

69765-0

69765-0

No. 69765-0-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

RANDY ROYAL,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

APPELLANT'S REPLY BRIEF

NANCY P. COLLINS
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

2013 AUG -1 PM 4:48
CONSULTANT
STATE OF WASHINGTON
DIVISION ONE

TABLE OF CONTENTS

- A. ARGUMENT..... 1
 - 1. The prosecution misrepresents the only factual basis of theft on which the State elected to present to the jury and misapprehends the legal requirements of theft..... 1
 - 2. Mr. Royal unequivocally asked to represent himself and the court’s failure to identify any significant delay to the case impermissibly denied Mr. Royal his right to self-representation 4
- B. CONCLUSION..... 7

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

City of Seattle v. Shepard, 93 Wn.2d 861, 613 P.3d 1158 (1980)..... 2

State v. Madsen, 168 Wn.2d 496, 229 P.3d 714 (2010) 4, 5, 6

State v. Vasquez, _ Wn.2d _, _ P.3d _, 2013 WL 3864265 (2013) 3

Washington Court of Appeals Decisions

State v. Lawrence, 166 Wn.App. 378, 271 P.3d 280, *rev. denied*, 174 Wn.2d 1009 (2012)..... 6

State v. Walker, 75 Wn.App. 101, 897 P.2d 957 (1994) 3

State v. Walters, 162 Wn.App. 74, 255 P.3d 835 (2011)..... 3

Statutes

RCW 9A.56.020 3

Other Authorities

13B Wash. Practice, Criminal Law § 2606 (2012-2013 ed.)..... 3

A. ARGUMENT.

1. **The prosecution misrepresents the only factual basis of theft on which the State elected to present to the jury and misapprehends the legal requirements of theft**

The prosecution asserts that Randy Royal “shook down” undercover officer Kevin Jones by demanding more money in the course of a drug sale. But this claim confuses the basis of the theft allegation presented to the jury. At the prosecution concedes, it specifically elected to rest its theft charge on the allegation of wrongfully taking drugs, and therefore, it may not prove its case by claiming Mr. Royal improperly took money from Officer Jones. *See* 3RP 306, 314; *see also* Opening Brief at 12-13; Response Brief at 11. The theft conviction must be judged based on the allegation presented to the jury, which was that Mr. Royal unlawfully took drugs from Officer Jones.

The prosecution does not address several of the arguments raised in Mr. Royal’s Opening Brief. The drug that Mr. Royal purportedly stole was prescription medication belonging to Mr. Royal. 2RP 264-65; 3RP 304. It is unlawful for a person to possess prescription medication that was not prescribed to him or her. RCW

69.41.030. The prescription medication never lawfully belonged to Officer Jones, even if he paid money for it, because it was not prescribed to him by a physician.

The prosecution offers a case of a pawnbroker who refused to return money to the rightful owner as an example of theft. *City of Seattle v. Shepard*, 93 Wn.2d 861, 613 P.3d 1158 (1980). But the reasoning of *Shepard* favors Mr. Royal's argument. By statute, the pawnbroker in *Shepard* did not have legal authority to possess a pawned item when the rightful owner requested the property, which had been stolen from him unbeknownst to the pawnbroker. 93 Wn.2d at 867. A pawnbroker's right to own property is always trumped by the true owner. *Id.* The Supreme Court held that the pawnbroker committed theft by disobeying a rightful owner's request to return property. *Id.* Similarly, Officer Jones had no superior ownership right to Mr. Royal's prescription medication even if he paid money for it.

More fundamentally, Mr. Royal's temporary taking of a drug in the course of a drug sale, where he was trying to get more money for the drugs than was initially offered, does not fall within the definition of theft. A theft is not a temporary taking of property. *See* Response Brief at 12 (quoting 13B Wash. Practice, Criminal Law § 2606 (2012-

2013 ed.) as explaining that the intent to commit theft must “be to deprive the owner of the property, not merely the temporary use of it.”).

While the intent to deprive need not be permanent, there must be an intent to deprive that is more than fleeting seconds. *See, e.g., State v. Walker*, 75 Wn.App. 101, 106, 897 P.2d 957 (1994); *State v. Walters*, 162 Wn.App. 74, 86, 255 P.3d 835 (2011); RCW 9A.56.020(1)(a). “Intent may not be inferred from evidence that is ‘patently equivocal.’” *State v. Vasquez*, _ Wn.2d _, _ P.3d _, 2013 WL 3864265, *3(2013) (internal citations omitted). The evidence does not rationally support Mr. Royal’s intent to deprive the owner of drugs by the fleeting seconds that the drugs were out of Officer Jones’s possession. *Id.* at *6 (reversing forgery conviction based on equivocal evidence of intent to defraud). Because the prosecution failed to prove that a theft occurred, reversal is required.

2. Mr. Royal unequivocally asked to represent himself and the court's failure to identify any significant delay to the case impermissibly denied Mr. Royal his right to self-representation

Mr. Royal unambiguously asked to represent himself. Defense counsel told the court that Mr. Royal said he wanted to represent himself. 1RP 21. Mr. Royal did not retreat from that representation and explained to the court that if he represented himself, he would “have a better chance defending [him]self.” 1RP 22. He said he knew the statutes and court rules. 1RP 21-22. Mr. Royal was not asking for an alternative to self-representation and the court understood the nature of his request. Consequently, it was not equivocal, contrary to the State’s assertion on appeal. *See State v. Madsen*, 168 Wn.2d 496, 506, 229 P.3d 714 (2010) (where defendant does not waiver or equivocate in request for self-representation, but alternatively asks for another lawyer, request not equivocal).

The court labeled the request “equivocal,” not because Mr. Royal was uncertain about whether he wanted to represent himself, but because the court interpreted the request as premised on the need for a continuance. 1RP 23. The court was focused on the timing of the

request and not ambiguity in Mr. Royal's expressed desire to represent himself.

There is no reasonable inference that Mr. Royal was trying to delay the proceedings. He asked for the minimal time of "a couple days" so that he could review discovery and potentially obtain a witness with whom defense counsel had already consulted. 1RP 22. Defense counsel himself has a few last minute details that he needed resolved before he would be ready to proceed. 1RP 22. Mr. Royal's request for a negligible amount of additional time was reasonable and his desire to represent himself was clear.

While a judge has discretionary authority to deny a request to waive counsel based on its timeliness, the decision must be based on specific, identifiable facts. *Madsen*, 168 Wn.2d at 505, 508. Mr. Royal only asked for a couple of days. The judge did not even inquire how that delay would affect the case. There was no claim that the police officers who were the State's witnesses would be unavailable; in fact, the trial judge chastised the prosecution for calling unnecessary, repetitive witnesses and prolonging their testimony during the trial. RP 172-72, 201-02. The court rejected Mr. Royal's request based on his stated need for a minimal amount of time to prepare without

questioning whether a short continuance would have any effect on the prosecution's ability to proceed with the case. The court's failure to exercise its discretion based on accurate, specific information about how the request effected the trial constitutes an abuse of discretion. *See State v. Lawrence*, 166 Wn.App. 378, 386, 271 P.3d 280, *rev. denied*, 174 Wn.2d 1009 (2012) ("Discretion also is abused when a court uses an incorrect legal standard in making a discretionary decision").

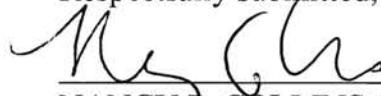
As the Supreme Court held in *Madsen*, the trial judge cannot "stack the deck" against the accused by failing to conduct the proper inquiry. 168 Wn.2d at 506. When a court fails to follow up on an unequivocal request to proceed pro se, "the only permissible conclusion is that [the accused's] request was voluntary, knowing, and intelligent." *Id.* The court improperly refused Mr. Royal's request to represent himself without adequate inquiry into any effect minimal delay would cause in the prosecution of the case and his knowing, intelligent and voluntary decision to represent himself .

B. CONCLUSION.

For the foregoing reasons as well as those argued in Appellant's Opening Brief, Mr. Royal respectfully requests this Court remand his case for further proceedings.

DATED this 1st day of August 2011.

Respectfully submitted,



NANCY P. COLLINS (28806)
Washington Appellate Project (91052)
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 69765-0-I
v.)	
)	
RANDY ROYAL,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 1ST DAY OF AUGUST, 2013, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<p>[X] TOMAS GAHAN, DPA KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT 516 THIRD AVENUE, W-554 SEATTLE, WA 98104</p>	<p>(X) () ()</p>	<p>U.S. MAIL HAND DELIVERY _____</p>
<p>[X] RANDY ROYAL 712265 WSP 1313 N 13TH AVE WALLA WALLA, WA 99362</p>	<p>(X) () ()</p>	<p>U.S. MAIL HAND DELIVERY _____</p>

SIGNED IN SEATTLE, WASHINGTON THIS 1ST DAY OF AUGUST, 2013.

X _____ 

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710