Supreme Court No. 90127-9
(COA No. 69765-0-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RANDY ROYAL,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Randy Royal, petitioner here and appellant below, asks this Court to review of the Court of Appeals decision terminating review dated March 3, 2014, pursuant to RAP 13.3(a)(1) and RAP 13.4(b). A copy of the decision is attached as Appendix A.

B. ISSUES PRESENTED FOR REVIEW

1. Theft requires wrongfully obtaining property that belongs to another person and acting with the intent to deprive the owner of that property. Mr. Royal was convicted of first degree theft based on the claim that when selling illegal drugs, he handed the drugs to the buyer, took them back from the buyer to demand more money, then returned them to the buyer when he received more money. The entire transaction lasted no longer than 43 seconds according to a videotape. The Court of Appeals disregarded case law holding that theft requires proof that the perpetrator's intent to deprive lasted more than a few seconds, and instead ruled that any momentary deprivation of property meets the controlling dictionary definition. Is the Court of Appeals decision contrary to case law defining the scope of a theft?

2. The illegal drugs that Mr. Royal was accused of stealing during the drug sale were Mr. Royal's own prescription medication.

The Court of Appeals held that the buyer of the prescription medication becomes the lawful owner during the sale even if by statute, a person cannot transfer title to prescription medication to another person. The Court of Appeals acknowledged there is no case law addressing this issue. Should this Court accept review when the Court of Appeals decision is contrary to the statute authorizing people to possess only their own prescription medication, its decision improperly extends the definition of theft, and no clear authority directed the Court of Appeals?

3. The right to self-representation is constitutionally guaranteed and, when requested, the court may not deny it without undertaking the necessary inquiry on the record. Mr. Royal unambiguously asked to represent himself, but the court denied the request solely on the basis that Mr. Royal asked for two days of time to prepare. Did the court's disregard of Mr. Royal's clearly expressed request to represent himself, without any finding his request would unduly delay the trial, violate his right to represent himself?

C. STATEMENT OF THE CASE

Randy Royal sold prescription medication to an undercover police officer, although the officer thought he was buying crack. 2RP 140-44. Mr. Royal was arrested and charged not only with unlawfully

selling an uncontrolled substance in lieu of a controlled substance, he was also charged with one count of theft in the first degree for his actions during this drug sale. CP 1-2.

During the exchange of drugs for money, undercover officer Kevin Jones said that Mr. Royal put drugs in his hand and took the $30 the officer offered, but then demanded more money. 2RP 143. Mr. Royal complained, "that's not enough" and removed the drugs from Officer Jones's hand. 2RP 164. In response to Mr. Royal's statement "that's not enough," Officer Jones handed Mr. Royal another $10, but Mr. Royal saw that Officer Jones had more money in his pocket and said, "all or nothing, all or nothing." 2RP 164-65. Officer Jones handed Mr. Royal his last $20. 2RP 165. At that point, Mr. Royal handed the drugs to Officer Jones and Officer Jones left with the drugs, which he gave to another officer after the incident. 2RP 167.

A videotape from a nearby bar documents the interaction between Mr. Royal and Officer Jones. Ex. 3. The videotape is blurry and the camera's view is partly blocked by someone's head, but it shows that the entire exchange took less than one minute. Ex. 3 (entire incident lasts from 6:50 to 7:33 on videotape). In those 43 seconds, Mr. Royal gave something to Officer Jones, took it back, and returned it to

Officer Jones. It is this brief loss of possession that the State charged as theft in the first degree. 2RP 314. The State expressly elected that the theft charge was not premised on the negotiation of additional money from the officer during the sale, but only on the take-back and return of the drugs. 3RP 314-15.

On appeal, Mr. Royal argued there was insufficient evidence that he committed first degree theft because his take-back of the drugs lasted mere seconds and the officer never had superior title to the prescription medication, and thus was not the owner of the property from whom it could be stolen. He also argued that the trial court improperly refused his motion asking to represent himself. The Court of Appeals affirmed his convictions.**Error! Bookmark not defined.**

The facts are further set forth in the Court of Appeals opinion, pages 1-4, Appellant's Opening Brief, pages 3-5, and Appellant's Reply Brief, pages 1-6. The facts as discussed in these pleadings are incorporated by reference herein.

D. ARGUMENT

1. **The Court of Appeals incorrectly expanded the definition of theft to include the failure to immediately transfer ownership of illegal drugs during a drug sale**

To prove Mr. Royal committed first degree theft, the prosecution was required to establish that he wrongfully obtained property belonging to another person with the intent to deprive the owner of this property. CP 1-2; CP 82. The "property" that the State claimed Mr. Royal wrongfully obtained were his drugs that he gave to an undercover police officer, took back from the officer while requesting more money, and seconds later he returned to the officer after the officer paid more money. 3RP 314-15. The Court of Appeals affirmed Mr. Royal's conviction for first degree theft, concluding that theft occurs even when the "taking" lasts mere seconds and the property "taken" is the accused person's prescription drugs for which he has no authority to transfer legal ownership to another person.

a. *Theft requires more than a fleeting second of possessory dispute, contrary to the Court of Appeals's conflicting interpretation of case law*

Theft requires the specific intent to deprive another of property or services, combined with a wrongful taking. *State v. Walker*, 75

Wn.App. 101, 106, 897 P.2d 957 (1994); RCW 9A.56.020 (1). "Theft" means "[t]o wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him of such property or services." RCW 9A.56.020(1)(a).

The deprivation must be of some duration: "the theft statute proscribes the continued or permanent unauthorized use" of property. *Walker*, 75 Wn.App. at 108; *see also State v. Walters*, 162 Wn.App. 74, 86, 255 P.3d 835 (2011). In *Walker*, the court compared the essential elements of theft with taking a motor vehicle without the owner's permission. *Walker* held that the two statutes were not concurrent because taking a motor vehicle involved taking a car "for a spin around the block," where theft requires the person must intend to deprive the owner of its use "for a substantial period of time." 75 Wn.App. at 106. Theft requires not merely an initial taking, but rather the perpetrator's intent to maintain the "continued or permanent" deprivation of property belonging to another. *Id.* at 107.

Additionally, "a person cannot steal his or her own property." *State v. Pike*, 118 Wn.2d 585, 590, 826 P.2d 152 (1992). The owner of the property is a person with a lawful, superior possessory interest. *Id.* at 590-91. When a person takes properly "openly and avowedly under a

claim of title made in good faith, even though the claim be untenable," he does not demonstrate the required intent to steal. RCW 9A.56.020(2)(a). Therefore, when a person believes he is taking his own property, the taking may be lawful. *State v. Kjorsvik*, 117 Wn.2d 93, 110, 812 P.2d 86 (1991) (citing *State v. Hicks,* 102 Wn.2d 182, 683 P.2d 186 (1984)).

Disregarding this common law, the Court of Appeals held that any taking of property, even a "take back" of one's own drugs during an illegal drug sale, meets the legal definition of theft. It refused to apply the "continued or permanent unauthorized use" standard relied on in *Walker*, 75 Wn.App. at 108, and *Walters*, 162 Wn.App. at 86, considering those cases as inapposite because they involved taking vehicles. Slip op. at 7.

The Court of Appeals decision is contrary to this Court's recent ruling cautioning courts against inferring intent from equivocal acts. *State v. Vasquez*, 178 Wn.2d 1, 8, 309 P.3d 318 (2013). As the Court explained in *Vasquez*, "inferences based on circumstantial evidence must be reasonable and cannot be based on speculation." *Id.* at 16 (citing *Jackson v. Virginia,* 443 U.S. 307, 319, 99 S.Ct. 2781, 61

L.Ed.2d 560 (1979); *Bailey v. Alabama,* 219 U.S. 219, 31 S.Ct. 145, 55 L.Ed. 191 (1911).; U.S. Const. amend. 14.

The evidence does not rationally support Mr. Royal's intent to deprive Officer Jones drugs by the fleeting seconds that the drugs were out of Officer Jones's possession. *Vasquez*, 178 Wn.2d at 16-17 (reversing forgery conviction based on equivocal evidence of intent to defraud). Because the prosecution failed to prove that a theft occurred, reversal is required.

b. *The Court of Appeals acknowledged there is no clear precedent for turning a dispute during an illegal sale of prescription drugs into a theft, showing why there is substantial public interest in this Court's review*

The drug that Mr. Royal gave, took back, and then sold to Officer Jones was prescription medication. 2RP 264-65. The prescription medication belonged to Mr. Royal. 3RP 304 (describing Mr. Royal's admission that what he sold "was my medicine"). The prescription never applied to Officer Jones and therefore he never obtained superior legal title to Mr. Royal's pill by offering him money to buy it. *See* RCW 69.41.030 (unlawful to "possess any legend drug except upon the order or prescription of a physician").

In *Pike*, the court discussed whether a person commits theft when he takes back his own car from a mechanic without paying for the repairs. 118 Wn.2d at 588. The Supreme Court ruled that "a general contractual debt cannot support a theft conviction." *Id.* at 595. The failure to pay for repairs does not make the repaired property "the property of another" as required for theft, because the repair shop "has no possessory interest in the car, only a right to recover damages from Pike in a civil lawsuit. *Id.* at 593-94. Second, mere breach of a contractual obligation to pay does not create criminal liability absent a specific statute, or contractual fraud." *Id.* at 595.

Similarly to *Pike*, Officer Jones did not become the "owner" of another person's prescription medication as required for theft by offering money to buy it, even if Officer Jones thought he was illegally buying cocaine rather than illegally buying mirtazapine. Furthermore, the officer's momentary, temporary loss of possession of the drugs occurred in the course of a negotiation over the price of the drugs. An oral agreement to buy drugs does not create criminal liability based on failure to adhere to the initially quoted price. *See e.g., Pike*, 118 Wn.2d at 925.

The Court of Appeals considered *Pike* too different from the scenario in the case at bar to provide controlling authority. Slip op. at 5. It found no authority explaining whether a police officer can become the "owner" of prescription medication for purposes of theft. *Id.* But the Court of Appeals opted to affirm the conviction notwithstanding the absence of case law supporting the notion that the scenario in the case at bar meets the essential elements of theft.

When Mr. Royal received what he thought was sufficient payment, he gave the drugs to Officer Jones and Jones took them. 2RP 169. This exchange satisfies neither the wrongful obtaining of property of another element of theft, nor the intent to deprive that owner thereof. This Court should accept review to resolve the legal question for which the Court of Appeals found no relevant authority involving whether a temporary taking of prescription medication during a drug sale constitutes a theft.

2. **The court impermissibly denied Mr. Royal's request to represent himself**

a. *A clear request for self-representation must be granted unless it will obstruct justice or is not knowing and voluntary.*

The constitution guarantees criminal defendants the right to representation by a competent attorney at all stages of a criminal proceeding, as well as the corollary right to waive counsel and represent oneself. U.S. Const. amend. 6;[1] U.S. Const. amend. 14;[2] Wash. Const. art. I, § 22;[3] *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 self-representation 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

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[1] The Sixth Amendment provides in part,

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

[2] The Fourteenth Amendment says in part: "No state shall . . . deprive any person of life, liberty, or property, without due process of law."

[3] Article I, section 22 provides in pertinent part:

503. "The unjustified denial of this [pro se] right *requires* reversal." *Id.* (quoting *State v. Stenson,* 132 Wn.2d 668, 737, 940 P.2d 1239 (1997) (emphasis added in *Madsen*)).

Anytime an accused person requests to represent himself, "the trial court *must* determine whether the request is unequivocal and timely." *Madsen*, 168 Wn.2d at 504 (emphasis added). Then, unless the court finds the request is equivocal or untimely, "the court *must* determine if the request is voluntary, knowing, and intelligent, usually by colloquy." *Id.* (emphasis added).

The "only bases" to deny a request for self-representation is the court's finding that the request is equivocal, untimely, involuntary, or made without understanding its consequences. *Id.* This finding "must be based on some identifiable fact," not merely on speculation by the court. *Id.* at 505. The court cannot "stack the deck" against the accused by failing to conduct the proper inquiry. *Id.* at 506.

A request is not untimely because it is made as trial is about to commence. Before trial is underway, the timeliness of the request

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In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, . . .[and] to have a speedy public trial by an impartial jury."

"depends on the facts of the particular case with a measure of discretion reposing in the trial court in the matter." *Id.* at 508. Even a request to proceed pro se made during trial must be fully considered by the court, although at this late stage the trial court has more authority to deny the request based on its "informed discretion." *Id.* (quoting *State v. Barker,* 75 Wn.App. 236, 241, 881 P.2d 1051 (1994)).

b. *Mr. Royal's request was explicit and would not unduly delay the proceedings.*

The court claimed it was denying Mr. Royal's request because it was "equivocal." 1RP 23. However, Mr. Royal unambiguously asked to represent himself. Defense counsel told the court that Mr. Royal had told him he wanted to represent himself and when asked to explain, Mr. Royal said, "I'll have a better chance defending myself," and offered that he knew the statutes and court rules. 1RP 21-22. The court was not confused about the nature of Mr. Royal's request and it was not equivocal.

The Court of Appeals deemed the request untimely. Slip op. at 9. However, in the context of timeliness, the trial court's discretion over granting a criminal defendant's request for self-representation "lies at a continuum." *State v. Vermillion*, 112 Wn.App. 844, 855, 51 P.3d 188

(2002), *rev. denied*, 148 Wn.2d 1022 (2003). First, if a request is made "well before trial," an accused person has the right to self-representation as a matter of law; second, a request made right before trial is about to commence "depends on the facts of the particular case with a measure of discretion reposing in the trial court in the matter"; and third, "if made during the trial ... the right to proceed pro se rests largely in the informed discretion of the trial court." *State v. Breedlove*, 79 Wn.App. 101, 106-07, 900 P.2d 586 (1995) (quoting *State v. Fritz*, 21 Wn.App. 354, 360-61, 585 P.2d 173 (1978), *rev. denied*, 92 Wn.2d 1002 (1979)).

When a request is made before the trial commences, the court "must exercise its discretion by balancing the important interests implicated by the decision: the defendant's interest in self-representation and society's interest in the orderly administration of justice." *Breedlove*, 79 Wn.App. at 107. As the *Breedlove* Court explained,

> Washington case law indicates only two types of circumstances that warrant the denial of a motion to proceed pro se that is made shortly before trial or as the trial is about to begin. The trial court can deny the request if it finds either (1) that the motion is made for improper purposes, i.e., for the purpose of unjustifiably delaying a trial or hearing, or (2) that granting the request would obstruct the orderly administration of justice.

Id. at 107-08.

A request for more time does not demonstrate the intent to improperly delay proceedings, because it may show simply the "desire to prepare the defense his counsel had allegedly neglected to prepare." *Id.* at 109. Similarly to *Breedlove*, there is no reasonable inference that Mr. Royal was trying to delay the proceedings. The extent of his continuance request was minimal; he merely he asked for "a couple days" of additional time so that he could review discovery and potentially obtain a witness with whom defense counsel had already consulted. 1RP 22. Defense counsel himself said there were a couple of last minute details that needed to be resolved before he would be ready to proceed. 1RP 22.

Like *Breedlove*, the record does not "reflect that granting the motion would likely have impaired the efficient judicial administration in the present case." 79 Wn.App. at 109. By asking for a short continuance of two days, he would not have disrupted the State's ability to try the case. The trial involved no civilian witnesses and, in fact, during trial the court repeatedly admonished the prosecutor for calling

unnecessary police witnesses and eliciting repetitive testimony. 2RP 97, 172-73, 201-02.

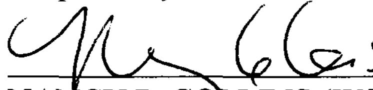
There is no evidence that Mr. Royal's request was designed to delay his trial in an inappropriate fashion. *See Breedlove*, 79 Wn.App. at 109. The timeliness requirement "must not be used as a means of limiting the defendant's *constitutional* right to self representation." *Breedlove*, 79 Wn.App. at 110. The request "should be granted" when there is no improper motive or impairment of the orderly administration of justice. *Id.* The record offers no basis to conclude Mr. Royal's request would disrupt the orderly administration of justice. The denial of his request to proceed pro se is contrary to *Madsen* and *Breedlove* and this Court should grant review.

E. CONCLUSION

Petitioner Randy Royal respectfully requests that review be granted pursuant to RAP 13.4 (b).

DATED this 2nd day of April 2014.

Respectfully submitted,



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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. RANDY LEE ROYAL, Appellant.	NO. 69765-0-I DIVISION ONE UNPUBLISHED FILED: March 3, 2014

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LAU, J. — Randy Royal appeals his convictions for first degree theft and delivery of a noncontrolled substance in lieu of a controlled substance. Because we conclude that his theft conviction is supported by sufficient evidence and that the trial court did not abuse its discretion in denying his conditional request to proceed pro se, we affirm.

FACTS

Based on allegations that Royal sold an undercover officer prescription medication in lieu of cocaine, took the medication back, and then demanded more money, the State charged him with delivery of a noncontrolled substance in lieu of a controlled substance, cocaine, and first degree theft.

The day before trial, Royal's counsel informed the court that Royal wished to represent himself. The following colloquy ensued:

> MR. ROYAL: . . . I just, I'll have a better chance defending myself. I know, you know, the statutes and the rules of the courts and with the court ruling.
> COURT: Ready to go to trial tomorrow?
> MR. ROYAL: No. I would need some time to sit down and discuss with myself, (unintelligible) discovery is. I'd have to get a, some other documents I'm trying to do with Dr. Julie.
> COURT: With who?
> MR. ROYAL: Dr. Julie.
> [DEFENSE COUNSEL]: Dr. Julian. He . . . wanted me to hire Dr. Julian.
> COURT: You're ready to go tomorrow?
> [PROSECUTOR]: Yes, Your Honor.
> [COURT]: And you're ready to go tomorrow?
> [DEFENSE COUNSEL]: There's a couple of last minute details, but it looks like we're getting them wrapped up. So yes.
> COURT: All right. Mr. Royal, if you want to represent yourself, you can do that, but trial's tomorrow. I'm not going to grant your request to go pro se if it involves a continuance.
> MR. ROYAL: Well, I would need, I would need a couple days, Your Honor.
> COURT: I understand. I'm denying it.
> MR. ROYAL: You're denying it?
> COURT: Right. Right. That's not an unequivocal request for one thing. It's conditioned upon a continuance and I'm not going to grant it . . . .

Report of Proceedings (RP) (Nov. 5, 2012) at 21–23.

In its written order denying Royal's request, the court stated in part that the request "was not unequivocal and [was] contingent on a continuance request. Court incorporates its oral findings."

At trial, the evidence established that on April 23, 2002, Seattle Police Officer Kevin Jones took part in a drug "buy-bust" operation in downtown Seattle. Disguised as a homeless transient, Jones's role was to purchase narcotics from a street dealer and then signal to other officers when a purchase had been completed. The other officers would then arrest the suspect.

During the operation, Jones saw Royal standing with some people on the corner of Third Avenue and Bell Street. Jones asked if anybody had crack cocaine. Royal replied that he was the only one in the area that "had any soup." RP (Nov. 8, 2012) at 139–40. Jones testified that "soup" is a street term for crack cocaine.

Royal asked Jones how much cocaine he wanted, and Jones said "$30 worth of crack." RP (Nov. 8, 2012) at 140. As they walked northbound on Second Avenue, Royal said, "I can do that." RP (Nov. 8, 2012) at 143. Shortly thereafter, Royal handed Jones something wrapped in prescription paper, and Jones handed Royal $30. Royal then "snatched" the package out of Jones's hand but kept his $30. According to Jones:

> [Royal] started to get more animated, his arms started coming up. He said, "That's not enough, give me more," at which point I pulled out more money. I had a 10 [dollar bill] and I also had a 20 [dollar bill] in my hand. I gave him the $10 bill. He saw I had that 20. His arms are going back and forth like this, and he says, "All or nothing, all or nothing," and he steps into me. He's 6-2, 230 pounds. I'm 5-10, 170 pounds. He's towering over me, his arms are up. I gave him another $20. Just handed it to him. I was fearful. Gave him the money.

RP (Nov. 8, 2012) at 143–44.

After Jones gave Royal all of his money, Royal "slapped the drugs down" in Jones's hand. Jones said, "What the hell?" RP (Nov. 8, 2012) at 145. Royal replied, "Fuck me, no, fuck you." He then put his hand in his pocket, pointing it in a way that made Jones believe he had a gun. RP (Nov. 8, 2012) at 145, 154. Jones gave a "help" signal to the other officers, who moved in and arrested Royal.

A forensic scientist testified that the drugs inside the package were mirtazapine, a prescription antidepressant. The jury also heard excerpts from phone calls made by Royal where he admitted that he sold some "bunko dope to the police" and that the drugs were "nothin' but a bunko charge . . . . I threw some bunk dope to a motherfucker

undercover policeman." Exs. 20, 21, 22. In one of the calls, the other party asked Royal if he sold the police his "medicine or something," and Royal answered, "Yeah, that's all it was." Ex. 21.

The defense called no witnesses. The prosecutor argued in closing argument that Royal committed theft when he took the drugs from Jones after a completed sale. He maintained that Royal was not negotiating with Jones after he took the drugs back; rather, he was trying to take advantage of him:

> [T]he defendant never gave Officer Jones cocaine. He never intended on giving him cocaine. He was looking for the money. He saw an opportunity. He saw a homeless person. He saw an opportunity to receive some money from someone who was looking for crack cocaine. After . . . he'd gotten the $30, he decided that wasn't enough, so he took the drugs back and demanded more money. Took the drugs that he'd already bought and then he saw it as an opportunity to get more money. Still, perception that it's a homeless person. There was no intent on [giving] him $30 worth of crack. We know that because he didn't have the crack cocaine on him. He was giving him the mirtazapine in lieu of it, a noncontrolled substance as testified to by Mark Strongman. Stealing the drugs back was just another means of getting more money.

RP (Nov. 13, 2012) at 306–07. In rebuttal, the prosecutor added, "[H]e said that they were still in negotiation, okay? But notice, the defendant never gave back the $30. He kept that." RP (Nov. 13, 2012) at 313.

The jury convicted Royal as charged. He appeals.

DECISION

Royal contends his theft conviction is not supported by sufficient evidence. Evidence is sufficient if, when viewed in the light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (citing Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). A claim of

insufficient evidence admits the truth of the State's evidence and all inferences that can reasonably be drawn from it. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence is as probative as direct evidence. State v. Vermillion, 66 Wn. App. 332, 342, 832 P.2d 95 (1992).

To convict Royal of first degree theft, the State had to prove beyond a reasonable doubt that he wrongfully took property from the person of another with intent "to deprive the other person of the property." Royal contends the evidence was insufficient to meet this standard for two reasons. First, because the drugs were Royal's own prescription medication and because it is unlawful to possess a prescription drug without a prescription, Royal contends Jones never lawfully possessed the drugs and, therefore, never had a superior possessory interest. But Royal cites no authority, nor are we aware of any, supporting the proposition that a law enforcement officer cannot lawfully possess prescription drugs sold to him or her during an undercover operation.[1] Arguments unsupported by relevant authority need not be considered. State v. Johnson, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992) (appellate court will not review issue unsupported by relevant authority).

Second, relying principally on State v. Pike, 118 Wn.2d 585, 590, 826 P.2d 152 (1992), Royal contends that a person does not commit theft if they believe in good faith

[1] We note that contraband and illegal drugs are property for purposes of theft State v. Schoonover, 122 Wash. 562, 565, 211 P. 756 (1922) ("[The] outlawed and contraband nature [of intoxicating liquor] did not prevent it from being the subject of larceny."); State v. Donovan, 108 Wash. 276, 283, 183 P. 127 (1919) ("[I]ntoxicating liquor, though unlawfully held by the one in possession thereof, . . . was a subject of larceny."); cf. State v. Graham, 64 Wn. App. 305, 309, 824 P.2d 502 (1992) ("'[R]obbery may . . . occur when a person is in possession of property without any legally recognizable claim thereto.'") (quoting State v. Latham, 35 Wn. App. 862, 865–66, 670 P.2d 689 (1983)).

that they are taking their own property. He concludes that he did not commit theft because he took the drugs back during a negotiation over the price. There was, however, substantial evidence that negotiations had ended prior to the taking and that the subsequent "negotiations" were in reality a shakedown for more money. The weight, credibility, and persuasiveness of the evidence are matters for the trier of fact. State v. Walton, 64 Wn. App. 410, 415–16, 824 P.2d 533 (1992).

In addition, Pike is readily distinguishable. In that case, a mechanic agreed to install an engine in Pike's car. When the work was finished, Pike took the car without paying the bill. Pike, 118 Wn.2d at 588. The Pike court held that the taking was not a theft because the mechanic had not perfected a lien and therefore had only a contractual claim, not a possessory interest in the car. Pike, 118 Wn.2d at 590–94. Here, by contrast, Royal sold his interest in the drugs to a law enforcement officer. Thus, when he took the drugs back, he took the property of another.

Third, Royal argues that Officer Jones's "momentary, temporary loss of possession" was insufficient to constitute a theft. Appellant's Br. at 11. He concedes that intent to "permanently" deprive is not an element of theft. State v. Komok, 113 Wn.2d 810, 816–17, 783 P.2d 1061 (1989). He argues, however, that "there must be an intent to deprive that is more than fleeting seconds." Appellant's Reply Br. at 3. In support, he cites State v. Walker, 75 Wn. App. 101, 879 P.2d 957 (1994), and State v. Walters, 162 Wn. App. 74, 86, 255 P.3d 835 (2011). Neither case supports Royal's argument.

Walker compared theft of a motor vehicle and taking a motor vehicle without permission. The court concluded:

> [T]he statutes proscribe different conduct. For instance, the joyriding statute would be violated by taking a motor vehicle without permission for a spin around the block. In contrast, the theft statute would be violated only if the defendant intended to deprive the owner of its use, as is the case when the motor vehicle is taken for a substantial period of time.

Walker, 75 Wn. App. at 106. While the court went on to state that the "'intent to deprive' element [of theft] nevertheless implies that the deprivation be of a greater duration than that required for taking a motor vehicle without permission," the court did not hold that the theft statute has a duration requirement. Walker, 75 Wn. App. at 107–08. Walker merely stands for the proposition that the duration of a taking is a circumstance bearing on the nature of a person's intent. As for Walters, other than stating, erroneously, that "intent to permanently deprive is an element of a theft prosecution,"[2] it contains no support whatsoever for Royal's claim. Walters, 162 Wn. App. at 86.

In any case, our state Supreme Court made it clear in Komok that courts are to give the word "deprive" its common meaning. Komok, 113 Wn.2d at 814–15. According to Komok, the common meaning of "deprive" is "[t]o take something away from"; "[t]o keep from having or enjoying"; or "[t]o take." Komok, 113 Wn.2d at 815 n.4 (final alteration in original) (citing WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 365 (1984); BLACK'S LAW DICTIONARY 529 (4th ed.1968)). Viewed in a light most favorable to the State, the evidence in this case was sufficient to support a finding that Royal took the drugs he sold to Jones with intent to deprive him of them.

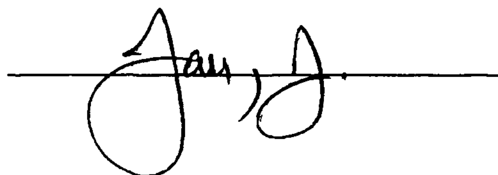
Next, Royal contends the trial court abused its discretion in denying his request to represent himself pro se. Both the federal and state constitutions guarantee a

[2] This statement in Walters is contrary to the Washington State Supreme Court's holding in Komok.

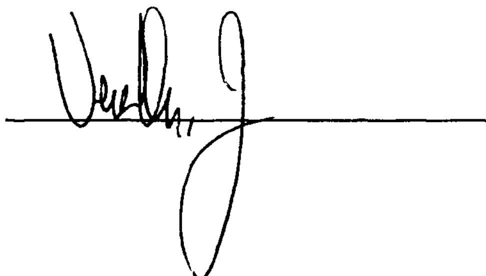
defendant the right to self-representation. U.S. CONST. amends. VI and XIV; WASH. CONST. art. I, § 22; see also Faretta v. California, 422 U.S. 806, 818–19, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). To exercise the right, a defendant must make an unequivocal and timely request. State v. Vermillion, 112 Wn. App. 844, 51 P.3d 188 (2002) (citing State v. Breedlove, 79 Wn. App. 101, 106, 900 P.2d 586 (1995)). The trial court's decision on such a request is discretionary, and the degree of its discretion varies with the timing of the request. Breedlove, 79 Wn. App. at 107; State v. Fritz, 21 Wn. App. 354, 361, 585 P.2d 173 (1978). If the request 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 496, 508 n.4 229 P.3d 714 (2010) (emphasis added) (quoting State v. Barker, 75 Wn. App. 236, 241, 881 P.2d 1051 (1994)). If, on the other hand, 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.'" Madsen, 168 Wn.2d at 508 (quoting Barker, 75 Wn. App. at 241). Absent "substantial reasons," a last-minute request for self-representation "should generally be denied, especially if the granting of such a request may result in delay of the trial." State v. Garcia, 92 Wn.2d 647, 656, 600 P.2d 1010 (1979). Likewise, the lateness of a request for a continuance is also a relevant factor in determining whether a continuance should be granted. Rich v. Starczewski, 29 Wn. App. 244, 245–46, 628 P.2d 831 (1981). Decisions on requests for self-representation or a continuance are reviewed for abuse of discretion. Madsen, 168 Wn.2d at 504; State v. Grilley, 67 Wn. App. 795, 798, 840 P.2d 903 (1992).

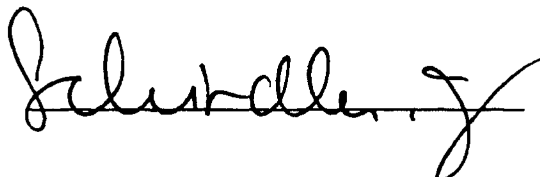
Here, Royal's request to proceed pro se was made on the eve of trial and was thus untimely. It was also conditioned on the court granting an untimely continuance so that Royal could, among other things, speak with a medical expert who had not even been secured as a witness. Although the court was willing to allow Royal to proceed pro se if trial commenced as scheduled, Royal rejected this proposal. Considering the lateness of Royal's requests and the fact that trial had already been continued four times,[3] we cannot say the court abused its discretion in ruling that he could proceed pro se only if trial commenced as scheduled.

Affirmed.



WE CONCUR:





[3] Two of the continuances were agreed, one was requested by Royal, and one was requested by the State. Prior continuances are a relevant consideration in determining whether a court abused its discretion in denying an additional continuance. State v. Barnes, 58 Wn. App. 465, 471, 794 P.2d 52 (1990), aff'd, 117 Wn.2d 701, 818 P.2d 1088 (1991).

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. 69765-0-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 Deborah Dwyer, DPA
King County Prosecutor's Office-Appellate Unit

☒ petitioner

☐ Attorney for other party

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Washington Appellate Project

Date: April 2, 2014