68926-6

68926-6

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 REPLY BRIEF

Marla L. Zink
Attorney for Appellant

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

Washington Court of Appeals Decisions

United States Supreme Court Decisions

Constitutional Provisions

Rules

A. INTRODUCTION TO REPLY

Thomas Arthur's right to proceed pro se was violated when the trial court denied his motion. The State's response brief fails to alter the necessary outcome—Mr. Arthur's conviction should be reversed and remanded for a new trial.

In addition to the argument below, Mr. Arthur notes that he incorrectly stated his 1991 conviction resulted from a guilty plea. *See* Op. Br. at 1. In fact, he was found guilty. Exhibit 7.

B. ARGUMENT IN REPLY

The trial court violated Mr. Arthur's constitutional right to proceed pro se by denying his pretrial motion as burdensome and inconvenient and refusing to even conduct a colloquy on the voluntariness of his waiver.

During pretrial motions, Mr. Arthur moved to represent himself pursuant to his Sixth Amendment and Article I, section 22 rights. 4/24/12 RP 16. While some pretrial matters had been discussed, no jury had been impaneled and the Criminal Rule 3.5 hearing had not occurred. 4/24/12 RP 2-11, 22-25. The court had received no evidence or testimony. Nonetheless, the trial court denied Mr. Arthur's motion and refused to take the time to consider the matter. The court ruled trial had already begun, finding the motion untimely and inconvenient and finding burdensome the notion of Mr. Arthur representing himself.

4/24/12 RP18-19, 24-25. By denying Mr. Arthur's motion, the trial court denied his constitutional right to proceed pro se.

In justifying the court's ruling, the State argues in response that trial had already begun at the time of Mr. Arthur's request. *E.g.*, Resp. Br. at 1, 8. As set forth in Mr. Arthur's opening brief, however, this characterization is misplaced. In a bench trial, trial begins when the court receives evidence or testimony. *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). Mr. Arthur moved to proceed pro se before the Criminal Rule 3.5 hearing and before the court had received any evidence or testimony. *See* 4/24/12 RP 25 (first CrR 3.5 witness called), 42-43 (first trial witness sworn).[1] Allowing Mr. Arthur to proceed pro se would not have required any proceedings to begin anew. Further, there is no indication that Mr. Arthur's request was made for purposes of delay or tactical advantage. *See State v. Stenson*, 132 Wn.2d 668, 737-

[1] The State argues that the court had received evidence. Resp. Br. at 10. But the court's pretrial ruling that exhibits are admissible does not constitute the receipt of evidence nor can it be fairly equated with the start of trial. Trial courts regularly streamline proceedings by deeming evidence admissible and marking exhibits in advance of the start of trial.

38, 940 P.2d 1239 (1997) (request untimely where made for purposes of delay or tactical advantage).

To support its argument, the State cites to cases that decide when a trial "commences" for purposes of the criminal speedy trial rule, Criminal Rule 3.3. Resp. Br. at 8 (citing *State v. Carson*, 128 Wn.2d 805, 820, 912 P.2d 1016 (1996) (speedy trial case); *State v. Vermillion*, 112 Wn. App. 844, 855, 51 P.3d 188 (2002) (considering right to proceed pro se by relying on speedy trial cases; *State v. Carlyle*, 84 Wn. App. 33, 36, 925 P.2d 635 (1996) (speedy trial case)). In reviewing Mr. Arthur's constitutional right to represent himself, however, the commencement standard for purposes of another constitutional right—double jeopardy—more appropriately applies than would the standard under Criminal Rule 3.3. The trial court and State's assertion that trial had already begun is improper.

The State also contends that proceeding pro se would have delayed the trial. Resp. Br. at 1, 10. This assumption is not based in the record. If allowed to represent himself, Mr. Arthur told the court he would seek the admission of additional evidence and call two additional witnesses that his trial counsel had not listed. 4/24/12 RP 17-18. But the court did not inquire how long it would take Mr. Arthur

to secure this evidence or whether he could amass the documents and witnesses while the trial proceeded (for example, during breaks or at the end of the first day of trial). Thus it is not known from the record whether an actual trial continuance would have been necessary if Mr. Arthur had been allowed to proceed pro se.

The State ignores that the trial court premised its denial on improper bases, regardless of the timing of Mr. Arthur's request. The administration of justice does not trump Mr. Arthur's fundamental right to proceed pro se. *State v. Madsen*, 168 Wn.2d 496, 509, 229 P.3d 714 (2010). Yet here the court denied Mr. Arthur's request as "inconvenient" and found it would be burdensome merely to conduct a colloquy into the voluntariness of Mr. Arthur's waiver of his right to counsel. 4/24/12 RP 21, 24. To the extent the trial court exercised its discretion at all, it rested its decision on improper bases. *Madsen*, 168 Wn.2d at 509; *State v. Miles*, 77 Wn.2d 593, 597-98, 464 P.2d 723 (1970) (court abuses discretion by failing to exercise it). Therefore, even if Mr. Arthur's request is deemed made after the commencement of trial, the matter should be remanded for a new trial.

C. CONCLUSION

The trial court abused its discretion by denying Mr. Arthur's request to proceed pro se. Because the error is structural, his conviction for failure to register should be reversed.

DATED this 30th day of April, 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 1ST DAY OF MAY, 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:

[X]	JOHN JUHL, DPA SNOHOMISH COUNTY PROSECUTOR'S OFFICE 3000 ROCKEFELLER EVERETT, WA 98201	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X]	THOMAS ARTHUR 14500 ADMIRALTY WAY LYNNWOOD, WA 98087	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON, THIS 1ST DAY OF MAY, 2013.

X_____

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