

69526-6

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NO. 69526-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

SHAWN LLOYD,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CAROL A. SCHAPIRA

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BRIEF OF RESPONDENT

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A. ISSUE PRESENTED

Prior to trial, Lloyd unequivocally chose to waive his right to counsel after a proper colloquy by the court. Lloyd subsequently requested counsel but conditioned his request upon obtaining a different attorney from his standby counsel. Did the trial court act within its discretion by denying Lloyd's request for substitute counsel after his unequivocal, knowing waiver?

B. STATEMENT OF FACTS

1. PROCEDURAL FACTS

The State charged defendant Shawn Lloyd by information with violation of the Uniform Controlled Substances Act, possession of methamphetamine. CP 1. The State alleged that he possessed methamphetamine on October 18, 2010. CP 1.

At a pretrial hearing in the criminal presiding court on March 21, 2012, Lloyd asked to represent himself *pro se*. 1RP 5-7. The Honorable Judge Ronald Kessler warned Lloyd that if he gave up his right to counsel "that's a permanent decision; you don't get to have a lawyer." 1RP 5. Lloyd stated that he would rather represent himself because he did not feel that his attorney was "capable or interested or taking my case serious." 1RP 6. Lloyd also indicated

that the last time he spoke to his attorney, he “laughed at me and walked away.” 1RP 6. Lloyd also expressed dissatisfaction with the amount of time his attorney had spent with him. 1RP 6.

Counsel of record for Lloyd was not present that day in court; however, another lawyer from the same agency was present. 1RP 6. He noted that Lloyd had “made it very clear that he wants to discharge counsel.” 1RP 6. The court gave Lloyd one week to see if he could hire a private attorney. 1RP 7.

At the next hearing in the criminal presiding court on March 28, 2012, Lloyd again articulated his wish to go forward without an attorney. 1RP 8-15. Lloyd stated that he thought he could do a better job than his assigned counsel because his “case wasn’t taken serious by him at all.” 1RP 9. The Honorable Judge Michael Hayden told Lloyd that he had seen Lloyd’s counsel perform well in trial before and that he “...indeed does a good job. And I guarantee he’ll do a better job than you will do if you represent yourself.” 1RP 11.

Judge Hayden warned Lloyd of the many adverse consequences of continuing without counsel. 1RP 8-13. The court informed Lloyd of the courtroom rules and procedures that he would be expected to follow at trial, the standard range for the

offense with which he was charged, and the maximum possible penalty. 1RP 9-13. The court specifically cautioned him that if he was allowed to represent himself but changed his mind after trial began, the trial judge would say “Mr. Lloyd, you’ve kind of made your bed, you’re now going to sleep in it.” 1RP 11. Lloyd indicated that he understood and was steadfast in his desire to represent himself. 1RP 11. The court granted his request. 1RP 13. Lloyd indicated he wished to set the case for trial and a date was selected. 1RP 13.

After Lloyd waived his right to counsel but during the same hearing, the attorney standing in for counsel of record raised the possibility of standby counsel: “Your Honor, I’m in a difficult position. I don’t know if Mr. Lloyd intended to request the assistance of any kind of a standby counsel or whether that’s been, that possibility has been...” 1RP 14. The court asked Lloyd if he was asking for standby counsel, to which Lloyd answered “Yes. I’ll exercise that option.” 1RP 15. The court clarified whether Lloyd wanted counsel of record as his standby counsel and Lloyd confirmed that he did by saying “Sure. That will work if I’m allowed to do that.” 1RP 15.

Nearly four months later on July 20, 2012, Lloyd appeared before the criminal presiding court asking for an attorney, but only if

he was allowed to have a different attorney from the one previously appointed to his case. 1RP 16. When the court asked why he wanted a different attorney, Lloyd cited “some discrepancies, some miscommunication between my current standby counsel when he was appointed.” 1RP 16. Lloyd explained that if his request was not granted, then he would continue to represent himself. 1RP 16. Judge Kessler denied Lloyd’s motion for a new attorney. 1RP 17.

Trial commenced on August 13, 2012, before the Honorable Judge Carol Schapira. 1RP 18. Lloyd asked the trial court to reappoint counsel partway through the CrR 3.5 hearing and after several motions in limine had been completed. 1RP 100. He stated “I am not, due to the complications, I’m not qualified to represent myself at all.” 1RP 100. Standby counsel indicated that he was not prepared to proceed as Lloyd’s attorney at that time. 1RP 100-01.

The trial court sent the parties to the criminal presiding court to hear Lloyd’s request. 1RP 102. There, Judge Kessler asked standby counsel if he was ready to go to trial as Lloyd’s attorney. 1RP 106. Standby counsel indicated that he was not prepared to start trial. 1RP 106. Judge Kessler denied Lloyd’s motion and reminded Lloyd that Judge Hayden had warned him how difficult it

would be to represent himself. 1RP 107. The parties returned to Judge Schapira's continued pretrial motions. 1RP 110.

Lloyd was convicted as charged after a jury trial. CP 34. The trial court imposed a standard range sentence. CP 35-38. Lloyd appealed.

2. SUBSTANTIVE FACTS

On the afternoon of October 18th 2010, Officer Steve Kerzman of the Bothell Police Department was on duty when he noticed a vehicle parked on a dead end street that was known for abandoned stolen vehicles, narcotic usage, and illegal dumping of trash. 1RP 221-22. He parked behind the vehicle and contacted Shawn Lloyd, who was seated in the driver's seat. 1RP 222, 225. Lloyd was alone in the car, which was turned off. 1RP 225. Officer Kerzman explained that Lloyd was not allowed to park on that street and pointed to the posted street sign that prohibited parking. 1RP 224-26. Officer Kerzman talked with him and asked to see his identification. 1RP 226. Lloyd became uncooperative. 1RP 226. Dispatch informed Officer Kerzman that Lloyd's vehicle was not legally on the roadway because it was registered as a total loss and was unsafe. 1RP 226-27.

After some delay, Lloyd gave his driver's license to Officer Kerzman. 1RP 228. Upon learning that there was a warrant for Lloyd's arrest, Officer Kerzman took him into custody. 1RP 159-60. Pursuant to Bothell Police Department policy, a tow truck was called to impound Lloyd's car since no one was available to drive it away. 1RP 230-31. Officer Kerzman inventoried the contents of the vehicle before it was towed. 1RP 231. During the inventory process, he discovered two small plastic bags of suspected methamphetamine on top of other items in the unlocked center console. 1RP 232-33. The inventory was stopped and a search warrant was obtained for the vehicle. 1RP 232, 238.

Executing the search warrant revealed two glass smoking pipes, cash, and a cell phone with the methamphetamine in the center console of Lloyd's vehicle. 1RP 239. Raymond Kusumi, a forensic scientist with the Washington State Patrol Crime Laboratory, confirmed the substance was methamphetamine. 1RP 181-82.

C. **ARGUMENT**

THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING LLOYD'S REQUEST FOR REAPPOINTMENT OF SUBSTITUTE COUNSEL WHEN LLOYD FAILED TO ARTICULATE A LEGITIMATE LEGAL BASIS FOR NEW COUNSEL.

Lloyd argues that the trial court erred by denying his request for reappointment of substitute counsel. Because Lloyd waived his right to counsel after a proper colloquy and he did not provide legitimate reasons for the assignment of substitute counsel, Lloyd's conviction should be affirmed.

A defendant in a criminal case is constitutionally entitled to the assistance of counsel. Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); State v. Luvene, 127 Wn.2d 690, 698, 903 P.2d 960 (1995). To be valid, a defendant's waiver of the right to counsel must be made knowingly, voluntarily, and intelligently. State v. Modica, 136 Wn. App. 434, 441, 149 P.3d 446 (2006), aff'd, 164 Wn.2d 83, 186 P.3d 1062 (2008). A colloquy on the record is the preferred method to determine whether a defendant should be allowed to proceed *pro se*. Modica, 136 Wn. App. at 441.

A trial court's ruling on a motion to proceed *pro se* is reviewed for abuse of discretion. State v. Madsen, 168 Wn.2d 496,

504, 229 P.3d 714 (2010); State v. Breedlove, 79 Wn. App. 101, 106, 900 P.2d 586 (1995). “Discretion is abused if a decision is manifestly unreasonable or rests on facts unsupported in the record or was reached by applying the wrong legal standard.” Madsen, 168 Wn.2d at 504 (citation and internal quotation marks omitted).

“Once an unequivocal waiver of counsel has been made, the defendant may not later demand the assistance of counsel as a matter of right since reappointment is wholly within the discretion of the trial court.” State v. DeWeese, 117 Wn.2d 369, 376-77, 816 P.2d 1 (1991). Further, there is no absolute right of the pro se defendant to standby counsel. DeWeese, 117 Wn.2d at 379 (citing Locks v. Sumner, 703 F.2d 403, 407 (9th Cir.1983)).

The decision whether to grant an indigent defendant’s motion to appoint substitute counsel is a matter within the trial court’s discretion. DeWeese, 117 Wn.2d at 376. A trial court considers the following factors in deciding whether to grant a motion for substitute counsel: “(1) the reasons given for the dissatisfaction, (2) the court’s own evaluation of counsel, and (3) the effect of any substitution upon the scheduled proceedings.” State v. Schaller, 143 Wn. App. 258, 270, 177 P.3d 1139 (2007). Inquiry into conflict between a defendant and counsel is properly

conducted when the trial court allows the defendant and counsel to fully express their concerns. Id. at 271.

A defendant must show good cause to warrant substitution of counsel, such as a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant. Schaller, 143 Wn. App. at 267-68 (citing State v. Stenson, 132 Wn.2d 668, 734, 940 P.2d 1239 (1997)). When an indigent defendant does not present the court with legitimate reasons for the assignment of substitute counsel, the court may require the defendant to either continue with current appointed counsel or to represent himself. DeWeese, 117 Wn.2d at 376 (citing State v. Sinclair, 46 Wn. App. 433, 437-38, 730 P.2d 742 (1986)).

In the case at hand, Lloyd concedes that he waived his right to counsel on March 28, 2012, after a proper colloquy by the trial court. He assigns error to the court's denial of his motion for reappointment of counsel on July 20, 2012; however, Lloyd did not ask for reappointment of his assigned counsel at that hearing. 1RP 16-17. He asked for reappointment of *substitute* counsel because he was dissatisfied with the attorney assigned to his case.

1RP 16-17. Lloyd's claim fails because he did not provide a legally cognizable basis justifying substitution of counsel.

State v. Sinclair, 46 Wn. App. 433, is instructive. In that case, the defendant requested a substitute for his court-appointed attorney, claiming that his lawyer lied to him, refused to do research he wanted, and that he had no confidence in his counsel. Sinclair, 46 Wn. App. at 434-35. The trial court found that Sinclair had shown no legal basis for discharging appointed counsel and noted that Sinclair had the right to represent himself. Id. at 435. Sinclair opted to proceed *pro se*. Id. Throughout trial, Sinclair made motions for substitute counsel, asserting that he was not qualified to act as his own attorney. Id. The court encouraged Sinclair to take advantage of appointed standby counsel, but Sinclair refused on the basis that he would rather represent himself if the court would not appoint a different attorney for him. Id.

On appeal, Sinclair argued that he was coerced into choosing between appearing *pro se* or being represented by appointed counsel. Id. at 436. This Court rejected Sinclair's argument, stating that Sinclair's reasoning meant that there can never be a valid waiver of the right to counsel when a defendant

conditions his request to appear *pro se* upon the trial court's refusal to appoint new counsel. Id. at 437.

Lloyd's argument parallels the defendant's argument in Sinclair. At the hearing on July 20, 2012, Lloyd conditioned his choice to continue *pro se* upon obtaining a different attorney from the lawyer who was available to him as standby counsel. His complaints were substantially similar to Sinclair's complaints about his counsel. 1RP 6, 9, 16. Lloyd explained that if his request was not granted, then he would continue to represent himself. Facing very similar facts in Sinclair, this Court rejected the argument that conditioning a decision to proceed *pro se* upon substitution of counsel renders the waiver of a right to counsel invalid.

Further, Lloyd was not entitled to reappointment of counsel as a matter of right because he had previously waived his right to counsel. To justify appointment of substitute counsel, Lloyd needed to articulate a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between him and his attorney. Schaller, 143 Wn. App. at 267-68. There was no such conflict. Lloyd was given ample opportunity at multiple hearings to explain why he wanted a different attorney. There is nothing in the record to indicate that Lloyd was inhibited in expressing his

concerns about his appointed counsel. Therefore, the lower court conducted a proper inquiry to determine whether a conflict existed between Lloyd and his attorney that warranted substitution of counsel and correctly denied Lloyd's request. Id. at 271.

Assuming for the sake of argument that Lloyd's complaints about his counsel were true, they do not meet the legal threshold required to justify appointment of new counsel. Id. at 267-68. When Judge Kessler asked why Lloyd was dissatisfied with his lawyer on July 20, 2012, Lloyd only stated that there were "some discrepancies, some miscommunication between my current standby counsel when he was appointed." 1RP 16. The nature of Lloyd's grievances against his attorney related to a general loss of confidence or trust, which the Washington State Supreme Court has held to be insufficient grounds to substitute counsel. Stenson, 132 Wn.2d at 734. Further, Judge Hayden noted on the record that Lloyd's appointed counsel had tried cases in his courtroom and performed well in trial. 1RP 11. Simply stated, Lloyd failed to present information that would provide a legal basis for substitution of counsel.

Lloyd's waiver of the right to counsel was valid. When he requested reappointment of a different attorney, he failed to present

the court with a legitimate basis for substitution of counsel.

Therefore, the lower court acted within its discretion in denying Lloyd's request.


D. CONCLUSION

For the foregoing reasons, Lloyd's conviction for the crime of violation of the uniform controlled substances act should be affirmed.

DATED this 23rd day of May, 2014.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Gregory Link, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. SHAWN LLOYD, Cause No. 69526-6-1, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 23rd day of May, 2014



Kirtsi Cooper Goodwin
Done in Kent, Washington

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