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Supreme Court No. 98884-6

SUPREME COURT
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,
Respondent,

v.

LANCE THEOPOLIS SMITH,
Petitioner.

ANSWER TO PETITION FOR REVIEW

ANDY MILLER
Prosecuting Attorney
for Benton County

Terry J. Bloor
Deputy Prosecuting Attorney
WSBA No. 9044
OFFICE ID 91004

7122 West Okanogan Place
Bldg. A
Kennewick WA 99336
(509) 735-3591

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I. ISSUES PRESENTED FOR REVIEW

Should the defendant's Petition for Review be accepted under RAP 13.4 (b)?

II. STATEMENT OF THE CASE

Procedural History: The defendant is allowed to represent himself, which results in a mistrial on March 12, 2018 because the defendant infuriated the jury.

The defendant was arraigned on December 14, 2017 and requested an attorney. RP 12/14/2017 at 6. He soon started requesting the opportunity to represent himself. RP 01/04/2018 at 3; RP 01/12/2018 at 9. The Court ordered a competency examination under RCW 10.77 on January 25, 2018. RP 01/25/2018 at 2. That competency examination resulted in a finding that the defendant was competent to stand trial. RP 01/04/2018 at 13. The Court then allowed the defendant to proceed pro se with a standby attorney appointed. RP 01/04/2018 at 16, 18. Trial was set for March 12, 2018. RP 01/04/2018 at 18.

Throughout pretrial proceedings, Smith continued to argue with, berate, and ask unusual questions to the trial court. *See* RP 01/25/18 at 3-5, 42-45, 47-51, 53; RP¹ at 9-13, 39, 41-46, 67, 71, 74-77, 80,

¹ Unless otherwise indicated, "RP" refers to the Verbatim Report of Proceedings for the Motion Hearings and Jury Trials spanning the dates of 03/07/2018, 03/12/2018, 10/24/2018, and 01/07-09/2018 prepared by Michelle Gianguialano, RPR

91-93, 98-104, 106-07, 113-14, 121-24, 161-64, 166-68; RP 01/12/18 at 10, 31-39, 42-43, 46, 54; RP 07/25/18 at 6-10, 17-18, 20-25, 36-41, 44-45, 48-52.

On March 12, 2018 the Court advised the defendant that he may lose his right of self-representation if he disrupted the court or did not follow the court's instructions. RP at 39. The Court again warned him that he could lose his right of self-representation after he used a laptop computer to email Ms. Bonneru. RP at 56, 80.

Problems arose when the defendant began voir dire.

The defendant began with a two-page monologue wherein he asked one question: "Does anybody kind of want to be here or is interested in this trial, raise your hand?" RP 03/12/18 at 61. He also said, "Raise your hand if you like me. No one likes me. Okay. That felt really good. All right." RP 03/12/18 at 61-62.

He again asked, "Who doesn't want to be here really, really bad?" RP 03/12/18 at 62. A number of potential jurors raised their hands, including Juror No. 30. *Id.* The defendant again asked, "(Juror) 30, why don't you want to be here?" RP 03/12/18 at 63. Juror 30 answered, "I think your conduct and decision to represent yourself has put you at a disadvantage to prove your own innocence" *Id.* Juror 30 stated that

the defendant had made such a bad impact on him that he could not be fair. Juror 30 was excused. *Id.*

However, many jurors agreed with that sentiment. Juror 43 said, “My thoughts (are) exactly with 30. Your decision might have been a bad one.” He was excused. RP 03/12/18 at 64. The next juror to speak, Juror 45, said, “I echo 43.” He was excused. RP 03/12/18 at 65. The next juror to speak was Juror 15, who said, “I echo Juror 30 as well. I can’t believe that you are representing yourself.” RP 03/12/18 at 65. She was excused. RP 03/12/18 at 67.

The defendant seemed to try to regroup: “I am just kind of burning up 20 minutes. I am just kind of making this up as I go. . . . I am winging this. I am just trying to, you know, win the favor of my jury a little bit, you know, make you guys appreciate me a little bit. I mean, what can I tell you about myself? I have had a great life and a really rough life” RP 03/12/18 at 67.

At this point, the prosecutor objected and stated that the defendant should ask questions. RP 03/12/18 at 67. That objection was sustained. RP 03/12/18 at 68.

The defendant began asking questions that, if coming from a licensed attorney, would be considered bizarre. “[H]ow familiar are you with the courtroom? How many times have you come to court before?” RP

03/12/18 at 68. He used the answer to state, “I am a very honest person, a very good person.” RP 03/12/18 at 68.

He next asked, “Number 8, what is the most famous attorney that you have ever heard of?” RP 03/12/18 at 68-69. This caused Juror 33 to ask to address the Judge. Juror 33 said, “I am concerned whether the defendant is of a sound mind the way this is proceeding and I just wanted to bring that to your attention.” RP 03/12/18 at 69.

The following colloquy occurred:

Mr. Smith: Does that mean you are excited to be here or not excited to be here? Because a lot of people will look at this both ways. This is—I am either really entertaining—I either come off as a genius and really entertaining or really irritating and completely mental.” RP 03/12/18 at 69.

Juror 33: Our time is really valuable and it feels like you are not taking that into account. RP 03/12/18 at 69-70.

Mr. Smith: No. I am 100 percent. And like I said, I have really great appreciation for life. And in every moment I am at I stick out wherever I am as having more fun than everybody else. I don’t do that on purpose. It’s just naturally who I am. I am a skater. RP 03/12/18 at 70.

Juror 33: If you don't have important questions to ask the jury I would request that you move ahead so we can complete this session. RP 03/12/18 at 70.

Mr. Smith: I actually asked someone and they said they wanted to hear what I had to say. So I mean, I guess at this point I feel that you may not want to be on the jury. RP 03/12/18 at 70.

Juror 33: I am happy to serve. RP 03/12/18 at 70.

Mr. Smith: Okay. RP 03/12/18 at 70.

Juror 33: However, as long as we are moving ahead as rapidly as possible and not just talk about yourself but try to pick a jury that's going to serve what you think is best for you. RP 03/12/18 at 70.

Mr. Smith: Well, what I am trying to do is make the jury like me, because if the jury likes you then at the end of the trial they will give you an innocent plea rather than a guilty one. RP 03/12/18 at 70.

Juror 33: I am more concerned about making a good judgment, not about liking you or not. RP 03/12/18 at 70.

The defendant moved on but did not heed Juror 33's advice because his next questions was, "(Juror) Number 9, are you excited for St. Patrick's Day?" RP 03/12/18 at 71. When the response was "Not really," the defendant replied that he hoped he would be out of jail because he liked corned beef. RP 03/12/18 at 71.

The defendant continued asking irrelevant questions when he next asked, “(Juror) Number 10, do you like the way our government is being ran right now?” RP 03/12/18 at 71. And, “(Juror) Number 1, do you think it’s cool or not cool that the Bible is no longer in our courtroom?” RP 03/12/18 at 72. And, “(Juror) Number 2, is it springtime right now? I have been locked up for two months.” RP 03/12/18 at 73.

He then asked three more jurors what they thought of the current government. RP 03/12/18 at 73. This prompted Juror 36 to state, “Mr. Smith, I am concerned about your ability to represent yourself. You are off topic. . . . [Y]ou don’t seem to be aware of what time of year it is, and I don’t think I can be fair because I don’t think you have the capability to represent yourself.” RP 03/12/18 at 73.

The trial judge then asked the bailiff to escort the jury pool from the courtroom. RP 03/12/18 at 74. The Judge noted that two jurors had expressed a concern about the defendant’s competency and ability to represent himself. The defendant told the jury that he was incarcerated and was asking repetitive questions. RP 03/12/18 at 74. The court could have also noted the reluctance of Juror No. 33 to participate, as well as Jurors 30, 43, 15 and 45 being excused because they felt they could not be fair to the defendant.

The Judge concluded that the defendant's behavior had created a situation where the jury would not be fair to him and declared a mistrial. RP 03/12/18 at 76. The Judge further concluded that there was no reason to believe that the defendant could successfully pick a jury. RP 03/12/18 at 76. The Judge continued the case two days, to March 14, 2018 to reset the trial date and to readdress whether the defendant should continue to represent himself. RP 03/12/18 at 77.

March 14, 2018: Trial Judge concludes that the defendant's right to self-representation should be withdrawn.

On March 14, 2018, the Judge reported that the jurors were dismayed at the defendant's behavior when he debriefed them after he declared the mistrial. RP 01/12/18 at 38-39. The Judge also noted that the nonverbal conduct of the defendant, including gestures, resulted in the jury becoming unresolvably tainted against him. RP 01/12/18 at 32-34.

The court noted the defendant's consistent pattern of being unable to keep from acting out, which made it impossible for the defendant to represent himself. RP 01/12/18 at 40. That pattern was evident in the hearing on this date. He wanted the Judge to refer to him as "Attorney Smith." RP 01/12/18 at 31. He tried to question the Judge about whether he made a mistake, gave contempt, or broke the law. RP 01/12/18 at 32. He challenged the Judge to "speak honestly" and "be honest and fair." RP

01/12/18 at 33. He wanted the Judge to demonstrate the gestures the defendant made to the jury. RP 01/12/18 at 34. He claimed that his voir dire was “really genius.” RP 01/12/18 at 34. He accused the Judge of having a grudge against him and of perjury. RP 01/12/18 at 35, 38.

The Judge stated he reviewed several cases, including *State v. Afeworki*, 189 Wn. App. 327, (2015), *State v. Thompson*, 169 Wn. App. 436 (2012), and *State v. Kolocotronis*, 73 Wn.2d 92 (1968), and denied the defendant the right to continue to represent himself. RP 01/12/18 at 29, 40, 44.

Trial on January 7, 2019: The defendant is removed to a media room where he could see and hear the proceedings.

The case was called for trial on January 7, 2019. RP at 96. The defendant was represented by Ms. Ajax. RP at 97. Nevertheless, the Court had lengthy colloquies with the defendant in which he stated that he was not ready for trial, requested that he be allowed to represent himself, accused the Judge of committing a crime and said the Judge would be in trouble with the United States Army and with congress, called his attorney a fraud. RP at 97, 99, 101, 122, 124. The trial judge warned him that he could be removed from the courtroom if he continued to disrupt the proceedings. RP at 102.

The jury pool was brought in for voir dire shortly thereafter. RP at 125. During the voir dire, the defendant said, “For the record, Attorney Ajax, you are fired because you don’t listen to me and you are jeopardizing my innocence.” RP at 161. The court called a recess and as the jurors were being escorted out of the courtroom, the defendant said, “Keep that in mind jurors. . . . As you are leaving, she does not represent me.” RP at 161.

As a result, the defendant was removed to a media room where he could see and hear the proceedings. RP at 169. There were no further interruptions or outbursts.

Substantive facts from trial:

The defendant was a server at a restaurant in Richland in 2010. RP at 238. Jennifer Bonneru was a bartender at that restaurant. RP at 237. They never dated or had a romantic relationship. RP at 239.

For whatever reason, the defendant developed an obsession with Ms. Bonneru. The defendant began writing lengthy letters to her. RP at 243. She asked him to stop, but he continued. RP at 241, 243. One time her car broke down near Biggs, Oregon. She had so many incoming text messages from the defendant that she could not call a tow truck. RP at 242.

He posted messages for her on Facebook. RP at 249. He sent letters to her place of employment. RP at 250. He threatened her ex-boyfriends. RP at 250. He contacted her sister and mother. RP at 250. She estimated that she had received hundreds of letters from the defendant. RP at 253. He would sometimes send 3-4 letters a day, some over 17 pages long. RP at 280. On one text he wrote, "I feel like hurting you and every living thing around you." RP at 280. His constant efforts to contact Ms. Bonneru affected her and everyone around her. RP at 250-51. He sent a package to her apartment. RP at 255.

He continued to contact her regardless of Ms. Bonneru obtaining a No Contact Order. RP at 244. He was twice convicted of Violation of a No Contact Order. Ex. 1; RP at 246.

Count I involved a series of letters, packages, and Facebook messages the defendant sent to Ms. Bonneru from September 23, 2017 to December of 2017. See RP at 252, 254, 264 He wrote her a letter postmarked September 23, 2017 to her place of employment. Ex. 5; RP at 252. He wrote her two letters to her apartment. Ex. 6, 7; RP at 253-54. On October 25, 2017, he sent her a package to an old address. RP at 254-55. He sent her Facebook messages in December 2017. RP at 264.

Count II involved an in-person contact on January 10, 2018. Ms. Bonneru was out at a bar with friends, including Breanna Watts,

celebrating Ms. Watts' birthday. RP at 265, 283. The police found the defendant about 50 yards from the bar. RP at 327. He told a police officer that he just happened to see Ms. Bonneru at the bar and waived at her. RP at 327.

Those other witnesses include Ms. Bonneru, who saw the defendant knocking on the glass window of the bar and waving frantically, trying to get her attention. RP at 266. Ms. Watts saw the same and told him to leave. RP at 285. The defendant did not leave, but circled around the building, and crossed the sidewalk. RP at 285-86. Ms. Watts called the police when the defendant kept pacing back and forth, staring at the bar. RP at 286.

III. ARGUMENT

A. The Petition for Review should not be accepted under RAP 13.4 (b).

1. Standard for review:

RAP 13.4 (b) sets out the considerations governing acceptance of review:

A petition for review will be accepted by the Supreme Court only:

- (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
- (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or

- (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
- (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

2. The defendant's petition does not meet any of these considerations.

Regarding consideration (4), there is no allegation that the petition involves an issue of substantial public interest. A person with mental health problems was stalking a former co-worker. That person wanted to represent himself, he failed, and the trial court revoked the decision allowing the defendant to go pro se. The only parties interested are the defendant, the police, and the victim.

Regarding consideration (3), there is no issue of a significant question of constitutional law. The defendant has a constitutional right to an attorney and a constitutional right to represent himself. But what happens when a defendant wants to go pro se but is unable to make it through *voire dire* without infuriating potential jurors? That is an issue for the sound discretion of the trial court, guided by various opinions from the Court of Appeals and Supreme Court.

The defendant argues the Court of Appeals decision is inconsistent with *In re Rhome*, 172 Wn.2d 654, 659-60, 260 P.3d 874, 878-79 (2011) and especially with the statement that “the right of self-representation does

not extend to persons who lack the mental capacity to represent themselves.” The defendant claims *Rhome* did not so hold. However, the *Rhome* court held exactly that:

[T]he United States Supreme Court [in *Indiana v. Edwards*, 554 U.S. 164, 128 S.Ct. 2379] considered whether a state may insist that a defendant who is found mentally competent to stand trial must nevertheless proceed to trial with counsel, rather than be allowed to represent himself. Recognizing that *Faretta* and authority since *Faretta* placed limits on the right to self-representation, *the Edwards Court further held that it is constitutionally permissible for a state to deny a defendant pro se status “on the ground that [he] lacks the mental capacity to conduct his trial defense” even though he was found competent to stand trial.*

Rhome, 172 Wn.2d at 659-60.

The *Edwards* Court observed that the standard to determine whether a defendant is competent to stand trial assumes he will *assist* in his defense, not conduct his defense, and therefore competency to stand trial does not automatically equate to a right to self-representation. *Indiana v. Edwards*, 554 U.S. 164, 174-75, 128 S. Ct. 2379, 171 L. Ed. 2d. 345 (2008). In addition, while the dignity and autonomy of an individual underscore the right to self-representation, in the *Edwards* court's view, a right of self-representation at trial will not “affirm the dignity” of a defendant who lacks the mental capacity to conduct his defense without the assistance of counsel. To the contrary, given that defendant's uncertain

mental state, the spectacle that could well result from his self-representation at trial is at least as likely to prove humiliating as ennobling. *Id.* at 176.

The defendant also argues that the Court of Appeals decision is not consistent with *State v. Madsen*, 168 Wn.2d 496, 229 P.3d 714 (2010). However, the court was not faced with a defendant who had mental health problems. In *Madsen*, the court did not order a competency examination. When asked the defendant “volunteered to take an ‘IQ test’ or a ‘psychological exam[,] [w]hatever you need.’” *Id.* at 502. The defendant’s attorney told the court there were no concerns regarding competency. *Id.* at 510. The court denied the defendant’s request to represent himself because he had not been to law school, he did not know how to select a jury, and the trial judge believed he was “‘not relishing the idea’ of representing himself.” *Id.* at 502.

Thus, there were no issues about Mr. Madsen’s mental capacity to represent himself. The *Madsen* court concluded that a court may not deny pro se status merely because the defendant is unfamiliar with legal rules or because the defendant is obnoxious. *Id.* at 509. Here, Mr. Smith’s request for pro se status was denied because he lacked the mental capacity to represent himself.

There is one additional distinction between this case and *Madsen*. Mr. Madsen was never allowed to represent himself. Mr. Smith infuriated potential jurors during voir dire. The trial court should have the discretion to revoke the defendant's pro se status when he does not have the mental capacity to make it through voir dire without causing a mass revolt among the jury pool. The Court of Appeals' decision is not in conflict with any opinion from this court or another division of the Court of Appeals.

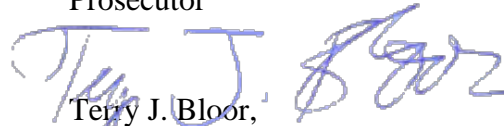
IV. CONCLUSION

Accordingly, the petitioner for review should be denied.

RESPECTFULLY SUBMITTED this 13th day of October, 2020.

ANDY K. MILLER

Prosecutor



Terry J. Bloor,
Deputy Prosecuting Attorney
WSBA No. 9044
OFC ID NO. 91004

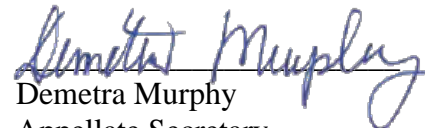
CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

Tiffinie Ma
Washington Appellate Project
1511 Third Avenue, Suite 610
Seattle, WA 98101

E-mail service by agreement
was made to the following
parties: tiffinie@washapp.org

Signed at Kennewick, Washington on October 13, 2020.


Demetra Murphy
Appellate Secretary

BENTON COUNTY PROSECUTOR'S OFFICE

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Kennewick, WA, 99336
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