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COURT OF APPEALS, STATE OF COLORADO Colorado State Judicial Building Two East 14th Avenue Denver, Colorado 80203	
Arapahoe District Court Honorable William Blair Sylvester Case Number 98CR3336	
THE PEOPLE OF THE STATE OF COLORADO Plaintiff-Appellee v. JESUS MANUEL MACIAS Defendant-Appellant	σ COURT USE ONLY σ
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REPLY BRIEF OF DEFENDANT-APPELLANT

In response to matters raised in the Attorney General's Answer Brief, and in addition to the arguments and authorities presented in the Opening Brief, Defendant-Appellant, Jesus Manuel Macias, submits the following Reply Brief.

ARGUMENT

I. The district court erred by denying Mr. Macias' Crim. P. Rule 35(c) motion, alleging conflict of interest and ineffective assistance of counsel, without first granting a hearing and appointing him counsel, even after finding that the conduct of his counsel, as described in the 35(c) motion "may fall below the standard of professional reasonableness for his counsel."

A. The State completely misses the point of Macias' argument that he did not execute a *valid* waiver of his speedy trial rights because, in doing so, he acted on the advice of conflicted counsel.

On page 9 of the Answer Brief, the State asserts that the "speedy trial claim" is the "underlying basis of [the] conflict of interest claim." The State then leaps over several points of legal analysis to conclude that Mr. Macias was procedurally required to litigate the validity of his own speedy trial waiver prior to trial, even though he had not been informed, prior to trial, that his counsel labored under a conflict of interest by advising him to waive his speedy trial rights to keep Macias as a paying client. The State's argument is erroneous and unresponsive to Macias' actual claims.

Macias could not have litigated or waived his right to conflict-free counsel on the speedy trial issue prior to trial, because no one informed him of the conflict. The

right of effective assistance of counsel includes the right to conflict-free representation by counsel. Holloway v. Arkansas, 435 U.S. 475, 483-84 (1978); Rodriguez v. District Court, 719 P.2d 699, 706 (Colo. 1986). Although ineffective assistance of counsel may be asserted by a defendant when his counsel has been found to have a conflict of interest, it will not be found if the defendant waived his right to conflict-free representation, **and if such waiver is made with full knowledge of the actual conflict**. People v. Castro, 657 P.2d 932, 944 (Colo. 1983); Armstrong v. People, 701 P.2d 17, 19 (Colo. 1985) (emphasis added)

Under certain circumstances, a defendant may waive the right to conflict-free representation, even though by such waiver the defendant, in all probability, will receive representation which is less effective than representation which could be provided by conflict-free counsel. Holloway v. Arkansas, 435 U.S. 475, 483 (1978); Rodriguez v. District Court, 719 P.2d 699, 706 (Colo. 1986).

In order to waive the constitutional protection of conflict-free counsel, however, a defendant must be fully advised of existing or potential conflicts. Castro, 657 P.2d at 944. The prosecution bears the burden of establishing (1) that the defendant was aware of the conflict and its likely effect on the defense attorney's ability to offer effective representation, and (2) that the defendant thereafter voluntarily, knowingly, and intelligently relinquished his right to conflict-free

representation. Holloway, 435 U.S. at 483, 98 S.Ct. at 1178; Castro, 657 P.2d at 945-46; see also Brewer v. Williams, 430 U.S. 387 (1977) (regarding intentional relinquishment or abandonment of a known right or privilege). The State has failed to do this in every respect. In addition, "[t]he record must affirmatively show that the trial court fully explained the nature of the conflict and the difficulties defense counsel faced in his effective advocacy for the defendant." People v. Martinez, 869 P.2d 519, 524 -525 (Colo. 1994); see Wheat v. United States, 486 U.S. 153, 161, (1988). The record here shows the opposite—that Macias never received an on-the-record advisement by the trial court explaining his counsel's conflict in advising him to waive his speedy trial rights.

Macias never waived his claim to a conflict-free advisement from counsel on whether he should waive his rights to speedy trial. Whether Macias waived his rights to speedy trial is not the "threshold matter," therefore, as the State claims. (Answer Brief, p9) Everyone agrees that Macias executed the waiver. The question is whether the waiver was valid (knowing, intelligent, voluntary, etc.) given that he was following the advice of his conflicted counsel when that conflict was never explained to Macias prior to the waiver. This issue plainly requires a district court hearing.

B. The State erroneously faults Macias for allegedly failing to "establish that there was any actual conflict of interest in this case" and failing to "point to specific instances in the record indicating that the conflict impaired counsel's representation of defendant" when Macias was unfairly denied his hearing at which he could have "established" his record.

On pp 12 – 16 of the Answer Brief, the State both faults Macias for failing to produce a record of evidence that would support his Crim. P. 35(c) claims, and simultaneously asks this Court to affirm the district court's summary denial of the 35(c) motion. But Macias cannot be faulted for failing to do what he was unfairly denied the opportunity to do---to make a district court record on his Crim. P. Rule 35(c) claims, including the existence and depth of Lucero's conflict of interest.

The State argues the wrong standard of review. Macias is entitled to a hearing if, assuming his allegations are true, he may be entitled to relief. As a reminder, a defendant is not required to set forth the evidentiary support for his allegations in his initial Crim. P. 35 motion. See White v. District Court, 766 P.2d 632, 635 (Colo. 1988) This is particularly true for *pro se* litigants. The defendant need only assert facts that, if true, would provide a basis for relief under Crim. P. 35. Id.

Macias cannot be denied a hearing based on a record lacking in evidentiary support if he never got the chance to present that evidence in the first place. See

People v. Kenny, 30 P.3d 734, 742-46 (Colo. App. 2000) ("Because defendant's motion asserted facts which **may have showed** that trial counsel's actions fell below the norm and which may have altered the outcome of the trial, . . . and because the trial court did not examine trial counsel's performance under the heightened scrutiny required by the analyses [of] conflict of interest and *per se* ineffective representation issues, we conclude that **the hearing should encompass an opportunity for defendant to present evidence and arguments on his assertions of ineffective assistance**.) (emphasis added) Even assuming, *arguendo,* that "the defendant's **allegations** do not establish that there was any actual conflict of interest in this case," as the State argues (AB, p13), Macias must be given the chance to produce evidence in support of his allegations. That is the 35(c) standard.

C. Macias most certainly does "allege that his defense was impaired by the extra time allowed by the continuance."

On page 16 of the Answer Brief, the State boldly asserts that "the defendant does not allege that his defense was impaired by the extra time allowed by the continuance." The State has overlooked a large portion of Macias' Opening Brief, which reads:

"After Macias waived his speedy trial rights to accommodate his attorney's suspension period, the prosecutor dramatically strengthened its case against Macias.

On October 15, 1999, the prosecutor filed a motion to endorse twenty-three additional witnesses (not previously endorsed). (v1, p88-89) On November 22-23, 1999, the court held hearings to litigate the prosecutor's motion to admit uncharged misconduct and hearsay evidence against Macias. (v4) The prosecutor informed the court that, after his recent interviews with the additional witnesses, he discovered additional "other acts evidence" not included in his 404(b) motion, and an "additional theory for admissibility of evidence." (v4, 11/22/99, p9)

After the hearing, on December 27, 1999, the prosecutor filed a "Delineation of Statements and Other Acts Sought to be Admitted" that greatly expanded the motion to admit hearsay and 404(b) evidence filed by the prosecutor before Macias waived his right to speedy trial. (compare original motion of 7/9/99, attached as Appendix D (v1, p79-80) with expanded motion of 12/27/99, attached as Appendix E (v1, p100-110)) In the expanded "delineation" motion, the prosecutor also stated, for the first time, that he intended to call the "People's domestic violence expert(s), Barbara Shaw and possibly Ron Gallup" to use the new hearsay testimony (generated by the pre-trial hearing of November 22-23, 1999) "as the bases for giving expert testimony and opinions, pursuant to CRE 702 and 703, concerning the victim's and defendant's relationship, domestic violence, battered and abusive partners, the

dynamics of such relationships, and the significance of these factors upon the defendant's state of mind at the time the homicide . . ." (v1, p100)

The defense objected to the admission of all of this evidence. (v4, 11/22/99 p6: "we're objecting to the admission of any of these prior acts, obviously"; see v1, p94-96: (Defendant's) "Motion in Limine I: Motion to Prohibit Introduction of Evidence of Defendant's Character by Prosecution" objecting to expert witness testimony)

On December 9, 1999, the prosecutor moved to endorse an additional witness--domestic violence expert witness Barbara Snow. (v1, p113) The defense moved to continue the trial date again so that it could prepare rebuttal evidence to all of the additional evidence generated by the newly endorsed prosecution witnesses and expanded 404(b) motion. (v1, p382-83) The district court then vacated the January 7, 2000 trial date and re-set trial for May 15, 2000. (v1, p112) On April 4, 2000, the prosecutor moved to endorse an additional witness that would become key to the prosecution's case—Anthony Cunningham. (v1, p114)

Cunningham was a former jail cellmate of Macias that contacted the district attorneys' office offering alleged information about Macias in hopes of getting a sentence reduction. Over defense objection, Cunningham testified at trial that Macias had told him that he was in jail for shooting a drug dealer, and that he made the dealer

get on his knees and ask God for forgiveness. (v15, p88) Cunningham also testified that Macias had told him that, before shooting him, Macias stated that he was the drug dealer's god, and told him, "You're a dead motherfucker." (v15, p88) Although the district attorney admitted that there was no evidence to support the drug dealer story, he argued that it was a "half-truth" indicative of Macias' culpable mental state when he shot the actual victim in this case---his girlfriend. (v14, p229-34) The district attorney described Cunningham as "an essential witness" to its case and even offered immunity in exchange for his testimony against Macias at trial. (v1, p139)

Finally, on May 4, the prosecutor moved to endorse one more witness—Ted Ritter, of the Colorado Bureau of Investigations. (v1, p118) After a trial that included the testimony of **seven more witnesses** than those the district attorney originally endorsed (before Macias first waived his right to speedy trial), Macias was convicted of second-degree murder. (v1, p88-89; see v9: testimony of Patricia Alderete; v10: testimony of Nicole Gutierrez, Iris Macias, and Josephine Gutierrez; v13: testimony of Benita Gonzales; v14: testimony of Priscilla Olivas; v15: testimony of "essential witness" Anthony Cunningham)." (Opening Brief, p8-11)

AND, also from the Opening Brief:

"And, the record here is replete with evidence that the prosecutor dramatically strengthened his case after Macias waived his speedy trial rights the first time. The

record is clear that the prosecutor expanded his use of "similar transaction" and hearsay evidence, and elicited trial testimony from seven witnesses not previously endorsed, including the 'essential witness' Cunningham whose testimony the prosecutor used to argue Macias' culpable mental state." (Opening Brief, p26)

The State's assertion is belied by the express language of the Opening Brief.

D. The State's arguments on the factual merits of the 35(c) claims set forth on pp18-25 are premature given that Macias has not yet had an evidentiary hearing is district court on his ineffective assistance claims.

Because relief for ineffective assistance of counsel requires a criminal defendant to prove both deficient representation and prejudice, denial of the motion without a hearing is justified **ONLY IF** the existing record establishes that the defendant's allegations, even if proven true, would fail to establish one or the other prong of the Strickland test. Ardolino v. People, 69 P.3d 73, 77 (Colo. 2003). If a criminal defendant has alleged acts or omissions by counsel that, if true, could undermine confidence in the defendant's conviction or sentence, and the motion, files, and record in the case do ***not*** clearly establish that those acts or omissions were reasonable strategic choices or otherwise within the range of reasonably effective assistance, the defendant must be given an opportunity to prove they were not. Id.

Here, the State faults Macias for failing to set forth offers of proof as to what every potential witness would testify to, etc, to support his claims of prejudice. This is an outrageous expectation given that Macias has been incarcerated since well before he filed this motion and therefore unable to do any *pro se* investigation or gathering of testimonial offers of proof. Moreover, the district court denied Macias' request for appointment of counsel to assist him in preparing his Crim. P. 35(c) motion, and the State would now fault him based on the limitations of his *pro se* filing, prepared while incarcerated and with no outside investigator or other assistance at his disposal. To hold Macias to this standard would be particularly unfair in this case, given the district court's premature filing deadline that deprived Macias of approximately two years of the three-year preparation period for filing the 35(c) motion. (See Statement of the Case, Opening Brief) Macias' *pro se* 35(c) motion should not be held to the absurd standard that the State advocates, and it is not the proper legal standard in any case.

E. Regarding the possible modified-*Allen* instruction, the State makes unwarranted factual assumptions from the existing record when it is Macias' contention that the questionable instruction was omitted from the record.

The State simply assumes from the existing record that "[t]he Defendant has apparently confused Instructions 19 and 20 for a modified-*Allen* instruction," and

completely disregards his memory of the modified-*Allen* instruction based on the existing record. Macias, however, claims that this instruction was given off-the-record.

Once again, this Court must assume that Macias' allegation is true under the 35(c) standard of review. See White v. District Court, 766 P.2d 632, 635 (Colo. 1988). The defendant need only assert facts that, if true, would provide a basis for relief under Crim. P. 35. Id. Macias is entitled to a hearing at which he can attempt to prove his allegation.

CONCLUSION

THEREFORE, based on the arguments and authorities presented in the Opening Brief and this Reply Brief, Mr. Macias respectfully requests that this Court reverse the district court's ruling denying relief on his 35(c) motion and remand to the district court with instructions to appoint counsel and conduct a hearing on the issues discussed in this appeal.

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CERTIFICATE OF SERVICE

I certify that, on October 17, 2007, a copy of this Reply Brief of Defendant-Appellant was hand-delivered to the Colorado Court of Appeals for deposit in the Attorney General's mailbox to the attention of:

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