160 P.3d 1275, 1278-1279 (Ct. App. 2007) (a district court is not required to conduct a hearing in order to afford a full and fair opportunity for a defendant to pursue his motion for substitute counsel).

Third, the district court concluded that Lippert failed to provide evidence of a severe or pervasive conflict with his appointed counsel, or that he had such

⁴ Though Lippert requested substitute counsel at both a November 16, 2005 pre-trial hearing, and the morning of trial, the Idaho Court of Appeals, on remand, instructed the district court to consider only Lippert’s request for counsel made on the morning of trial. (#33028 Tr., Vol. II p.18, L.13 - p.20, L.7; #33028 Tr., Vol. I, p.174, L.5 – p.179, L.2; Lippert at ____, 181 P.3d at 518-523.) The district court recognized this instruction (R., p.2 n.1), but properly considered all of the circumstances of the criminal proceedings that led up to Lippert’s final request for substitution of counsel (R., pp.36-52).

minimal contact with his counsel that meaningful communication was not possible. (R., pp.41-46.) While Lippert claimed that he wrote several unanswered notes to his appointed counsel in the months prior to the trial, and that his appointed counsel refused to communicate with him in preparing for trial (Tr., p.13, L.19 – p.14, L.3), Lippert's appointed counsel testified that he actually had significant communications with Lippert prior to the jury trial. At the hearing on Lippert's motion, Lippert's appointed counsel testified that he: visited Lippert in jail 13 times, discussed and agreed upon the disqualification of the initially assigned district court trial judge, spoke with Lippert prior to and after the preliminary hearing, provided Lippert with all of the discovery provided by the state, tracked down two out-of-state potential witnesses as requested by Lippert (but then elected not to subpoena those witnesses after Lippert told him they would lie at the jury trial), and discussed Lippert's right not to testify at trial. (Tr., p.54, L.19 – p.66, L.22.)

A review of the record reveals Lippert's communications with his appointed counsel continued through the day before the jury trial and the trial itself. On the morning of trial, when the district court was trying to ascertain Lippert's position with regard to attending trial, Lippert's appointed counsel told the court that on the previous day he visited Lippert at jail and discussed the jury list, reviewed a transcript of a prior proceeding, and discussed what Lippert would wear at the trial. (#33028 Tr., Vol. I, p.166, L.21 – p.168, L.3.) At the jury trial itself, Lippert passed notes to his appointed counsel, and was able to engage in direct examination with him when Lippert testified in his own defense.

(Tr., p.64, Ls.21-23, p.75, L.14 – p.76, L.3; #33028 Tr., Vol. I, p.343, L.9 – p.357, L.9.) While Lippert may have desired more personal contact with his appointed defense attorney, the existing communication fell far short of a “complete, irrevocable breakdown of communication.”

Fourth, the district court found that Lippert substantially contributed to the communication issues between himself and his appointed attorney. (R., pp.46-48.) Lippert’s appointed counsel testified that Lippert was uncooperative and difficult to deal with and would not discuss the case in details beyond affirmations of his innocence, and the expression of beliefs that the victim and other witnesses were lying. (Tr., p.62, Ls.14-18, p.66, Ls.19-22, p.72, L.1 – p.73, L.11.) The private counsel Lippert retained for the hearing on remand from the Idaho Court of Appeals acknowledged Lippert is “a little on the stubborn side.” (R., p.24.) Having observed Lippert’s obstructionist behavior firsthand, the district court noted that “[b]ased upon [its] own observations and the testimony provided at the recent hearing, [it] is not persuaded that the fault for a possible lack of communication should be laid squarely on appointed counsel alone, but that Mr. Lippert substantially contributed to any breakdown of communication by his own actions.” (R, p.48.)

On appeal, Lippert merely second-guesses the conclusion of the district court. (See generally, Appellant’s brief.) He also repeats some complaints made below about his appointed counsel’s performance (including allegations that his counsel was unprepared, had “alcohol on his breath” and that he could not “track in court”) (Appellant's brief, pp.7-8; Tr., p.14, L.25 – p.15, L.4, p.19, Ls.21-25),

that do not address the claimed breakdown in communication and would be more appropriately brought in a post-conviction ineffective assistance of counsel claim.⁵

While Lippert's relationship with his appointed defense counsel was clearly somewhat rocky, he has failed to show that an irrevocable breakdown of communication occurred. Lippert has thus failed to show that the district court abused its discretion in denying his motion for substitute counsel.

CONCLUSION

The state respectfully requests this Court to affirm Lippert's judgment of conviction for sex abuse of a child under 16.

DATED this 28th day of December 2011.



MARK W. OLSON
Deputy Attorney General

⁵ As the Idaho Court of Appeals recognized, an ineffective assistance of counsel claim is separate from a motion for substitute counsel, and Lippert is not precluded from making an ineffective assistance of counsel claim following the resolution of his direct appeal. Lippert, 145 Idaho at ___ n.4, 181 P.3d at 523 n.4.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 28th day of December 2011, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

DIANE M. WALKER
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in The State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.



MARK W. OLSON
Deputy Attorney General

MWO/pm