70236-0

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No. 70236-0-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE



STATE OF WASHINGTON,

Respondent,

v.

ROBERT A. MERINO,

Appellant.

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

The Honorable Bill Bowman

# BRIEF OF APPELLANT

THOMAS M. KUMMEROW
Attorney for Appellant

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

WASHINGTON CASES

A. ASSIGNMENT OF ERROR

The trial court violated Mr. Merino's Sixth Amendment and article I, section 22 rights to counsel when it failed to conduct a sufficient colloquy regarding his motion to proceed *pro se*.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

A defendant has the constitutionally protected right to waive his right to counsel and represent himself. To be a valid waiver of the right to counsel, there must be evidence in the record that the waiver was made knowingly, voluntarily, and intelligently, most often by a colloquy of the defendant conducted by the trial court. Here, the colloquy conducted by the trial court consisted of "yes" and "no" answers by Mr. Merino, which failed to establish Mr. Merino understood the dangers of waiving the right to counsel and there was no other evidence in the record that his waiver was made knowingly, voluntarily, and intelligently. Must this Court reverse Mr. Merino's convictions for a violation of his right to counsel?

C. STATEMENT OF THE CASE

Robert Merino was charged with one count of child rape in the first degree and one count of rape of a child in the second degree. CP 1-2. On February 21, 2012, prior to trial, Mr. Merino moved to

proceed *pro se*. The trial court engaged in a colloquy regarding Mr. Merino's motion:

> MR. MERINO: Good morning. Yes, I'd like to go pro se, your Honor.
>
> THE COURT: All right, Mr. Merino. When is the trial date?
>
> MR. WYNNE: The current trial date is the –
>
> THE COURT: I think it's March 6th, so it's right around the corner; is that correct?
>
> MR. WYNNE: Yes. I was thinking it was the 11th.
>
> THE COURT: Okay. And, Mr. Merino, what kind of charge is this? Can you tell me?
>
> MR. MERINO: The charges?
>
> THE COURT: Yeah. What's the charge?
>
> MR. MERINO: It's rape of a Child 1, and rape of a Child 2.
>
> THE COURT: Okay. And you understand how serious those charges are?
>
> MR. MERINO: Yes.
>
> THE COURT: And you understand that you have a trial date in a week and a half, two weeks at most?
>
> MR. MERINO: Yes.
>
> THE COURT: All right. So can you help me understand how you plan on representing yourself.

MR. MERINO: Well, I just -- I just need my information is all, my discovery. And I'm innocent of these charges. I just need to go to court. I just need to go to trial and state my case.

THE COURT: Okay. But do you understand what -- have you ever been to trial before?

MR. MERINO: Yes.

THE COURT: All right. So do you understand how to select the jury?

MR. MERINO: Yes.

THE COURT: And how do you do that?

MR. MERINO: Well, I've been selected for a juror before, so I know the process as far as the Prosecutor and the Defense going through that.

THE COURT: Do you understand that nobody will be there to help you?

MR. MERINO: Yes.

THE COURT: Do you understand that if you go to trial, if you actually represent yourself, you're going to be responsible for the Rules of Evidence? Are you familiar with those?

MR. MERINO: A little bit, yes. I've been going to the law library and studying a little bit on that.

THE COURT: Okay. So I've been doing this for a number of years and I'm here to tell you, I still don't understand all of the Rules of Evidence. You need to understand you're going to be held accountable, just as if you were an attorney. Do you understand that?

MR. MERINO: Yes, ma'am.

THE COURT: You will also be held accountable for all of the Washington State Court Rules. Do you have any questions about that?

MR. MERINO: No.

THE COURT: I need for you to understand something. The Court of Appeals and the Supreme Court has told us that if you really want to go to trial on your own, even though I think it is the silliest thing that you could do in your entire life, I have to let you do that. So you need to understand if I decide to let you do that even though I know, in my opinion at least –

MR. MERINO: Yes.

THE COURT: -- you will not have a clue what to do, and it will be to your disadvantage and you're looking at some very, very serious charges and some decent time. So you need to understand –

MR. MERINO: I understand.

THE COURT: -- I think you're being very foolish.

MR. MERINO: I understand. Thank you.

2/21/2012RP 2-5.

The prosecutor proceeded to ask Mr. Merino a series of questions designed to elicit a "yes" or "no" answer from a preprinted form prepared by the prosecutor. CP 27-30; 2/21/2012RP 5-11. At the conclusion of this series of questions, the trial court concluded the colloquy by noting:

THE COURT: Mr. Merino, so am I hearing you correctly, that you understand that you could be found guilty, the maximum penalty is to life and it is still your desire to represent yourself –

MR. MERINO: Yes.

THE COURT -- because you're nodding in the affirmative –

MR. MERINO: Yes, ma'am.

THE COURT: -- and it appears to me that you have absolutely no hesitancy whatsoever?

MR. MERINO: No.

THE COURT: All right. Well, I think I've already suggested to you that I think it's unwise. I would wish that you would stay with counsel. On the other hand, as I stated to you, the Courts have indicated that you have every right to represent yourself so I am going to find that you are knowingly and voluntarily waiving your right to counsel.

I will allow you to represent yourself. I think this is unequivocal. I think you know exactly what it is that you're doing. Am I correct in that assessment?

MR. MERINO: Yes, ma'am.

THE COURT: Any doubts whatsoever?

MR. MERINO: No.

THE COURT: No more questions that I can ask you? You're shaking your head, no.

MR. MERINO: No, not at this moment.

> THE COURT: Do you want to ask the two attorneys standing next to you any questions?
>
> MR. MERINO: No, no questions.
>
> THE COURT: I will grant that request. And you may sign, if you will, the document that the Prosecutor's handing you. It's the document that he's just been over with you; if you want to read it over again, let me know. You're signing it.
> ...
> All right. Well, I don't know what else to ask, so I think you're set on what it is that you're going to do. Sir?
>
> MR. SCHMIDT: And, your Honor, I would note for the record, my signature on the document that Mr. Merino has just signed indicates that I did review the document with him prior to going on the record this morning.
>
> In light of the Court's resolution of Mr. Merino's motion to proceed pro se, Ms. Dillon and I would ask the Court to grant our motion to withdraw as counsel of record.
>
> THE COURT: All right. Well, I am finding that the defendant is competent. I am signing this document granting his request, and I will sign those two documents as well.

2/21/2012RP 11-14.

The State was subsequently allowed to amend the information to charge two counts of first degree child rape, one count of second degree child rape, and one count of first degree child molestation. CP 31-33. The matter proceeded to trial with Mr. Merino appearing *pro se*, at the conclusion of which the jury convicted him as charged. CP 145-50.

D. ARGUMENT

THE TRIAL COURT VIOLATED MR. MERINO'S RIGHT TO COUNSEL IN ACCEPTING AN INVALID WAIVER OF THAT RIGHT

1. Absent a valid waiver, a defendant has a constitutionally protected right to counsel. The Sixth Amendment provides that "the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. In felony cases, a criminal defendant is entitled to be represented by counsel at all critical stages of the prosecution, including sentencing. *Mempa v. Rhay*, 389 U.S. 128, 134-37, 19 L. Ed. 2d 336, 88 S. Ct. 254 (1967). In addition, the Sixth and Fourteenth Amendments to the United States Constitution as well as art. I, § 22 of the Washington Constitution allow criminal defendants to waive their right to the assistance of counsel and proceed *pro se*. *Faretta v. California*, 422 U.S. 806, 807, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); *State v. Madsen,* 168 Wn.2d 496, 503, 229 P.3d 714 (2010). The right to counsel may be waived, but the waiver must be knowing, voluntary, and intelligent. *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938); *State v. DeWeese*, 117 Wn.2d 369, 377, 816 P.2d 1 (1991). Recognizing the serious nature of the inquiry into the waiver of the right to counsel, the United States

Supreme Court has admonished that "courts [should] indulge in every reasonable presumption against waiver." *Brewer v. Williams*, 430 U.S. 387, 404, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977).

The right to proceed *pro se* is neither absolute nor self-executing. *State v. Woods,* 143 Wn.2d 561, 586, 23 P.3d 1046, *cert. denied,* 534 U.S. 964 (2001). In order to exercise the right to self-representation, the criminal defendant must knowingly and intelligently waive the right to counsel; that waiver should include advice about the dangers and disadvantages of self-representation. *Faretta,* 422 U.S. at 835. A thorough colloquy on the record is the preferred method of ensuring an intelligent waiver of the right to counsel. *City of Bellevue v. Acrey,* 103 Wn.2d 203, 211, 691 P .2d 957 (1984). The colloquy should, *at a minimum*, consist of informing the defendant of the nature and classification of the charge, the maximum penalty upon the conviction, and that technical rules apply to the defendant's presentation of his case. *Id.* at 211.

The basis for a waiver of counsel must be firmly established by a searching inquiry on the record. *Acrey,* 103 Wn.2d at 211. Generally, the "question ultimately is the subjective understanding of the accused rather than the quality or content of the explanation

provided." *State v. Chavis,* 31 Wn.App. 784, 790, 644 P.2d 1202 (1982). The trial judge "should question the accused in a manner designed to reveal *understanding,* rather than framing questions that call for a simple 'yes' or 'no' response." *Chavis,* 31 Wn.App. at 790.

> [A] *mere routine inquiry* - the asking of several standard questions followed by the signing of a standard written waiver of counsel - may leave a judge entirely unaware of the facts essential to an informed decision that an accused has executed a valid waiver . . .

*Id.* at 789-90 (italics in original), *quoting Von Moltke v. Gilles*, 332 U.S. 708, 724, 68 S.Ct. 316, 92 L.Ed.2d 309 (1948).

Absent a proper inquiry, the trial court has no basis upon which to deny - or to grant - the defendant's request for self-representation. *United States v. Peppers,* 302 F.3d 120, 134 (3rd Cir.2002); *McMahon v. Fulcomer*, 821 F.2d 934, 946 (3rd Cir.1987). A court's error in wrongly granting a defendant the right to proceed *pro se* constitutes *per se* prejudicial error of the right to counsel, and the error can never be harmless. *State v. Vermillion,* 112 Wn.App. 844, 851, 51 P.3d 188 (2002).

2. The court's inquiry here was inadequate rendering the subsequent waiver invalid. The trial court's colloquy regarding Mr. Merino's request to proceed *pro se* was inadequate and rendered the waiver invalid leading to a denial of his constitutionally protected right to counsel. Mr. Merino submits he is entitled to reversal of the convictions and remand for retrial.

In *Patterson v. Illinois,* the United States Supreme Court elaborated on "the dangers and disadvantages of self-representation" to which *Faretta* referred. 487 U.S. 285, 108 S.Ct. 2389, 101 L.Ed.2d 261 (1988). "[A]t trial," the Supreme Court observed, "counsel is required to help even the most gifted layman adhere to the rules of procedure and evidence, comprehend the subtleties of *voir dire,* examine and cross-examine witnesses effectively . . . , object to improper prosecution questions, and much more." 487 U.S. at 299, n. 13. Warnings of the pitfalls of proceeding to trial without counsel, the Court therefore said, must be "rigorous[ly]" conveyed. *Id.* at 298.

*Patterson* described a "pragmatic approach to the waiver question," one that asked "what purposes a lawyer can serve at the particular stage of the proceedings in question, and what assistance he could provide to an accused at that stage," in order "to determine the

scope of the Sixth Amendment right to counsel, and the type of warnings and procedures that should be required before a waiver of that right will be recognized." *Id. See also Iowa v. Tovar*, 541 U.S. 77, 89, 124 S.Ct. 1379, 158 L.Ed.2d 209 (2004).

The court here never inquired about Mr. Merino's reasons for wanting to waive his right to counsel, nor inquired into his educational or employment backgrounds. The colloquy was instead the *pro forma* inquiry that only required "yes" or "no" answers that failed to determine Mr. Merino's subjective understanding of the implications of the decision to proceed *pro se*. If, for example, Mr. Merino was merely dissatisfied with his trial attorneys, this could have either been "good cause" for appointing new counsel, or form the basis for a finding of an equivocal request by Mr. Merino to proceed *pro se*.

Instructive on this issue is the decision in *Chavis, supra*, where questions requiring single-answer responses similar to those questions asked of Mr. Merino were found to be inadequate in determining whether the defendant understood the pitfalls of self-representation. 31 Wn.App. at 788-89. The questions, although fewer, mirrored the questions asked by the prosecutor here. Division Three of the Court noted:

> Since the question ultimately is the subjective understanding of the accused rather than the quality or content of the explanation provided, the court should question the accused in a manner designed to reveal understanding, rather than framing questions that call for a simple "yes" or "no" response. The judge must make a penetrating and comprehensive examination in order to properly assess that the waiver was made knowingly and intelligently. Although a lack of legal technical knowledge generally will not serve as a basis for denying assertion of the right to self-representation, waivers of counsel have been held invalid where they were not intelligently or understandingly made due to factors indicating inability to comprehend the matter.

*Id.* at 790-91 (internal citations omitted, footnote omitted).

The court failed to assure itself that Mr. Merino's waiver was knowingly and intelligently entered. The waiver was invalid and constituted a *per se* violation of Mr. Merino's constitutionally protected right to counsel. *Vermillion,* 112 Wn.App. at 851. Mr. Merino is entitled to reversal of his convictions.

E. CONCLUSION

For the reasons stated, Mr. Merino asks this Court to reverse his convictions.

DATED this 25th day of February 2014.

Respectfully submitted,

THOMAS M. KUMMEROW (WSBA 21518)
tom@washapp.org
Washington Appellate Project – 91052
Attorneys for Appellant

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

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| STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>ROBERT MERINO,<br><br>Appellant. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | NO. 70236-0-I |

## DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 25TH DAY OF FEBRUARY, 2014, I CAUSED THE ORIGINAL **OPENING 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:

| | | |
|---|---|---|
| [X] KING COUNTY PROSECUTING ATTORNEY<br>APPELLATE UNIT<br>KING COUNTY COURTHOUSE<br>516 THIRD AVENUE, W-554<br>SEATTLE, WA 98104 | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____ |
| [X] ROBERT MERINO<br>364904<br>STAFFORD CREEK CORRECTIONS CENTER<br>191 CONSTANTINE WAY<br>ABERDEEN, WA 98520 | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____ |

**SIGNED** IN SEATTLE, WASHINGTON THIS 25TH DAY OF FEBRUARY, 2014.

X_____

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