No. 90139-2
COA No. 69525-8-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RENEE BISHOP-McKEAN,

Petitioner.

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

The Honorable Eric Z. Lucas

PETITION FOR REVIEW

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RULES

A. IDENTITY OF PETITIONER

Renee Bishop-McKean asks this Court to accept review of the Court of Appeals decision terminating review designated in part B of this petition.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4(b), petitioner seeks review of the unpublished Court of Appeals decision in *State v. Renee Bishop-McKean*, No. 69525-8-I (March 10, 2014). A copy of the decision is in the Appendix at pages A-1 to A-8.

C. ISSUE PRESENTED FOR REVIEW

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 a significant question of law under the United States and Washington presented entitling Ms. Bishop-McKean to reversal of

her conviction where the trial court violated her timely-requested and constitutionally-protected right to represent herself?

D. 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-

[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.

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 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.

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

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?
>
> 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.

The Court of Appeals rejected Ms. Bishop-McKean's argument that her constitutionally protected right to represent herself was violated, ruling she never unequivocally asserted her right of self-representation. Decision at 6-8.

E. ARGUMENT ON WHY REVIEW SHOULD BE GRANTED

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

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).

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*. *State v. Barker,* 75 Wn.App. 236, 241, 881 P.2d 1051 (1994).

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 Court of Appeals conclusion that "[g]iven the time constraints of the trial call calendar, Judge Downes was unable to determine whether [Ms.] Bishop-McKean's request was an intelligent and unequivocal waiver" ignores the Ms. Bishop-McKean's unequivocal request and misstates the court's ruling. The trial court did

not refuse to allow Ms. Bishop-McKean to represent herself because of the demands of the trial call calendar, but because it thought she was making a mistake. 1RP 21-22. Further, the fact Ms. McKean ultimately decided to represent herself, which the Court of Appeals placed great reliance on, is of no moment. Ms. Bishop-McKean unequivocally stated a desire to represent herself, which she was constitutionally allowed to do. The fact the trial court refused to allow her her right of self-representation cannot be cured by a subsequent ruling that she wished to proceed with counsel.

This Court should accept review and rule Ms. Bishop-McKean's timely and unequivocal request entitled her, as a matter of right, to represent herself regardless of whether she was, in the trial court's eyes, making a mistake.

F. CONCLUSION

For the reasons stated, Ms. Bishop-McKean asks this Court to grant review and reverse her convictions.

DATED this 7th day of April 2014.

Respectfully submitted,

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APPENDIX A

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

STATE OF WASHINGTON, Respondent, v. RENEE CHRISTINE BISHOP-MCKEAN, Appellant.	)	No. 69525-8-I UNPUBLISHED OPINION FILED: March 10, 2014

VERELLEN, J. — Renee Bishop-McKean appeals from the judgment and sentence entered on the jury verdict finding her guilty of attempted first degree murder. She contends that the trial court erred by denying her motion to represent herself at trial. But the record amply demonstrates that Bishop-McKean never made an unequivocal request to represent herself. In an extensive colloquy with the trial court, she explained that she was frustrated by delays in starting trial, but preferred to proceed with appointed counsel. Under these circumstances, the trial court's denial of the motion was a sound exercise of its discretion, and furnishes no basis for appellate relief. Other issues Bishop-McKean raises are without merit. We affirm.

FACTS

Bishop-McKean was charged with one count of attempted first degree murder and one count of first degree assault.

The court granted Bishop-McKean's motion for a stay in the proceedings to allow an evaluation of her competency. After a 15-day evaluation period at a state psychiatric

hospital, the court concluded Bishop-McKean was not competent to stand trial. It entered an order to commit her for 90 days to restore her competency. On February 28, 2012, the court found Bishop-McKean competent to stand trial and set a trial date of April 6.

On March 30, Bishop-McKean requested substitute counsel. She explained, in response to questioning by the court, that she was asking for a new attorney, not asking to represent herself. Gurjit Pandher was appointed to represent her.

At trial call on Friday, April 6, Pandher told the court that he needed a continuance to effectively represent Bishop-McKean. He also told the court that Bishop-McKean wanted to represent herself, and that she believed that she would be ready for trial the following Monday, April 9.

Snohomish County Superior Court Judge Michael Downes conducted a limited colloquy, inquiring as to Bishop-McKean's age, education, courtroom experience, experience with the rules of evidence and criminal procedure, and understanding of the potential penalties applicable to the offense. Judge Downes determined that a more thorough inquiry was required, but he was unable to perform an adequate inquiry at that time because he was presiding over the trial call calendar. Instead, Judge Downes assigned consideration of Bishop-McKean's motion to Judge Eric Lucas, who was immediately available to complete the colloquy. Judge Lucas resumed the hearing that same day.

In response to Judge Lucas's questioning, Bishop-McKean explained that she was ready to go to trial the following Monday, but that she "would like to reserve Mr. Pandher . . . [i]n case I get cold feet."[1] After further inquiry by Judge Lucas, Bishop-

[1] Report of Proceedings (RP) (Apr. 6, 2012) at 8-9.

McKean clarified that her objective was to proceed to trial as quickly as possible, and that she was frustrated with her counsel:

> Six months I have been in jail for a crime I didn't commit with ineffective counsel, and it has been horrible. Now the Court and prosecution is asking me to start all over again, and I refuse to do that. I would much rather represent myself with the outcome I perceive it to be and what I wish to happen. I would have better luck if I do it myself rather than someone else who doesn't care and is unavailable and ineffective.[2]

Bishop-McKean also explained that she had no dissatisfaction with her present counsel, Pandher, except that she opposed his request for a continuance until June and she did not want to remain in jail for that time awaiting trial.

In response to the court's questioning, Bishop-McKean then specified that she did not want to represent herself, but only wanted her trial to be held as soon as possible:

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

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.

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.*

DEFENDANT: *Yes.*

COURT: What do you think is a more reasonable time?

. . . .

DEFENDANT: Sooner. April 30 when the trial date starts. Within the confines of my 60-day trial rights is what I'm hoping for.

COURT: Okay. So if the case was continued . . . to April 27, then under those circumstances, you would be happy with Mr. Pandher and be ready to proceed?

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[2] RP (Apr. 6, 2012) at 14-15.

DEFENDANT: Absolutely.

. . . .

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

DEFENDANT: That would be a pretty good idea, absolutely.[3]

Based on this colloquy, the court denied Bishop-McKean's motion to represent herself, without prejudice to renew. The court continued the trial for two weeks to allow Bishop-McKean to confer with her counsel and to decide whether she wanted to represent herself. She did not thereafter renew her request to represent herself.

Following trial, Bishop-McKean was found guilty of attempted first degree murder and first degree assault with a deadly weapon. Bishop-McKean appeals.

ANALYSIS

Bishop-McKean contends that the trial court violated her constitutional right to represent herself. We disagree.

The federal and state constitutions guarantee a defendant the right to self-representation.[4] To exercise the right, the defendant must make an unequivocal, knowing, intelligent, and timely request.[5] A cursory or routine inquiry is insufficient:

> "[A] judge must investigate as long and as thoroughly as the circumstances . . . demand. The fact that an accused may tell him that he

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[3] RP (Apr. 6, 2012) at 15-17 (emphasis added).

[4] U.S. CONST. amends. VI, XIV; WASH. CONST., art. I, § 22; see also Faretta v. California, 422 U.S. 806, 828-19, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975).

[5] State v. DeWeese, 117 Wn.2d 369, 377, 816 P.2d 1 (1991).

> is informed of his right to counsel and desires to waive this right does not automatically end the judge's responsibility."[6]

A trial court's denial of a request for self-representation is reviewed for abuse of discretion.[7] Discretion is abused when the decision is "manifestly unreasonable or 'rests on facts unsupported in the record or was reached by applying the wrong legal standard.'"[8]

Bishop-McKean contends that she "made a pretrial unequivocal request to represent herself that was not coupled with a request for a continuance of the trial."[9] She contends that the "trial court delayed ruling on her unequivocal request," and transferred it "to another judge, who in turn denied it."[10] These contentions are not accurate.

Despite the fact that Bishop-McKean's motion was raised without advance notice on the eve of trial, the judge presiding over the trial call calendar sought to ascertain whether her request was an informed and unequivocal waiver of her right to be represented by counsel. The colloquy Judge Downes conducted included questions similar to those outlined by the court in its sample colloquy in State v. Christensen and approved in subsequent cases.[11] Given the time constraints of the trial call calendar, Judge Downes was unable to determine whether Bishop-McKean's request was an

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[6] Bellevue v. Acrey, 103 Wn.2d 203, 210, 691 P.2d 957 (1984) (alteration in original) (quoting Von Moltke v. Gillies, 332 U.S. 708, 723-24, 68 S. Ct. 316, 92 L. Ed. 2d 309 (1948)).

[7] State v. Breedlove, 79 Wn. App. 101, 106, 900 P.2d 586 (1995).

[8] State v. Madsen, 168 Wn.2d 496, 504, 229 P.3d 714 (2010) (quoting State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)).

[9] Appellant's Br. at 1.

[10] Appellant's Br. at 1.

[11] 40 Wn. App. 290, 295 n.2, 698 P.2d 1069 (1985); see also State v. Vermillion, 112 Wn. App. 844, 858 n.3, 51 P.3d 188 (2002).

intelligent and unequivocal waiver. It was entirely appropriate, in these circumstances, for Judge Downes to decide that further questioning was appropriate and to ensure that Bishop-McKean's motion was promptly heard by Judge Lucas that same day.

Bishop-McKean's remarks to Judge Lucas demonstrate that, in fact, she did not seek to represent herself. Bishop-McKean clearly explained that she would prefer to receive the assistance of her attorney, provided that she obtain a prompt trial date.

Significantly, Bishop-McKean agreed that she wanted to confer with her counsel, and Judge Lucas denied her motion without prejudice to renew, so that she could, in fact, confer with her attorney. Under these circumstances, Judge Lucas had a tenable reason to deny the motion. The fact that Bishop-McKean never raised the issue again and proceeded through trial represented by counsel strongly supports the inference that she never intelligently and unequivocally asserted her right to self-representation at that time, or afterward.

Bishop-McKean subsequently filed a bar grievance against Pandher, causing him to withdraw from representation. Kenneth Lee was then appointed by the court to represent her. She did not object to the appointment of Lee, and agreed to a continuance to allow him to prepare for trial. These circumstances, likewise, do not support Bishop-McKean's argument that she unequivocally asserted the right to self-representation.

Bishop-McKean argues that she was entitled to represent herself as a matter of law, citing State v. Barker[12] and State v. Vermillion.[13] But the facts in Barker and

[12] 75 Wn. App. 236, 881 P.2d 1051 (1994).

[13] 112 Wn. App. 844, 51 P.3d 188 (2002).

Vermillion are distinguishable from the circumstances here.

In Barker, the defendant requested to represent himself on the eve of trial after unsuccessfully seeking appointment of new counsel.[14] Unlike the circumstances here, however, the judge engaged in no colloquy with Barker and merely informed Barker that his request was not timely.[15] In Barker, unlike here, the trial court did not analyze the facts and circumstances of the case and failed to exercise any discretion whatsoever.[16]

In Vermillion, the defendant made five requests to represent himself, expressed no hesitation, and understood the consequences of self-representation, having previously represented himself in another case.[17] The trial court denied the requests after concluding that self-representation was not in the defendant's best interest.[18] This court found such action to be an abuse of discretion, stating that the purpose of the colloquy is to determine if the defendant understands the risks involved in self-representation, not whether he has the technical skill to represent himself.[19]

Here, by contrast, two judges conducted an extensive colloquy, revealing that Bishop-McKean's request was equivocal, at best. Judge Lucas in particular analyzed Bishop-McKean's request based on a consideration of all of the circumstances and on her responses during the colloquy. Bishop-McKean ultimately decided to proceed to trial with the assistance of counsel and never again asserted the desire to represent

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[14] Barker, 75 Wn. App. at 238.

[15] Id. at 239-40.

[16] Id.

[17] Vermillion, 112 Wn. App. at 852-57.

[18] Id. at 857.

[19] Id.

herself. Her earlier request for self-representation was equivocal. There was no abuse of discretion.

Bishop-McKean raises numerous issues in her statement of additional grounds for review. None have merit. She identifies alleged discrepancies or falsehoods in witness trial testimony, makes conclusory arguments that remarks by witnesses and attorneys at trial were prejudicial to her, and claims ineffective assistance of counsel based on matters outside the record on appeal. Her contentions that much of the evidence at trial was inadmissible are based on inapplicable legal standards, minimal analysis, and conclusory statements about the historical facts of the case that are not supported by the record.[20] Some of the arguments made are incomprehensible. Her complaints about jail conditions also involve matters outside the record on appeal.[21]

Affirmed.

WE CONCUR:

[20] State v. Bugai, 30 Wn. App. 156, 158, 632 P.2d 917 (1981); State v. King, 24 Wn. App. 495, 505, 601 P.2d 982 (1979).

[21] See Bugai, 30 Wn. App. at 156; King, 24 Wn. App. at 505.

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. 69525-8-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 Mary Kathleen Webber, DPA
Snohomish County Prosecutor's Office

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: April 7, 2014