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NO. 68926-6-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

THOMAS JAMES DONALD ARTHUR,

Appellant.

BRIEF OF RESPONDENT

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I. ISSUES

After the start of trial, defendant requested to represent himself. Defendant was not prepared to proceed pro se and agreed his request would delay the trial. Two witnesses under subpoena were present for trial. The court found that defendant was represented by a skilled attorney who was prepared to proceed with the trial and that the delay from a continuance would cause inconvenience to the other parties. Was it an abuse of discretion for the trial court to deny defendant's untimely motion for self-representation?

II. STATEMENT OF THE CASE

A. FACTS OF THE CRIME.

Thomas James Donald Arthur, defendant, was adjudicated as juvenile in 1991 of rape of a child in the first degree. As a result of that conviction defendant is required to register as a sex offender. RCW 9A.44.130; CP 35-37 (EX 7); 2RP[1] 10-11.

On November 22, 2010, defendant changed his registration address from homeless to his parent's address in Mountlake Terrace. That remained defendant's registered address until

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[1] The verbatim reports of proceedings are referenced as follows:
1RP refers to Bench Trial and 3.5 Hearing on April 24 and 25, 2012;
2RP refers to the trial court's oral ruling on April 25, 2012;
3RP refers to the sentencing hearing on May 14, 2012.

September 8, 2011, when defendant changed his registered address to a location in Edmonds. CP 35-37 (EX 1, 2, 13); 2RP 10-12.

Charlotte Arthur, defendant's mother, said that the last time defendant lived at the Mountlake Terrace address was in 2005 to 2006. During March and April of 2011, only three people were living at that address, Charlotte Arthur, her husband, and her son David. 1RP 59-66.

Defendant did not reside at his registered address during the period of March 17, 2011 through April 27, 2011. Defendant knowingly failed to provide the sheriff's office with timely written notice of where he was residing during that period of time. CP 15-17; 2RP 12-16.

B. PROCEDURAL FACTS.

On August 2, 2011, the State charged defendant with Failure to Register. Defendant was arraigned on August 17, 2011, and trial was set for October 21, 2011. The trial was continued three times, on October 7, 2011, December 20, 2011, and February 9, 2012. CP 31-32, ___ (sub#7, Order Setting Trial Date), ___ (sub# 15, Agreed Trial Continuance), ___ (sub# 20, Agreed Trial Continuance), ___ (sub# 23, Agreed Trial Continuance).

1. Start Of Trial.

Trial commenced on April 24, 2012, 1:40 p.m.[2] Defendant waived jury trial. The State's witnesses were present. The court heard motions in limine and admitted seven exhibits. The court accepted defendant's stipulation that he was required to register during the period March 17 through April 27, 2011. It was the State's understanding that defendant was also going to stipulate to the admission of his registration forms. When defendant indicated that he would not stipulate to the admission of the registration forms the court said there would need to be a CrR 3.5 hearing. The court recessed so counsel could discuss the matter with defendant. CP 25; 1RP 2-16.

2. Defendant's Motion For Self-Representation.

After the recess, defendant requested to represent himself. Defendant stated that while he had the highest respect for his counsel, he asked that the court allow him to set motions in his own defense. Defendant's reasons for wanting to represent himself were discrepancies in the case that he thought should be brought up, but counsel was not bringing up those issues and things were not going the way defendant expected. Defendant said that there

[2] Defense counsel had just concluded another trial that morning and the court was awaiting the jury verdict. 1RP 2, 9, 15.

were two witnesses that he wanted to call that had not been subpoenaed and that he needed to get some documents and letters from the Mountlake Terrace Police for his defense. Defendant stated that he was not ready to proceed without the two witnesses and the documents and agreed that the trial would need to be delayed. 1RP 2, 16-18, 21.

The court found that trial had started, the court had already admitted several exhibits, and two witnesses under personal service subpoena were present. One witness had appeared the day before and was ordered to return that day, and the second witness had health complications that limited his ability to get to court. The trial court denied defendant's motion for a continuance and denied his motion to represent himself as untimely. Defense counsel, a skilled lawyer, was ready to proceed. 1RP 18-21, 24-25.

3. CrR 3.5 Hearing.

Defendant was willing to stipulate that he was not in custody when he signed the forms and did not intend to argue that he was coerced to sign the forms. Nonetheless, defendant decided he would not stipulate to the admission of the registration forms. The State made arrangements for Deputies Wells and Bilyeu to testify and a CrR 3.5 hearing was held. The court found that at the time

the forms were completed defendant was not in custody and no threats or promises were made. The court found the forms were admissible in the State's case in chief. The case then proceeded with opening statements. CP 18-20; 1RP 13-14, 21-42.

4. Verdict And Sentence.

At the conclusion of trial defendant was found guilty as charged. Sentencing was set for May 14, 2012, along with another of defendant's pending cases, at defendant's request.[3] CP 15-17; 2RP 12-18.

On May 14, 2012, defendant was sentenced to serve 90 days, work release if eligible, concurrent with 20 days on the other matter; placed on 12 months community custody with the condition that he register as required by law; ordered to pay $600.00 in legal financial obligations, with all payments to be made within 36 months of his release of confinement. CP 4-14; 3RP 2-18.

III. ARGUMENT

Criminal defendants have a right to self-representation under article I, § 22 of the Washington Constitution and the Sixth Amendment to the United States Constitution. State v. Madsen, 168 Wn.2d 496, 503, 229 P.3d 714, 717 (2010), citing Faretta v.

[3] The court received and read the letter from defendant's brother prior to sentencing. CP 33-34; 3RP 9.

California, 422 U.S. 806, 819, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); State v. Vermillion, 112 Wn. App. 844, 851, 51 P.3d 188 (2002). "The unjustified denial of this [pro se] right requires reversal." Madsen, 168 Wn.2d at 503, quoting State v. Stenson, 132 Wn.2d 668, 737, 940 P.2d 1239 (1997).

However, the right to self-representation is not absolute and the defendant's motion to proceed pro se must be made in a timely fashion or the right is relinquished and the matter of the defendant's representation is left to the discretion of the trial judge. Stenson, 132 Wn.2d at 737, citing State v. DeWeese, 117 Wn.2d 369, 377, 816 P.2d 1 (1991); State v. Bebb, 108 Wn.2d 515, 524, 740 P.2d 829 (1987). Since a request for pro se status is a waiver of the constitutional right to counsel, appellate courts have regularly and properly reviewed denials of requests for pro se status under an abuse of discretion standard. Madsen, 168 Wn.2d at 504. Both the United States and the Washington Supreme Courts have held that courts are required to indulge in "'every reasonable presumption' against a defendant's waiver of his or her right to counsel." Madsen, 168 Wn.2d at 504, citing In re Turay, 139 Wn.2d 379, 396, 986 P.2d 790 (1999) (quoting Brewer v. Williams, 430 U.S. 387, 404, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977)).

One of the basic principles for implementing and asserting the right to self-representation is that the demand must be timely made. State v. Jordan, 39 Wn. App. 530, 541, 694 P.2d 47 (1985); State v. Fritz, 21 Wn. App. 354, 361, 585 P.2d 173, 176 (1978). To be timely, the demand for self-representation should be made a reasonable time before trial. Fritz, 21 Wn. App. at, 361. The court may deny a request for self-representation that is untimely. Madsen, 168 Wn.2d at 504; State v. Baker, 75 Wn. App. 236, 241, 881 P.2d 1051 (1994).

Cases considering the timeliness of a proper demand for self-representation have generally held: (a) if made well before the trial or hearing and unaccompanied by a motion for continuance, the right of self-representation exists as a matter of law; (b) if made as the trial or hearing is about to commence, or shortly before, the existence of the right depends on the facts of the particular case with a measure of discretion reposing in the trial court in the matter; and (c) if made during the trial or hearing, the right to proceed pro se rests largely in the informed discretion of the trial court. Madsen, 168 Wn.2d at 508; In re Richardson, 100 Wn.2d 669, 675, 675 P.2d 209 (1983); State v. Bolar, 118 Wn. App. 490, 516, 78

P.2d 1012 (2003); Baker, 75 Wn. App. at 241; Jordan, 39 Wn. App. at 541; Fritz, 21 Wn. App. at 361.

In the present case, trial started prior to defendant making his request for self-representation. Trial starts when the case is called for trial and the trial court hears and disposes of preliminary motions, a customary and practical phase of a trial. State v. Carson, 128 Wn.2d 805, 820, 912 P.2d 1016 (1996); Vermillion, 112 Wn. App. at 855; State v. Carlyle, 84 Wn. App. 33, 36, 925 P.2d 635 (1996). Since this was a bench trial, even if the court employs the jeopardy standard for determining the start of trial, the trial started before defendant made his request for self-representation. In a nonjury trial, jeopardy attaches when the court begins to hear evidence. Serfass v. United States, 420 U.S. 377, 388, 95 S.Ct. 1055, 43 L.Ed.2d 265 (1975), citing McCarthy v. Zerbst, 85 F.2d 640, 642 (10th Cir. 1936).

Defendant's claim that his request for self-representation came prior to the start of trial is neither supported by the facts nor cases he cites. Appellant's Brief at 7-8. The Court in State v. Stenson, 132 Wn.2d 668, 940 P.2d 1239 (1997), declined to decide whether the request to proceed pro se late in the proceedings was timely. Id. at 740. Defendant cites the dissenting opinion in

Stenson, 132 Wn.2d at 769-770, for the principle that a request made to proceed pro se is timely if made before jury impaneled. In Serfass v. United States, 420 U.S. 377, 95 S.Ct. 1055, 43 L.Ed.2d 265 (1975) the trial court granted a pretrial motion to dismiss the indictment and the case did not proceed to trial. The Court held that jeopardy had not attached at the pretrial motion. Id. at 388. In State v. Bartholomew, 98 Wn.2d 173, 654 P.2d 1170 (1982), the issue was whether the trial court abused its discretion in denying a request for a post-trial evidentiary hearing. Id. at 211-212. The issue in State v. Thomson, 70 Wn. App. 200, 852 P.2d 1104 (1993) aff'd, 123 Wn.2d 877, 872 P.2d 1097 (1994), was whether the defendant voluntarily absented himself from trial when he disappeared during jury selection. The Thomson court found that "the facts of this case do not require us to explore" whether "other events that typically occur before or contemporaneously with the swearing of the jury panel, such as pretrial motions heard on the day of trial, could serve to indicate the start of trial." Id. at 211.

In the present case, the trial court found that defendant's motion to represent himself, brought after the start of trial, was untimely. Substantial evidence supports the trial court's finding that defendant's request for self-representation was untimely asserted

after trial had already started; preliminary motions had been heard and disposed, exhibits had been admitted as evidence along with defendant's admission that he was required to register. State v. Andrews, 66 Wn. App. 804, 810, 832 P.2d 1373 (1992), review denied, 120 Wn.2d 1022, 844 P.2d 1017 (1993); State v. Redd, 51 Wn. App. 597, 608, 754 P.2d 1041, review denied, 111 Wn.2d 1008 (1988); State v. Mathews, 38 Wn. App. 180, 183, 685 P.2d 605, review denied, 102 Wn.2d 1016 (1984). Further, defendant needed a continuance to prepare for self-representation, witnesses were present and it would be inconvenient for them to have to reappear for another date. Finally, defendant was represented by a skilled attorney who was present and prepared for trail.

The trial court had full discretion to grant or deny defendant's request. Bolar, 118 Wn. App. at 516. Discretion is abused if the trial court's decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons. Madsen, 168 Wn.2d at 504; Vermillion, 112 Wn. App. at 855.

> 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. 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."

State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003) (citations omitted). The trial court did not abuse its discretion in denying defendant's request for self-representation.

IV. CONCLUSION

For the above reasons the appeal should be denied and defendant's conviction affirmed.

Respectfully submitted on March 25, 2013.

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