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No. 69525-8-I

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

STATE OF WASHINGTON,

Respondent,

v.

RENEE BISHOP-McKEAN,

Appellant.

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

The Honorable Eric Z. Lucas
The Honorable Michael T. Downes

BRIEF OF APPELLANT

THOMAS M. KUMMEROW
Attorney for Appellant

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

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TABLE OF CONTENTS

A. ASSIGNMENT OF ERROR 1

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR..... 1

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

D. ARGUMENT..... 7

THE TRIAL COURT’S UNJUSTIFIED DENIAL OF
MS. BISHOP-MCKEAN’S DEMAND TO REPRESENT
HERSELF REQUIRES REVERSAL OF HER
CONVICTION 7

1. Ms. Bishop McKean had a constitutionally protected right to
represent herself. 7

2. Ms. Bishop-McKean’s request was unequivocal and
timely. 9

3. The unjustified denial of Ms. Bishop-McKean’s motion to
represent herself requires reversal of her conviction. 14

E. CONCLUSION 15

TABLE OF AUTHORITIES

UNITED STATES CONSTITUTIONAL PROVISIONS

U.S. Const. amend. VI..... 1, 7

U.S. Const. amend. XIV 7

WASHINGTON CONSTITUTIONAL PROVISIONS

Article I, section 22 1, 7, 10

FEDERAL CASES

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

Godinez v. Moran, 509 U.S. 389, 113 S.Ct. 2680, 125 L.Ed.2d 321
(1993)..... 13

Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461
(1938)..... 8

Mempa v. Rhay, 389 U.S. 128, 19 L. Ed. 2d 336, 88 S. Ct. 254
(1967)..... 8

WASHINGTON CASES

State v. Barker, 75 Wn.App. 236, 881 P.2d 1051 (1994)..... 9, 10, 13

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

State v. Hahn, 106 Wn.2d 885, 726 P.2d 25 (1986)..... 11

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

State v. Stegall, 124 Wn.2d 719, 881 P.2d 979 (1994)..... 8

State v. Stenson, 132 Wn.2d 668, 940 P.2d 1239 (1997), *cert. denied*,
523 U.S. 1008 (1998)..... 8

State v. Vermillion, 112 Wn.App. 844, 51 P.3d 188 (2002), *review*
denied, 148 Wn.2d 1022 (2003) 10, 11, 12, 14

State v. Woods, 143 Wn.2d 561, 23 P.3d 1046, *cert. denied*, 534 U.S.
964 (2001)..... 8

A. ASSIGNMENT OF ERROR

The trial court violated Renee Bishop-McKean's Sixth Amendment as well as article I, section 22 rights to represent herself.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

A defendant has a right under the United States and the Washington Constitutions to the assistance of counsel. A defendant may waive this right to counsel and instead represent herself where a request to do so is timely and unequivocal. Here, Ms. Bishop-McKean made a pretrial unequivocal request to represent herself that was not coupled with a request for a continuance of the trial. Nevertheless, the trial court delayed ruling on her unequivocal request, ultimately avoiding the issue entirely and transferring it to another judge, who in turn denied it. Is Ms. Bishop-McKean entitled to reversal of her conviction where the trial court violated her timely-requested and constitutionally-protected right to represent herself?

C. STATEMENT OF THE CASE

Renee Bishop-McKean was charged with one count of attempted first degree murder and one count of first degree assault, the assault count also alleging a sentence enhancement for use of a deadly

weapon. CP 112-13. At a pretrial hearing on April 6, 2012, Ms.

Bishop-McKean expressed an unequivocal desire to represent herself:

THE COURT: Monday would be the start of trial unless I postpone it. So I thought I heard your lawyer saying something about your proceeding without an attorney, but I haven't heard anything from you about that. So what is it that you are proposing?

THE DEFENDANT: Let's proceed on Monday, then.

THE COURT: And who's going to represent you?

THE DEFENDANT: I will.

THE COURT: Are you sure about that?

THE DEFENDANT: Yes, sir.

1RP 9.¹ The court then engaged in an extensive colloquy regarding Ms. Bishop-McKean's desire to represent herself, at the conclusion of which she had not wavered from her desire to represent herself. 1RP 9-21. Instead of ruling on Ms. Bishop-McKean's request, the court unilaterally decided to transfer the matter to a different judge:

THE COURT: I'm going to let Judge Kurtz deal with this because I'm out of time. I need you to think about something in the meantime, ma'am. You're looking at under a standard range of going to prison for up to 147 months. If there are substantial and compelling reasons to exceed the standard range, you're looking at going to prison for the rest of your life. You know very little

¹ There are two volumes of transcripts for April 6, 2012. "1RP" denotes the hearing before Judge Downes, and "2RP" denotes the hearing before Judge Lucas.

about the rules of evidence. You know very little about the rules of procedure. You don't know anything about how to cross-examine a DNA expert. You don't know what the elements of the offense are.

So between now and the time Judge Kurtz can get back to you, you need to spend a significant amount of time asking yourself how good an idea is this for me to be representing myself. Okay?

THE DEFENDANT: Yes, sir.

THE COURT: And, you know, in the end, if you know what you're doing, courts generally let people do it. But the court would need to know that you're making an unequivocal request, *which it appears you are*, and that you know what you're doing. In the end, it's going to be your call. You need to think about it.

1RP 21-22 (emphasis added).²

At this subsequent hearing, several matters were discussed before addressing Ms. Bishop-McKean's desire to represent herself.

2RP 1-6. The court turned to Ms. Bishop-McKean and questioned her about her request:

THE COURT: So Ms. Bishop-McKean, I understand that you have [sic] a little bit of a conversation with Judge Downes?

THE DEFENDANT: Yes sir.

THE COURT: So what was it you told him?

² Instead of transferring the matter to Judge Kurtz, the matter was transferred to Judge Lucas.

THE DEFENDANT: He asked me a bunch of specific questions regarding answering questions, can I read, grade level, college, and particular legal questions. I don't profess in any way, shape, or form to be an attorney, but I would like to be in pro se and represent myself.

THE COURT: But what?

THE DEFENDANT: I would like to be in pro se and represent myself.

THE COURT: Why?

THE DEFENDANT: A lot of reasons I would rather not speak of.

THE COURT: Well, you are going to have to speak of them if you want me to rule on it.

2RP 7-8. The court continued to probe Ms. Bishop-McKean, ultimately asking her about her transfer to Western State Hospital for a competency evaluation and her daily medication. 2RP 8-11. The court then asked Ms. Bishop-McKean about her current attorney:

THE COURT: So is there some problem that you have with Mr. Pandher?

THE DEFENDANT: Oh, no, no, no, no, other than the fact he wants an extension until June, and I have to sit in jail until he is ready to proceed. It is not his fault that prior counsel wasn't ready. He wants to extend it to June and that's understandable.

THE COURT: So is the real problem, the June request?

THE DEFENDANT: Yes, sir. Your jail is just too hard. It's too difficult. People would rather be in prison or dead than be in your jail.

THE COURT: Okay.

So it sounds to me like that really the problem is not that you want to be pro se and that you want a new attorney. The problem is you just want to go to trial.

THE DEFENDANT: Yes.

2RP 15-16.

The court engaged Ms. Bishop-McKean in a discussion about what a reasonable time for trial might be, and then the court asked Ms.

Bishop-McKean:

THE COURT: Do you think it might be helpful before you make a final decision on going pro se to meet with [Mr. Pandher] and talk with him about the case.

THE DEFENDANT: That would be a pretty good idea, absolutely. I was hoping for that, a PV [sic] or something.

2RP 17. The court stopped questioning Ms. Bishop-McKean and spoke with the attorneys about scheduling. 2RP 17-22. The court ultimately entered a ruling regarding Ms. Bishop-McKean's request to represent herself:

THE COURT: I will follow Mr. Pandher's advice. I'm going to deny her motion without prejudice and without findings.

...

I think the order should reflect that the request to go pro se is denied without prejudice.

...

However, I will leave you with this thought, okay? I think I need to do this. In my opinion, okay, I think you should listen to this carefully. In my opinion you would be far better defended by a trained attorney, and I think it's unwise for you to represent yourself.

...

What you need to realize is that in representing yourself, you're not going to be doing yourself a service, and in many situations you are going to be doing yourself a disservice because you are not familiar with the law, you're not familiar with criminal procedure, you're not familiar with the Rules of Evidence, right?

...

In this case, if this case turns on DNA evidence, you're not familiar with how to examine a DNA expert or cross-examine a DNA expert, and you could end up convicting yourself, and then you won't go anywhere. You will be in custody for 10 years, right?

THE DEFENDANT: Yes, sir.

THE COURT: That's my advice to you. Consider that.

THE DEFENDANT: I will.

2RP 23-24.

Following a jury trial, Ms. Bishop-McKean was convicted as charged. CP 75-77.³

³ At sentencing on the State's motion, the court sentenced Ms. Bishop-McKean on the attempted murder count only, as sentencing on the first degree assault conviction as well would have violated double jeopardy. 10/4/2012RP 3-4, 11.

D. ARGUMENT

THE TRIAL COURT'S UNJUSTIFIED DENIAL OF MS. BISHOP-MCKEAN'S DEMAND TO REPRESENT HERSELF REQUIRES REVERSAL OF HER CONVICTION

1. Ms. Bishop McKean had a constitutionally protected right to represent herself. The Sixth Amendment provides that “the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.” U.S. Const. amend. VI. In felony cases, a criminal defendant is entitled to be represented by counsel at all critical stages of the prosecution, including sentencing. *Mempa v. Rhay*, 389 U.S. 128, 134-37, 19 L. Ed. 2d 336, 88 S. Ct. 254 (1967). In addition, the Sixth and Fourteenth Amendments to the United States Constitution as well as art. I, § 22 of the Washington Constitution allow criminal defendants to waive their right to the assistance of counsel. *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). This waiver of the right to counsel must be knowing, voluntary, and intelligent. *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938); *State v. DeWeese*, 117 Wn.2d 369, 377, 816 P.2d 1 (1991).

The right to proceed *pro se* is neither absolute nor self-executing. *State v. Woods*, 143 Wn.2d 561, 586, 23 P.3d 1046, *cert.*

denied, 534 U.S. 964 (2001). When a defendant asks to represent herself, the trial court must determine whether the request is unequivocal and timely. *State v. Stenson*, 132 Wn.2d 668, 737, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). Absent a finding that the request was equivocal or untimely, the trial court must then determine if the defendant's request is voluntary, knowing, and intelligent, usually by colloquy. *Faretta*, 422 U.S. at 835; *State v. Stegall*, 124 Wn.2d 719, 881 P.2d 979 (1994).

This presumption does not give a court *carte blanche* to deny a motion to proceed *pro se*. 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. Such a finding must be based on some identifiable fact; the presumption in *Turay* does not go so far as to eliminate the need for any basis for denying a motion for *pro se* status. Were it otherwise, the presumption could make the right itself illusory.

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.

Madsen, 168 Wn.2d at 504-05. The unjustified denial of this right requires reversal. *Madsen*, 168 Wn.2d at 503; *Stenson*, 132 Wn.2d at 737.

2. Ms. Bishop-McKean's request was unequivocal and timely.

Ms. Bishop-McKean was unequivocal and unwavering before the trial court about her desire to represent herself. The court erred in failing to grant Ms. Bishop-McKean's request.

“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.*” *State v. Barker*, 75 Wn.App. 236, 241, 881 P.2d 1051 (1994) (emphasis added). “Although the trial court’s duties of maintaining the courtroom and the orderly administration of justice are extremely important, the right to represent oneself is a fundamental right explicitly enshrined in the Washington Constitution and implicitly contained in the United States Constitution. The value of respecting this right outweighs any resulting difficulty in the administration of justice.” *Madsen*, 168 Wn.2d at 509.

Here, Ms. Bishop-McKean demanded to exercise her right to represent herself unequivocally before Judge Downes and did not ask for continuance, even confirming that the following Monday for the start of trial was fine with her. 1RP 9. This was a sufficient invocation of the right to represent oneself and Judge Downes was compelled to rule on it. *See Madsen*, 168 Wn.2d at 506 (“*Madsen explicitly* and

repeatedly cited article I, section 22 of the Washington State Constitution - the provision protecting Madsen's right to represent himself." (emphasis in original)). Further, given Ms. Bishop-McKean's unequivocal request, she had the right to represent herself *as a matter of law*. *Barker*, 75 Wn.App. at 241.

Judge Downes' refusal to rule on Ms. Bishop-McKean's request arose from his concern that she was making a mistake since she knew little about how to try a case. 1RP 21-22. The right to represent oneself is so fundamental that it is afforded despite its potentially detrimental impact on both the defendant and the administration of justice. *Faretta*, 422 U.S. at 834; *State v. Vermillion*, 112 Wn.App. 844, 51 P.3d 188 (2002), *review denied*, 148 Wn.2d 1022 (2003). A court "may not deny pro se status merely because the defendant is unfamiliar with legal rules." *Madsen*, 168 Wn.2d at 509.

The purpose of asking the defendant about his experience, if any, in representing himself and his familiarity, if any, with the rules of evidence and other aspects of courtroom procedure is not to determine whether he has sufficient technical skill to represent himself. Rather, the purpose is to determine whether he fully understands the risks he faces by waiving the right to be represented by counsel, such as the risk that lack of familiarity with evidentiary rules could result in admission of prosecution evidence that could have been excluded by a proper objection, or exclusion of defense evidence that the defendant would like to present but

cannot for some reason based on evidentiary rules of which he has no knowledge. *See State v. Hahn*, 106 Wn.2d 885, 889-90 & n. 3, 726 P.2d 25 (1986). A defendant need not himself have the skill and experience of a lawyer in order to competently and intelligently choose self-representation, but the record should establish that “he knows what he is doing and his choice is made with eyes open.” *Id.* at 889, 726 P.2d 25 (quoting *Faretta*, 422 U.S. at 835).

Vermillion, 112 Wn.App. at 857.

This case is similar to *Vermillion*. Mr. Vermillion repeatedly and unequivocally expressed his desire to represent himself prior to trial. *Vermillion*, 112 Wn.App. at 852. In response to a judge’s questions during the colloquy, “Mr. Vermillion stated that he had taken a couple of years of college, had studied some law, and was prepared to represent himself, examine witnesses, and to be held to the same standard as a lawyer.” *Id.* However, he admitted to having done “very little preparation” for trial. *Id.* In denying Mr. Vermillion’s request to represent himself, the court ruled:

And sir, I believe it’s really in your best interests to be able to have counsel. These are serious charges, and you haven’t convinced me that you would be prepared to even meet the allegations or know how to proceed in a courtroom, given the serious nature of these charges.

Id. at 852-53. In reversing Mr. Vermillion’s conviction, this Court noted that

The record reflects that both Judge Pechman and Judge Shapira were trying to serve Mr. Vermillion's best interests by denying his requests for self-representations. Their denials of Mr. Vermillion's motions were based on the belief that self-representation wouldn't be in Mr. Vermillion's "best interest" because he was thought not sufficiently educated in the law to adequately represent himself. However, that is not the test. No showing of technical knowledge is required. *Faretta*, 422 U.S. at 835, 95 S.Ct. 2525.

Vermillion, 112 Wn.App. at 857.

Here, both judges were concerned about Ms. Bishop-McKean's lack of knowledge of the rules of evidence and the rules of procedure and were also concerned that going to trial without a lawyer would not be in her best interest. But, "[a]ny consideration of a defendant's ability to exercise the skill and judgment necessary to secure himself a fair trial was rendered inappropriate by *Faretta*." *Id.* at 858. Further, "the right of self-representation is afforded a defendant despite the fact that its exercise will almost surely result in detriment to the defendant[.]" *Id.* at 858. "If a person is competent to stand trial, that person is competent to represent himself." *Id.* at 857, citing *Godinez v. Moran*, 509 U.S. 389, 113 S.Ct. 2680, 125 L.Ed.2d 321 (1993).

Ms. Bishop-McKean was clear before Judge Downes that she wanted to represent herself. 1RP 9. Judge Downes engaged Ms. Bishop-McKean in an extensive colloquy, which just reinforced the

fact that her request was unequivocal. 1RP 9-21. At that point, Ms. Bishop-McKean had the right, as a matter of law, to represent herself. *Barker*, 75 Wn.App. at 241. But Judge Downes was concerned about Ms. Bishop-McKean's ability to try the case, expressing that concern repeatedly during the colloquy. So concerned was Judge Downes, that he refused to rule on Ms. Bishop-McKean's request. 1RP 21-22.

Judge Lucas shared Judge Downes' concern about Ms. Bishop-McKean's ability to represent herself competently, asking many of the same questions as Judge Downes, focusing on Ms. Bishop-McKean's lack of knowledge of the rules of evidence and the rules of procedure. 2RP 8-11. Ultimately, like Judge Downes, Judge Lucas refused to grant Ms. Bishop-McKean's request, and instead urged her to reconcile with Mr. Pandher, her court-appointed attorney, because of his concern that Ms. Bishop-McKean would be unable to provide herself with a fair and competent trial. 2RP 23-24.

The trial court's refusal to grant Ms. Bishop-McKean's timely and unequivocal request to represent herself was unjustified. This was especially so in light of the apparent rationale for the refusal: the desire to keep Ms. Bishop-McKean from engaging in conduct that would not be in her best interest.

3. The unjustified denial of Ms. Bishop-McKean's motion to represent herself requires reversal of her conviction. Where a defendant's motion to represent herself was erroneously and unjustifiably denied, the defendant is entitled as a matter of law to reversal of her conviction and remand to allow her to defend in person as guaranteed by the United States and Washington Constitutions. *Madsen*, 168 Wn.2d at 510. Where a conviction is reversed for a violation of the right to self-representation, the case must be remanded for retrial. *Vermillion*, 112 Wn.App. at 848.


Ms. Bishop-McKean unequivocally requested to represent herself prior to trial. The request was not accompanied by a request to continue the trial. The trial court's refusal to allow Ms. Bishop-McKean to represent herself at that time was unjustified and her conviction must be reversed.

E. CONCLUSION

For the reasons stated, Ms. Bishop-McKean requests this Court reverse her conviction and remand for a new trial.

DATED this 17th day of May 2013.

Respectfully submitted,



THOMAS M. KUMMEROW (WSBA 21518)
tom@washapp.org
Washington Appellate Project – 91052
Attorneys for Appellant

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STATE OF WASHINGTON,)	
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RENEE BISHOP-McKEAN,)	
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Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 17TH 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:

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SNOHOMISH COUNTY PROSECUTOR'S OFFICE
3000 ROCKEFELLER
EVERETT, WA 98201</p> | <p>(X) U.S. MAIL
() HAND DELIVERY
() _____</p> |
| <p>[X] RENEE BISHOP-McKEAN
361358
WASHINGTON CORRECTIONS CENTER
FOR WOMEN
9601 BUJACICH RD NW
GIG HARBOR, WA 98332</p> | <p>(X) U.S. MAIL
() HAND DELIVERY
() _____</p> |

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 COURT OF APPEALS DIV I
 STATE OF WASHINGTON

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