

FILED

JUL 22 2015

CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

FILED
Jul 07, 2015
Court of Appeals
Division I
State of Washington

Supreme Court No.: 91949-6
Court of Appeals No.: 71409-1-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

YASIN MOHAMED,

Petitioner.

PETITION FOR REVIEW

KATHLEEN A. SHEA
Attorney for Petitioner

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

TABLE OF CONTENTS

A. IDENTITY OF PETITIONER AND THE DECISION BELOW 1

B. ISSUE PRESENTED FOR REVIEW 1

C. STATEMENT OF THE CASE..... 1

D. ARGUMENT IN FAVOR OF GRANTING REVIEW 4

The Court should grant review of this significant constitutional question, and issue of substantial public interest, because a waiver of counsel is not valid when a defendant is forced to choose between abandoning his motions for a new trial or representation by counsel at sentencing. 4

E. CONCLUSION 8

TABLE OF AUTHORITIES

Washington Supreme Court

Bellevue v. Acrey, 103 Wn.2d 203, 691 P.2d 957 (1984) 5

In re Detention of Turay, 139 Wn.2d 379, 986 P.2d 790 (1990) 5

State v. DeWeese, 117 Wn.2d 369, 816 P.2d 1 (1991) 7

State v. Kolocotronis, 73 Wn.2d 92, 436 P.2d 774 (1968) 5

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

State v. Price, 94 Wn.2d 810, 620 P.2d 994 (1980) 7

Washington Court of Appeals

State v. Bandura, 85 Wn. App. 87, 931 P.2d 174 (1997) 5

State v. James, 138 Wn. App. 628, 158 P.3d 102 (2007)..... 5

State v. Modica, 136 Wn. App. 434, 149 P.3d 446 (2006) 6

State v. Silva, 108 Wn. App. 536, 31 P.3d 729 (2001) 4, 5

United States Supreme Court

Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562
(1975)..... 4

Washington Rules

RAP 13.4 1

A. IDENTITY OF PETITIONER AND THE DECISION BELOW

Mr. Mohamed requests this Court grant review pursuant to RAP 13.4(b) of the decision of the Court of Appeals, Division One, in State v. Yasin Mohamed, No. 71409-1-I, filed June 8, 2015. A copy of the opinion is attached as Appendix A.

B. ISSUE PRESENTED FOR REVIEW

A defendant has a constitutional right to both the assistance of counsel and the right to reject that assistance and represent himself. A defendant's request to proceed pro se must be unequivocal. Where Mr. Mohamed repeatedly requested the assistance of counsel at sentencing, but the trial court forced him to choose between proceeding with his post-verdict motions and being represented by counsel, does this case raise a significant constitutional question and issue of substantial public interest, warranting review by this Court? RAP 13.4(b)(3)-(4).

C. STATEMENT OF THE CASE

The State charged Yasin Mohamed with violating an order of protection, and he elected to represent himself at trial. CP 1; Ex. 3; 8/13/13 RP 4, 12. After a jury convicted Mr. Mohamed of violating the protection order, the court reappointed counsel for sentencing. 11/8/13

RP 3. However, Mr. Mohamed filed several motions pro se, requesting dismissal of the charge and a new trial. CP 110-39.

Appearing with appointed counsel on November 8, 2013, Mr. Mohamed initially informed the court he wished to proceed pro se, but upon additional questioning by the court, Mr. Mohamed explained he was making the request to represent himself only in order to argue the post-verdict motions he had filed. 11/8/13 RP 9. He wished to argue these motions because, having represented himself at trial, he was more familiar with the issues than his attorney. Id. Following a colloquy, Mr. Mohamed told the court, “I want him to represent me at the sentencing, but this motion is right now – I want to represent myself.” 11/8/13 RP 18. Based on this statement, the court decided to leave appointed defense counsel in place and allow counsel to present any post-verdict motions. 11/8/13 RP 19-20.

On November 25, 2013, Mr. Mohamed again appeared in court with appointed counsel. 11/25/13 RP 3. For the second time, Mr. Mohamed requested the opportunity to proceed pro se on his motions and asked that defense counsel be appointed only to represent him at sentencing. Id. In response, the court informed Mr. Mohamed he was required to appear pro se at sentencing if he elected to proceed pro se

on the motions. 11/25/13 RP 5. Given the choice between abandoning his due process right to be heard on his post-verdict motions and his right to counsel at sentencing, Mr. Mohamed agreed to represent himself at sentencing. Id.

Shortly after, on December 6, 2013, Mr. Mohamed appeared in court to request counsel at sentencing for the third time. 12/6/13 RP 3. The court acknowledged that Mr. Mohamed had properly filed his motions and the court was waiting on the State's response. Id. However, it instructed Mr. Mohamed that if it appointed counsel, the attorney would decide whether to proceed with any motions. Id. Mr. Mohamed responded that he had worked hard on the motions, properly served them, and wanted to represent himself until he obtained a ruling. 12/6/13 RP 4. Mr. Mohamed also expressed frustration that as soon as he indicated to counsel he wanted representation at sentencing, a hearing had been set to address his request, despite the fact he wished to obtain a ruling on his motions prior to requesting the appointment of counsel. 12/6/13 RP 4-5. The judge informed Mr. Mohamed such a timeline could not be accommodated because the motion hearing and

sentencing would take place on the same day.¹ 12/6/13 RP 5. Once again, the court required Mr. Mohamed to choose between being heard on his post-verdict motions and exercising his right to representation at sentencing. Mr. Mohamed again chose to represent himself. Id.

At sentencing, the trial court imposed a Drug Offender Sentencing Alternative (DOSA) of 19 months incarceration and 19 months of community custody. The Court of Appeals affirmed Mr. Mohamed's conviction and sentence. Slip Op. at 6.

D. ARGUMENT IN FAVOR OF GRANTING REVIEW

The Court should grant review of this significant constitutional question, and issue of substantial public interest, because a waiver of counsel is not valid when a defendant is forced to choose between abandoning his motions for a new trial or representation by counsel at sentencing.

The Sixth and Fourteenth Amendments of the United States Constitution, and article I, section 22, afford a criminal defendant both the right to assistance of counsel and the right to reject that assistance and represent himself. State v. Silva, 108 Wn. App. 536, 539, 31 P.3d 729 (2001) (citing Faretta v. California, 422 U.S. 806, 807, 95 S.Ct.

¹ Despite the court's pronouncement, the court heard, and swiftly denied, Mr. Mohamed's post-verdict motions on December 16, 2013, and held a sentencing hearing four days later, on December 20, 2013. 12/16/13 RP 3; 12/20/13 RP 11.

2525, 45 L.Ed.2d 562 (1975); State v. Kolocotronis, 73 Wn.2d 92, 97, 436 P.2d 774 (1968)). These rights extend to the sentencing phase of trial. State v. Bandura, 85 Wn. App. 87, 97, 931 P.2d 174 (1997) (“A defendant has a right to counsel at every critical stage of the case, and sentencing is such a stage.”); State v. James, 138 Wn. App. 628, 635, 158 P.3d 102 (2007) (“A defendant has the constitutional right to represent himself at trial and at sentencing.”).

Because tension exists between the right to represent oneself and the right to adequate assistance of counsel, a defendant’s request to proceed pro se must be unequivocal. Silva, 108 Wn. App. at 539. When a defendant waives his right to counsel, the court must find he did so knowingly, voluntarily, and intelligently. Bandura, 85 Wn. App. at 97; Bellevue v. Acrey, 103 Wn.2d 203, 208-09, 691 P.2d 957 (1984). Courts are required to indulge in “every reasonable presumption against a defendant’s waiver of his or her right to counsel.” State v. Madsen, 168 Wn.2d 496, 503, 229 P.3d 714 (2010) (quoting In re Detention of Turay, 139 Wn.2d 379, 396, 986 P.2d 790 (1990), cert. denied, 531 U.S. 1125 (2001)); Silva, 108 Wn. App. at 539.

The Court of Appeals found Mr. Mohamed had no right to counsel at sentencing because he executed a valid waiver of counsel

before the start of trial. Slip Op. at 4; 8/13/13 RP 4, 12. Relying on State v. Modica, the court found that “a valid waiver of the right to assistance of counsel generally continues throughout the criminal proceedings, unless the circumstances suggest that the waiver was limited.” Slip Op. at 5 (quoting Modica, 136 Wn. App. 434, 445, 149 P.3d 446 (2006)) (emphasis added).

Here, the record is clear the trial court believed Mr. Mohamed needed to execute a second waiver of counsel for sentencing, suggesting that the first waiver was limited to the trial. The trial court appointed counsel upon entry of the jury’s guilty verdict and found it had “discretion to allow Mr. Mohamed to again represent himself if he wants to for sentencing.” 11/8/13 RP 3-4. Thus, the trial court found it had discretion to allow Mr. Mohamed to proceed pro se, not discretion to appoint counsel.

But Mr. Mohamed did not validly waive his right to counsel at sentencing. He repeatedly requested representation for his sentencing hearing, and agreed to appear pro se only when the court required him to choose between having his post-verdict motions heard and having the assistance of counsel at sentencing. A defendant may not be compelled to choose one constitutional right at the expense of

another. Woods, 143 Wn.2d at 584; State v. Price, 94 Wn.2d 810, 620 P.2d 994 (1980). Yet this is exactly what the court required of Mr. Mohamed: it forced him to choose between his right to due process and his right to counsel at sentencing.

This case stands in stark contrast to those in which the trial court has required an indigent defendant to continue with his appointed counsel or represent himself. See e.g. State v. DeWeese, 117 Wn.2d 369, 816 P.2d 1 (1991). When a defendant requests new counsel multiple times, the court must consider issues of fairness and efficient judicial administration. DeWeese, 117 Wn.2d at 375. Otherwise, a defendant could continue the proceedings indefinitely by refusing to represent himself while also refusing to accept his current counsel. Thus, if an indigent defendant fails to provide legitimate reasons for the assignment of new counsel, the court may require the defendant to continue with his current counsel or represent himself. Id. at 376.

In this case, Mr. Mohamed's request did not hinder judicial efficiency or raise issues of fairness. Indeed, defense counsel's request for funds to obtain a transcript of the trial, in order to bring any post-verdict motions on Mr. Mohamed's behalf, demonstrates that allowing Mr. Mohamed to continue to represent himself until sentencing was the

most efficient course of action. CP 62. Even if the court wished to hold the sentencing proceedings immediately after ruling on Mr. Mohamed's motions, counsel could have been appointed for that purpose in advance, and the sentencing hearing could have proceeded without delay.

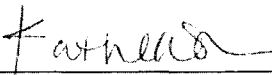
The court's denial of Mr. Mohamed's request to continue to represent himself on the post-verdict motions and reappoint counsel had no basis in the law. It raises a significant constitutional question and issue of substantial public interest and this Court should accept review.

E. CONCLUSION

The Court should grant review of the Court of Appeals opinion affirming Mr. Mohamed's conviction and sentence.

DATED this 7th day of July, 2015.

Respectfully submitted,



Kathleen A. Shea – WSBA 42634
Washington Appellate Project
Attorney for Petitioner

APPENDIX A

COURT OF APPEALS, DIVISION I OPINION

June 8, 2015

2015 JUN -8 AM 9:42

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	DIVISION ONE
Respondent,)	
)	No. 71409-1-1
v.)	
)	UNPUBLISHED OPINION
YASIN ALI MOHAMED,)	
)	
Appellant.)	FILED: June 8, 2015

DWYER, J. — Following a jury trial, Yasin Mohamed was convicted of violating an order of protection. Mohamed raises two claims on appeal. First, he contends that recordings of several telephone calls he made while in jail were improperly admitted at trial. Second, he contends that his right to counsel was violated when he chose to represent himself at sentencing. Finding no error, we affirm.

|

The State charged Mohamed with violating an order of protection after he visited his cousin, Fahmo Ali, at her apartment.¹ At the time of Mohamed's visit,

¹ Although Ali was repeatedly referred to as Mohamed's sister during trial, she indicated in the 911 call that Mohamed was her cousin, and a Somali interpreter testified that it was common in Somali culture to refer to a peer as "sister" or "brother" regardless of any blood relationship.

No. 71409-1-1/2

a valid protection order was in effect that prohibited him from contacting Ali and excluded him from her residence.

Ali did not testify at trial. Instead, the State proceeded against Mohamed using a 911 recording in which Ali told the dispatcher, through a Somali interpreter, that a man had entered her home. She explained that she had run out of the apartment after the man had entered because she feared he would physically attack her and that her infant daughter was still in the apartment with him. The officers who responded to the call testified that they spoke with Ali in the hallway of the building and then went to her apartment and knocked on the door. Mohamed answered and they placed him under arrest.

Mohamed was charged with domestic violence felony violation of a court order. While Mohamad was in jail, he made several telephone calls, including three calls to a number listed as Ali's and two calls to a bail bondsman. In the calls to Ali, Mohamed questioned her about whether she called the police and directed her not to cooperate with law enforcement. Over Mohamed's objection, the recordings of all five calls were admitted at trial, and translated transcriptions of portions of the calls made to Ali were published to the jury and admitted as illustrative exhibits.

Mohamed elected to represent himself at trial. After a jury convicted him of violating the protection order, the court reappointed counsel for sentencing. Mohamed filed several pro se motions requesting dismissal of the charge and a new trial. He repeatedly requested to both proceed pro se on these motions and have counsel represent him at sentencing. The trial court refused to order such

an arrangement. Instead, it required Mohamed to represent himself at sentencing if he wanted to proceed pro se on his motions. Mohamed chose to continue pro se, and the court appointed him standby counsel. At sentencing, the trial court imposed a drug offender sentencing alternative of 19 months incarceration and 19 months of community custody.

II

Mohamed first contends that the trial court abused its discretion in admitting recordings of five telephone calls that he made from jail. This is so, he now argues, because the evidence was irrelevant or, even if relevant, was more prejudicial than probative. Mohamed's failure to object below on the grounds raised on appeal bars appellate review of these evidentiary claims.

"[I]t is well established that '[i]f a specific objection is overruled and the evidence in question is admitted, the appellate court will not reverse on the basis that the evidence should have been excluded under a different rule which could have been, but was not, argued at trial.'" State v. Ferguson, 100 Wn.2d 131, 138, 667 P.2d 68 (1983) (quoting 5 KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE § 10, at 25 (2d ed.1982) and citing ER 103); see also State v. Korum, 157 Wn.2d 614, 648, 141 P.3d 13 (2006).

During the pretrial hearing regarding the admissibility of these calls, Mohamed raised one specific objection to all of the jail telephone calls—that he believed that the State should not be permitted to record his calls. He offered no legal authority in support of this assertion. When the recordings were offered at

trial, Mohamed did not raise any additional ground for his objection, stating only "defense would object."²

As to the calls to the victim, Mohamed also argued that the State could not establish that the person he called was the victim. The court explained the minimal information necessary to authenticate the identity of a person on the telephone and ruled the calls admissible.

Neither of these objections is the basis for Mohamed's claim on appeal. Accordingly, we do not further consider his evidentiary argument.

III

Mohamed next contends that he was denied his constitutional right to counsel at sentencing. This is so, he asserts, because the court "forced him to choose between abandoning his motions for a new trial and having counsel at sentencing." Br. of Appellant at 10. We disagree.

Under Washington law, once a defendant has asserted his right to represent himself and made a knowing, voluntary, and intelligent waiver of the right to counsel, the defendant is not entitled to reappointment of counsel as a matter of right. State v. DeWeese, 117 Wn.2d 369, 379, 816 P.2d 1 (1991). "[A] valid waiver of the right to assistance of counsel generally continues throughout the criminal proceedings, unless the circumstances suggest that the waiver was

² Mohamed later challenged the competency of the translator who provided the English translation of the telephone conversations with the victim, which were mostly in Somali. When transcripts of the calls to the victim were offered, which included the English translation, Mohamed objected that they were hearsay. These objections to the translation are not raised on appeal.

No. 71409-1-1/5

limited." State v. Modica, 136 Wn. App. 434, 445, 149 P.3d 446 (2006), aff'd, 164 Wn.2d 83, 186 P.3d 1062 (2008).³

After a defendant's valid waiver of counsel, the reappointment of counsel "is wholly within the discretion of the trial court." DeWeese, 117 Wn.2d at 376-77. "In exercising that discretion, the trial court may consider all of the circumstances that exist when a request for reappointment is made." Modica, 136 Wn. App. at 443 (citing State v. Canedo-Astorga, 79 Wn. App. 518, 525, 903 P.2d 500 (1995)).

Mohamed's contention that he was denied the right to counsel is based on the incorrect premise that he was entitled to reappointment of counsel for sentencing. In fact, Mohamed had previously validly waived his right to counsel in this case.⁴ Therefore, it was within the trial court's discretion whether to reappoint counsel.

The trial court exercised its discretion reasonably with regard to Mohamed's requests for reappointment of counsel. Thus, at Mohamed's request, the court reappointed counsel for sentencing. Despite then being represented by counsel, Mohamed filed several pro se motions requesting dismissal of the charge and a new trial. He repeatedly requested to represent himself on these motions but to have counsel represent him at sentencing.

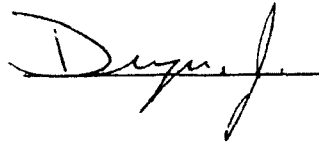
³ Federal law is in accord. As one court summarized, "Federal circuit courts are unanimous in holding that 'a defendant's waiver of counsel at trial carries over to subsequent [sentencing] proceedings absent a substantial change in circumstances.'" Fletcher v. Dickhaut, 834 F. Supp. 2d 10, 18 (D. Mass. 2011) (alteration in original) (quoting United States v. McBride, 362 F.3d 360, 367 (6th Cir.2004)); see also United States v. Unger, 915 F.2d 759, 762 (1st Cir.1990); United States v. Fazzini, 871 F.2d 635, 643 (7th Cir.1989); Panagos v. United States, 324 F.2d 764, 765 (10th Cir.1963); Davis v. United States, 226 F.2d 834, 840 (8th Cir.1955).

⁴ Mohamed does not challenge the validity of his prearrestment waiver of the right to counsel.

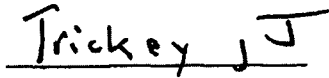
No. 71409-1-1/6

"A defendant does not have a constitutional right to choreograph special appearances by counsel." McKaskle v. Wiggins, 465 U.S. 168, 183, 104 S. Ct. 944, 79 L. Ed. 2d 122 (1984). Similarly, a defendant does not have a constitutional right to act as co-counsel. DeWeese, 117 Wn.2d at 379. Here, the trial court properly gave Mohamed a choice: he could be pro se or he could be represented by counsel. Desiring to argue his motions pro se, Mohamed chose to remain pro se. The trial court reasonably exercised its discretion in giving Mohamed this choice; he was entitled to no more.

Affirmed.



We concur:



DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 71409-1-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

respondent Donna Wise, DPA
[PAOAppellateUnitMail@kingcounty.gov]
[donna.wise@kingcounty.gov]
King County Prosecutor's Office-Appellate Unit

petitioner

Attorney for other party



MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: July 7, 2015