68926-6

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NO. 68926-6-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

THOMAS ARTHUR,

Appellant.

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

APPELLANT'S OPENING BRIEF

Marla L. Zink
Attorney for Appellant

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

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A. ASSIGNMENT OF ERROR

Contrary to Thomas Arthur's rights under the Sixth Amendment and article I, section 22 of the Washington Constitution, the trial court erred in denying his motion to proceed pro se.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

Where an accused person makes a timely and unequivocal request to represent himself, the Sixth Amendment and article I, section 22 require the trial court to determine whether the request is knowing, voluntary and intelligent. If it is, then the request must be granted. If a request to proceed pro se is made as the trial is about to commence, the existence of the right depends on the facts of the particular case with a measure of discretion reposing in the trial court. Even where the request comes during trial, the right to proceed pro se cannot be uniformly denied but rests largely within the informed discretion of the trial court. Did the trial court err when it failed to grant Mr. Arthur's request to proceed pro se, which was brought prior to the commencement of trial?

C. STATEMENT OF THE CASE

As a juvenile in 1991, Thomas Arthur pled guilty to rape of a child in the first degree. Exhibit 7. His brother, the supposed victim of

the crime, now contends no crime occurred. CP __ (Sub # 36 (letter from David Arthur)).[1] As part of his disposition, Mr. Arthur was required to register as a sex offender. Exhibit 7, p. 5; *see* RCW 9A.44.130.

On November 22, 2010, Mr. Arthur changed his registration from homeless to 5705 227th Street SW in Mountlake Terrace, Washington. Exhibits 1 & 13; 4/24/12 RP 81-82.[2] This address is his parent's home. 4/24/12 RP 43-44. He remained registered at that address until September 2011. Exhibits 1 & 2; 4/24/12 RP 90-91, 105-06, 106-07.

The State charged Mr. Arthur with one count of failure to register under RCW 9A.44.132, alleging that he ceased to reside at his parent's home between March 17, 2011 and April 27, 2011. CP 31.

Mr. Arthur waived his right to a jury trial. CP 25; 4/24/12 RP 4-7. During pretrial motions, he asked to represent himself. 4/24/12 RP

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[1] A supplemental designation of clerk's papers has been filed in the trial court, requesting the court to send this document to the Court of Appeals.

[2] The verbatim reports of proceeding are referred to herein as follows:

- "4/24/12 RP" refers to the verbatim report of the CrR 3.5 Hearing and Bench Trial from April 24 and 25, 2012.
- "4/25/12 RP" refers to the verbatim report of the court's oral ruling from April 25, 2012.
- "5/14/12 RP" refers to the verbatim report of the sentencing hearing from May 14, 2012.

16. After returning from a recess, defense counsel stated, "[I]t did come to my attention that Mr. Arthur . . . wished to represent himself at this trial." 4/24/12 RP 16. The court asked Mr. Arthur whether that was true, to which he replied, "Yes, Your Honor." *Id.* Mr. Arthur continued, "My attorney is an officer of the court. I have the highest level of respect for him. I request the Court allow me to set motions in my own defense at this time." *Id.* He elaborated,

> Your Honor, I did waive off a jury trial. I believe that will work and I have full faith in you, sir. However, there is [sic] some discrepancies in the case that I thought would be brought up and I'm not seeing anything in light of that right now. I don't want to waste any of the Court's time. I'm very capable of defending myself. With respect to [defense counsel], I just feel within me that there are things in this courtroom right now that are not going the way that I had expected that need to come out. . . .
>
> [T]here are at least two more witnesses that should have been on the docket and they're not here, and there is information that was supposed to be subpoenaed that would be . . . . That's in my defense.

4/24/12 RP 17-18. Mr. Arthur informed the court he was ready to represent himself immediately and go to trial as soon as he had the two witnesses and documentation he felt had been missing from defense counsel's case. 4/24/12 RP 18.

The trial court found the motion "untimely" and "inconvenient." 4/24/12 RP 24-25. Although some pretrial matters had been discussed, the Criminal Rule (CrR) 3.5 hearing regarding the admissibility of Mr. Arthur's statements to law enforcement had not yet been heard. *See generally* 4/24/12 RP 2-11, 22-25. No jury had been impaneled, and Mr. Arthur had agreed to a bench trial. 4/24/12 RP 7. Nonetheless, the court found trial had begun and it would be a burden to allow Mr. Arthur to represent himself. 4/24/12 RP 18-19, 24-25. The court found it would be a burden even to take the time to conduct a colloquy on the voluntariness of Mr. Arthur's requested waiver of counsel. 4/24/12 RP 19. Accordingly, the court denied Mr. Arthur's request to proceed pro se. 4/24/12 RP 19, 24-25.

At the bench trial, Mr. Arthur contended he was living at his parent's address during the charging period. *E.g.*, 4/24/12 RP 109-10, 112. His defense was supported by the testimony of his father and his girlfriend, who were called as State's witnesses. *E.g.*, 4/24/12 RP 43-46, 53-54, 56, 94-98. However, the court weighed the credibility of the witnesses and found Mr. Arthur guilty of failure to register. CP 4, 15; 4/25/12 RP 7-16.

D. ARGUMENT

Mr. Arthur's constitutional right to represent himself was violated when the court denied his request, which was made during pretrial motions, as "untimely" and "inconvenient."

1. The right to self-representation is protected by both the federal and state constitutions.

"Criminal defendants have an explicit right to self-representation under the Washington Constitution and an implicit right under the Sixth Amendment to the United States Constitution." *State v. Madsen*, 168 Wn.2d 496, 503, 229 P.3d 714 (2010) (citing *Faretta v. California*, 422 U.S. 806, 819, 95 S. Ct. 2525, 45 L. Ed. 2d 262 (1975)); U.S. Const. amend. VI; Const. art. I, § 22. This right is "so fundamental that it is afforded despite its potentially detrimental impact on both the defendant and the administration of justice." *Madsen*, 168 Wn.2d at 503. The unjustified denial of the right to self-representation is a structural error that requires reversal of the conviction. *Id.*

2. In Washington, the right to proceed pro se is strongly protected and may only be denied on limited grounds.

The Washington Constitution provides greater protection of the right to self-representation than the federal constitution. *State v. Rafay*, 167 Wn.2d 644, 650-51, 222 P.3d 86 (2009). Thus, while courts are "required to indulge in 'every reasonable presumption' against a

defendant's waiver of his or her right to counsel," this presumption "does not give a court carte blanche to deny a motion to proceed pro se." *Madsen*, 168 Wn.2d at 504. "The grounds that allow a court to deny a defendant the right to self-representation are limited to a finding that the defendant's request is equivocal, untimely, involuntary, or made without a general understanding of the consequences." *Id.* at 504-05.

> A court may not deny a motion for self-representation based on grounds that self-representation would be detrimental to the defendant's ability to present his case or concerns that courtroom proceedings will be less efficient and orderly than if the defendant were represented by counsel.

Id. at 505. The value of respecting the right of self-representation "outweighs any resulting difficulty in the administration of justice." *Id.* at 509.

The amount of scrutiny to which a trial court may subject a request to proceed pro se depends upon when the motion is made. "If the demand for self-representation is made . . . well before the trial or hearing and unaccompanied by a motion for a continuance, the right of self representation exists as a matter of law." *Madsen*, 168 Wn.2d at 508 (quoting *State v. Barker*, 75 Wn. App. 236, 241, 881 P.2d 1051 (1994)). If the request is made "as the trial or hearing 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." *Id.* Finally, if the demand is made "during the trial or hearing, the right to proceed pro se rests largely in the informed discretion of the trial court." *Id.*

3. Mr. Arthur demanded to proceed pro se as the trial was about to commence, and the court abused its limited discretion in denying the request.

As stated, if the request to proceed pro se is made as the trial is about to commence, "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." *Madsen*, 168 Wn.2d at 508. Here, Mr. Arthur demanded to represent himself before the pretrial CrR 3.5 hearing and promptly after executing a jury trial waiver. 4/24/12 RP 4-7, 16. Though the trial court characterized the timing as coming after the commencement of trial, the demand was in fact made prior to the start of trial. 4/24/12 RP 24; *State v. Stenson*, 132 Wn.2d 668, 769-70, 940 P.2d 1239 (1997) (request to proceed pro se is timely if made before jury impaneled) (citing *Moore v. Calderon*, 108 F.3d 261 (9th Cir. 1997)); *see Serfass v. United States*, 420 U.S. 377, 388, 95 S. Ct. 1055, 43 L. Ed. 2d 265 (1975) (where double jeopardy attaches in jury trial at

time jury is impaneled and sworn, the equivalent in bench trial is when court first receives evidence or testimony); *State v. Bartholomew*, 98 Wn.2d 173, 211-12, 654 P.2d 1170 (1982) (equating impaneling of jury with start of trial), *vacated on other grounds by Washington v. Bartholomew*, 463 U.S. 1203, 103 S. Ct. 3530, 77 L. Ed. 2d 1383 (1983); *State v. Thomson*, 70 Wn. App. 200, 210-11, 852 P.2d 1104 (1993) (trial commences when jury impaneled for purposes of CrR 3.4). After the court denied Mr. Arthur's request and took a short recess, the CrR 3.5 hearing was held. 4/24/12 RP 22-25. As the court itself noted, in addition to the above, opening statements had not yet been made and no witness had appeared. *Id.* The court had made rulings on some motions in limine and discussed the admission of exhibits; however these matters are regularly discussed and decided prior to the commencement of trial or impaneling of a jury. *See* 4/24/12 RP 2-11.

Thus the trial court had only limited discretion to deny Mr. Arthur's unequivocal request. *Madsen*, 168 Wn.2d at 508. Mr. Arthur indicated he was prepared to go to trial in his own defense but for a couple exhibits and witnesses he wanted to present. 4/24/12 RP 17-18. The trial court conducted no inquiry into the length of continuance Mr.

Arthur would require to secure such limited evidence. 4/24/12 RP 17-21.[3] In denying the request, the court focused on the presence of witnesses who were prepared to testify that day. 4/24/12 RP 19-21. In particular, the court focused on Mr. Arthur's father, who had medical issues that made appearing difficult. *Id.* However, the court did not ask Mr. Arthur's father, who was essentially appearing in support of his son, whether he would be willing and able to return to testify after a brief continuance to allow his son to represent himself. *See id.* Moreover, the court did not inquire into whether a brief continuance would cause any hardship to the State. *See id.* Further, no jury had been or would be impaneled.

In reiterating its denial of Mr. Arthur's motion the court emphasized that it was untimely and inconvenient. 4/24/12 RP 24-25. The court abused its limited discretion when it prioritized the "administration of justice" over Mr. Arthur's right to represent himself. *See Madsen*, 168 Wn.2d at 509 (holding that the value of respecting

[3] The Court refused even to take the time to conduct a colloquy. 4/24/12 RP 21. The court stated, "If the defendant truly wanted to represent himself, he should have made this motion before we had already started the trial and before these witnesses . . . were present outside in the hallway less than 15 feet from the courtroom door waiting to testify." *Id.*

right to self-representation "outweighs any resulting difficulty in the administration of justice").

4. Even if Mr. Arthur's request was made after preliminary trial proceedings had commenced, the trial court erred in denying the motion under the circumstances here.

In denying Mr. Arthur's request, the trial court found that trial had already commenced. 4/24/12 RP 20-21, 24-25. As discussed above, this finding was incorrect. However, even if the trial court had accurately assessed that trial had just commenced at the time of Mr. Arthur's request, the court still abused its discretion in denying it.

In *Madsen*, our Supreme Court made plain that any interest in the administration of justice cannot trump a defendant's fundamental right to proceed pro se. 168 Wn.2d at 509. The trial court's prioritization of speedy resolution and putting on witnesses who were already present in the courthouse was improper. The court called Mr. Arthur's request "untimely" and "inconvenient." 4/24/12 RP 24. But these are not per se bases for denying a request to proceed pro se. As noted, the court failed to inquire into the length of any necessary continuance to allow Mr. Arthur to collect the evidence he needed. The court also did not inquire of Mr. Arthur's father, or any other witness, whether he would be willing to return at a later time for testimony.

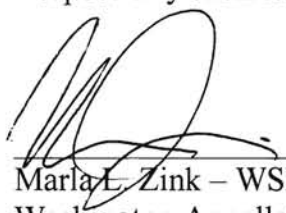
The court essentially declined to exercise its discretion, which is per se an abuse of discretion. *State v. Miles*, 77 Wn.2d 593, 597-98, 464 P.2d 723 (1970) (holding reversal appropriate where a trial court fails to exercise its discretion). The court considered the timing of Mr. Arthur's request to be a per se bar on honoring his constitutional right to represent himself. In light of the limited time likely required for Mr. Arthur to gather his evidence and the only slight inconvenience that would result, the court abused its discretion in denying Mr. Arthur's request to proceed pro se.

E. CONCLUSION

The trial court abused its discretion by denying Mr. Arthur's request to proceed pro se. His subsequent conviction for failure to register should be reversed due to this structural error.

DATED this 24th day of January, 2013.

Respectfully submitted,



Marla L. Zink – WSBA 39042
Washington Appellate Project
Attorney for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 68926-6-I
	)	
	)	
THOMAS ARTHUR,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 24TH DAY OF JANUARY, 2013, 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:

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[X]	THOMAS ARTHUR 8213 218TH ST SW EDMONDS, WA 98026	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

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X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
☎(206) 587-2711