No. 90968-7
Court of Appeals No. 69962-8-II

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MUHAMMED TILLISY,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Pursuant to RAP 13.4, Muhammad Tillisy asks this Court to accept review of the opinion in *State v. Tillisy*, 69962-8-I.

B. OPINION BELOW

Mr. Tillisy had two contemporaneous cases pending against him in superior court. Mr. Tillisy was represented by the same appointed attorney in both cases. The trial court made clear, that any motion and ruling pertaining to Mr. Tillisy's ability to represent himself or another attorney would apply equally to both case. Despite that ruling, the Court of Appeals concluded that the trial court's denial of Mr. Tillisy's unequivocal request to represent himself in one of the matters did not preserve the issue in this matter.[1]

C. ISSUE PRESENTED

The Sixth and Fourteenth Amendments and Article I, section 22 guarantee a criminal defendant the right to represent himself so long as the request is timely, unequivocal, and knowingly and voluntarily made. Well before trial began, Mr. Tillisy made a knowing and

[1] A petition for review has been filed in the linked case of *State v. Tillisy*, 70654-3-I.

unequivocal request to represent himself. Did the Court improperly deny Mr. Tillisy his right to represent himself?

D. STATEMENT OF CASE

The State charged Mr. Tillisy with three counts of second degree identity theft, two counts of and one count of unlawful possession of a payment instrument and checks belonging to others. *Id.*[2]

Mr. Tillisy made a request to represent himself a week prior to the start of trial. Mr. Tillisy had two separate causes pending. Mr. Tillisy was represented by the same appointed attorney in both matters. Mr. Tillisy had previously moved to have his appointed attorney replaced. 7/19/12 RP 4-5. Mr. Tillisy made that motion contending his attorney had not provided him copies of discovery he had requested and had not spent sufficient time meeting with Mr. Tillisy. *Id.* While the motion was only filed in one of the two pending case, Judge Appel made clear that if he were to make any determination of appointed counsel's ability to represent Mr. Tillisy "it would apply to any case." *Id.* at 14. The court then denied the motion. *Id.* at 22.

[2] Finding it violated the Double Jeopardy Clause, the Court of Appeals dismissed one of the identity theft counts.

On November 8, 2012, Mr. Tillisy renewed his previous motion. As before, that motion was made in only one of the two cases. But Mr. Tillisy explained that his attorney, who still represented him on both pending matters, had not met with him for a sufficient amount of time to review discovery in both cases. Supp. RP 17.[3] Mr. Tillisy explained he had only received a portion of the discovery in one of the cases.

A jury convicted Mr. Tillisy as charged. CP 69-74.

E. ARGUMENT

The trial court erred in refusing to grant Mr.Tillisy's request to proceed pro se.

Article I, section 22 of the Washington Constitution explicitly guarantees a defendant the right to "appear and defend in person, or by counsel." *State v. Madsen*, 168 Wn.2d 496, 503, 229 P.3d 714 (2010). The United States Supreme Court has recognized the Sixth Amendment implicitly provides a right to self-representation. *Faretta v. California,* 422 U.S. 806, 819, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975).

A valid waiver of counsel requires the trial court ensure the accused knowingly, voluntarily, and intentionally relinquishes this fundamental constitutional right. *Johnson v. Zerbst*, 304 U.S. 456, 464,

[3] "Supp RP" refers to report of proceedings from 70654-3-I, Mr. Tillisy's appeal of another Snohomish County case. The Court of Appeals granted Mr. Tillisy's motion to supplement the record in this case with that record.

58 S. Ct. 1019, 82 L. Ed. 1461 (1938). Unlike the right to a fair trial, the right of self-representation includes the right to forgo trained legal assistance, and even embraces the "personal right to be a fool." *State v. Fritz*, 21 Wn. App. 354, 359, 585 P.2d 173 (1978). It is the defendant who suffers the consequences of a conviction, and,

> It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. . . . his choice must be honored out of the respect for the individual which is the lifeblood of the law.

Faretta, 422 U.S. at 834 n.46 (quoting *Illinois v. Allen*, 397 U.S. 337, 350-51, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1978)).

The trial court's discretion to grant a criminal defendant's request for self-representation "lies at a continuum" based on the timeliness of the request:

> (a) if made well before the trial ... and unaccompanied by a motion for continuance, the right of self-representation exists as a matter of law; (b) if made as the trial ... 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 ... the right to proceed pro se rests largely in the informed discretion of the trial court.

State v. Vermillion, 112 Wn. App. 844, 855, 51 P.3d 188 (2002) (quoting *Fritz*, 21 Wn. App. at 361).

The opinion of the Court of Appeals concludes that Mr. Tillisy never actually made a motion to represent himself in this matter. Opinion at 3. But the Court granted Mr. Tillisy's motion to supplement the record on appeal in this case with the record on appeal in 70654-3-I. Opinion at 3, n . 16. That complete record makes clear that Mr. Tillisy did make a motion to represent himself. More importantly, the complete record makes abundantly clear the trial court understood Mr. Tillisy's request applied to both cases as the judge said any determination of appointed counsel's ability to represent Mr. Tillisy "it would apply to any case." 7/19/12 RP at 14.

It is clear, that Mr. Tillisy motion to proceed pro se applied to both pending trial court causes and that the trial court plainly understood as much. Thus, the Court of Appeals conclusion that no motion was made in this case is simply incorrect.

In response to Mr. Tillisy's request, the trial court engaged in a lengthy but largely irrelevant conversation with Mr. Tillisy centering on various technical aspects of trial. For example, the court pressed Mr. Tillisy to explain the exceptions to the hearsay rule. Supp. RP 37-38. The court quizzed Mr. Tillisy on the intricacies of jury selection and instruction. *Id.* at 41-42. But Mr. Tillisy's responses to such questions

does not demonstrate the requisite knowledge, or lack thereof, relevant to the his waiver of counsel. As the Supreme Court explained:

> We need make no assessment of how well or poorly Faretta had mastered the intricacies of the hearsay rule and the California code provisions that govern challenges of potential jurors on voir dire. For his technical legal knowledge, as such, was not relevant to an assessment of his knowing exercise of the right to defend himself.

Faretta, 422 U.S. at 836.

Mr. Tillisy plainly stated "I know what I am getting into." Supp. RP at 40. The record illustrates that he did indeed.

Nonetheless, the court concluded that Mr. Tillisy did not truly understand simply because Mr. Tillisy had been pressed into saying that if things got too difficult he would retain counsel. Supp. RP 51. But when told that he would not have the ability to do that, Mr. Tillisy clarified "Obviously, I'm not going to present future motions. My motion at this point is to proceed pro se." *Id.* at 47. Mr. Tillisy explained that he understood the consequences of his decision. There was no basis to conclude otherwise.

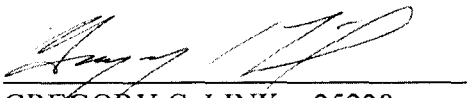
Mr. Tillisy timely and unequivocally requested to represent himself. The trial court erroneously concluded he lacked the necessary understanding of the consequences of that choice. The record on appeal is clear. The trial court's conclusion, affirmed by the Court of Appeals

is contrary to *Faretta*. This Court should accept review pursuant to RAP 13.4.

F. CONCLUSION

For the reasons set forth above, this Court should grant Mr. Tillisy's petition for review and reverse his convictions.

Respectfully submitted this 20th day of October, 2013.



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. MUHAMMED ZBEIDA TILLISY, Appellant.	)	No. 69962-8-I DIVISION ONE UNPUBLISHED OPINION FILED: September 22, 2014

TRICKEY, J. — In the early morning of May 31, 2012, Corporal Josh McClure of the Edmonds Police Department arrested Muhammed Tillisy on an outstanding arrest warrant.[1] Corporal McClure searched Tillisy incident to the arrest and discovered seven different bank checks.[2] The checks were identical in their format and contained the same account and routing numbers.[3] Some of the checks identified Tillisy as the payee and Honda of Fife as the account holder; other checks identified Tillisy as the account holder.[4]

After obtaining a warrant to search Tillisy's vehicle, police officers located two additional bank checks that were similar to those previously seized.[5] The officers also found a piece of scratch paper, on which the business name "Honda of Fife" was written, as well as the same account and routing numbers as those printed on the previously discovered checks.[6] The officers additionally found a checkbook for the Chase Bank account of Ok Kyung Yang.[7]

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[1] Report of Proceedings (RP) (Nov. 26, 2013) at 77, 83-84.
[2] RP at 86.
[3] RP at 86, 87.
[4] RP at 86.
[5] RP at 89, 93.
[6] RP at 93-94.
[7] RP at 144-45.

The State charged Tillisy, by second amended information, with three counts of second degree identity theft, in violation of RCW 9.35.020(1) and (3) (counts I, II, and V); two counts of forgery, in violation of RCW 9A.60.020(1)(b) (counts III and IV); and one count of unlawful possession of payment instruments, in violation of RCW 9A.56.320(1) and (2) (count VI).[8] A jury found Tillisy guilty on all counts.[9]

The trial court determined that counts I, II, and III encompassed the same criminal conduct and counted as one crime for purposes of determining the offender score.[10] The court also found that counts V and VI were the same criminal conduct for purposes of determining the offender score.[11] The court sentenced Tillisy to 49 months on counts I, II, and V; 25 months on counts III and VI; and 22 months on count IV.[12] Counts I, II, and III were to run concurrently but consecutive to count IV.[13] Counts V and VI were also to run concurrently.[14] The trial court imposed a total confinement of 120 months.[15] Tillisy appeals the judgment and sentence.

Tillisy contends that his two convictions for second degree identity theft violate double jeopardy because, under counts I and II, he was twice convicted of second degree identify theft for possession of Honda of Fife's financial information. The State concedes this point, and we accept its concession. The proper remedy is to vacate one of the underlying convictions for count I or count II. See In re Strandy, 171 Wn.2d 817, 819,

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[8] Clerk's Papers (CP) at 278-79. Counts I and II alleged Tillisy committed second degree identity theft for checks drawn on the account of Honda of Fife. CP at 278. Count V alleged Tillisy committed identity theft for checks drawn on the account of OK Kyung Yang. CP at 278-79.
[9] CP at 220-25.
[10] CP at 4.
[11] CP at 4.
[12] CP at 6.
[13] CP at 6.
[14] CP at 6.
[15] CP at 6.

256 P.3d 1159 (2011) ("When a conviction violates double jeopardy principles, it must be wholly vacated.").

Tillisy next asserts that the trial court erred by denying his request to represent himself pro se. But as the State correctly points out, Tillisy did not bring a motion to represent himself in the present case. Instead, Tillisy requested to proceed pro se in a separate case in which he was being prosecuted in Snohomish County Superior Court.[16] At a hearing on that superior court case, held on November 8, 2012, the only reference to the present case was when the State told the trial court that Tillisy had another case pending and informed the court of the trial date for that matter.[17]

The record before us on the current case reveals no motion to proceed pro se on behalf of Tillisy. A request to proceed pro se must be made timely and stated unequivocally. State v. Stenson, 132 Wn.2d 668, 737, 940 P.2d 1239 (1997). No timely request was made here. Accordingly, this claim of error fails.

Tillisy next contends that the trial court abused its discretion by denying his motion to dismiss the charges against him, which he raised at the conclusion of the State's opening statement. Tillisy argues the State's opening statement did not assert that the alleged crimes took place in the state of Washington.

A trial court has broad discretion to control the content of the parties' opening statements. State v. Kroll, 87 Wn.2d 829, 835, 558 P.2d 173 (1976). "The opening

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[16] In this appeal, Tillisy filed a motion to supplement the record with the transcript of a November 8, 2012 hearing that took place in the separate superior court case (No. 12-1-01574-5). That case is linked to this appeal (State v. Tillisy, No. 70654-3-I). Supplemental (Supp.) RP at 1. A commissioner of this court granted Tillisy's motion to supplement the record. Both parties cite to the supplemental report of proceedings in their briefs and we consider it for purposes of this appeal.

[17] Supp. RP at 27.

statement is based upon the anticipated evidence and the reasonable inferences which can be drawn therefrom." Kroll, 87 Wn.2d at 835 (citing State v. Aiken, 72 Wn.2d 306, 351, 434 P.2d 10 (1967)). The purpose of an opening statement is merely "to outline the material evidence the State intends to introduce." Kroll, 87 Wn.2d at 834. "Charges frame the issues; statements of counsel do not." State v. Gallagher, 15 Wn. App. 267, 270-71, 549 P.2d 499 (1976).

Tillisy contends on appeal, as he did at trial, that under Gallagher, the prosecutor was required to state in opening statements that the charged crimes took place in Washington, and the failure to do so mandated dismissal of the charges.

In Gallagher, the Court of Appeals affirmed the trial court's dismissal of two counts alleged in the information, concluding that "it is clear beyond doubt that the special prosecutor's [opening] statement affirmatively includes factual matters which constitute a complete defense to counts 2 through 6 of the information." 15 Wn. App. at 275. The court held that a trial court has authority to dismiss charges after the State's opening statement "only when it is clear beyond doubt that the statement affirmatively includes fact matter which constitutes a complete defense to the charge or expressly excludes fact matter essential to a conviction." Gallagher, 15 Wn. App. at 270. The court explained that "when some fact is clearly stated or admission is expressly made, leaving only an isolated and determinative issue of law, the court may resolve that issue." Gallagher, 15 Wn. App. at 270. Contrary to Tillisy's assertion, Gallagher does not support the proposition that a prosecutor's failure to mention the state of Washington in an opening statement mandates dismissal of the charges. Tillisy's reliance on Gallagher is unavailing.

We remand with instructions to vacate one of the underlying convictions for count I or II, and for resentencing. We otherwise affirm the judgment and sentence.

Trickey, J

WE CONCUR:

Leach, J.

Becker, J.

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Washington Appellate Project

Date: October 21, 2014

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