72904-7

NO. 72904-7-I

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

STATE OF WASHINGTON,

Respondent,

v.

JON DEL DUCA,

Appellant.

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

The Honorable Mary Roberts, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. DEL DUCA WAS DENIED HIS CONSTITUTIONAL RIGHT TO THE ASSISTANCE OF COUNSEL AT TRIAL.

The State has supplemented the record with materials from Del Duca's 2011 case, including the verbatim report of proceedings from five hearings.[1] In its brief, the State spends considerable time establishing that – just like his 2012 case – Del Duca was persistently displeased with counsel in the 2011 matter; he repeatedly voiced similar complaints about inadequate representation from public defenders; and he indicated he would not allow assigned counsel to represent him, thereby forcing him to proceed pro se. See Brief of Respondent, at 5-18.

While the State views the 2011 proceedings merely as additional proof Del Duca was persistently dissatisfied with appointed counsel, the more relevant revelation from the 2011 case is that the trial judge in that matter handled a similar situation without violating Del Duca's constitutional right to the assistance of counsel.[2]

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[1] The State refers to these supplemental volumes as: RP(A) – 11/16/11; and RP(B) – 11/29/11, 12/5/11, 1/24/12, 2/2/12.

[2] The trial judge in the 2011 matter was the Honorable Lori K. Smith. See State v. Del Duca, 180 Wn. App. 1029, review denied, 181 Wn.2d 1011, 335 P.3d 940 (2014).

In the current case, the State concedes there is no support in the record for Judge Roberts' finding that Del Duca forfeited his right to counsel. See Brief of Respondent, at 44 (referencing Judge Roberts' erroneous belief that Del Duca had forfeited right). The State also appears to concede there was no "waiver by conduct" because it does not argue for such a finding.[3] Instead, the State argues Judge Roberts properly found that Del Duca had knowingly, intelligently, and voluntarily waived counsel. See Brief of Respondent, at 37-44. This is incorrect.

In arguing that Judge Roberts found such a waiver, the State quotes her from September 25, 2013, saying, "I am making a determination that Mr. Del Duca has knowingly, intelligently, and voluntarily chosen to represent himself." Brief of Respondent, at 34. While she did indeed utter these words, they cry out for context.

Judge Roberts appeared at the September 25th hearing with a proposed form entitled "Waiver of Counsel." When Del Duca refused to sign the waiver, Judge Roberts initially attempted to modify the form to serve as an order on the subject of Del Duca's representation. 15RP 11-12. But she did not complete that

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[3] Like forfeiture, waiver by conduct would have required misconduct. See Brief of Appellant, at 21-22 (citing State v. Afeworki, 189 Wn. App. 327, 346, 358 P.3d 1186 (2015) and City of Tacoma v. Bishop, 82 Wn. App. 850, 859, 920 P.2d 214 (1996)).

modification in court. Recognizing the form's language (which indicates "I understand this, I understand that") was ill suited for such an order, Judge Roberts promised to change the language, enter a new order indicating "what I think happened," and then send Del Duca a copy so that he could voice his objections. 15RP 12. This plan was confirmed later in the hearing, when Judge Roberts said, "I'm going to create a new order with regard to, that you're going to represent yourself."[4] 15RP 22.

Judge Roberts' statement that she was making a determination that Del Duca had knowingly, intelligently, and voluntarily chosen to represent himself was merely a preview of what she anticipated the new written order would say. 15RP 12. But such an order was never entered. Moreover, subsequent discussions of her ruling on the subject of representation, including an additional promise of a thorough written order, confirm she ultimately relied on a finding of *forfeiture* rather than voluntary waiver. See 17RP 231-232 ("I have already decided that you have

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[4] The State has supplemented the record with the written waiver form Del Duca refused to sign on September 25, 2013, and which Judge Roberts began to modify. CP 587-589. Under "court's findings," a sentence that reads, "I find the defendant's waiver of counsel to be knowingly, intelligently, and voluntarily made" and "[t]he defendant understands the charges and consequences of his/her waiver" has been intentionally crossed out, indicating the absence of such findings. See CP 589.

forfeited your right to have counsel" and "I am going to issue a clearer written decision on the forfeiture of your right to have appointed counsel so that you will know exactly what my reasoning is."); 50RP 7 ("the reasons that you – that I found that you forfeited counsel were tied to the fact that you were not accepting of an attorney's determination that issues that you wanted to raise were not the ones that they could ethically raise, because they didn't believe that they were supported by the law. And so you're going to run into that same problem with any other attorney who's appointed.").

Notably, an oral decision from the bench is merely an expression of the judge's informal opinion at the time and is not binding until reduced to a written order. DGHI, Enterprises v. Pacific Cities, Inc., 137 Wn.2d 933, 944, 977 P.2d 1231 (1999); State v. Dailey, 93 Wn.2d 454, 458-459, 610 P.2d 357 (1980); Dept. of Social and Health Servs. v. Handy, 62 Wn. App. 105, 109 n.8, 813 P.2d 610 (1991). "A court's oral decision 'is necessarily subject to further study and consideration, and may be altered, modified, or completely abandoned.'" Hidalgo v. Barker, 176 Wn. App. 527, 545, 309 P.3d 687 (2013) (quoting Ferree v. Doric Co., 62 Wn.2d 561, 566-567, 383 P.2d 900 (1963)).

The only definitive and controlling ruling in the 2012 case is Judge Roberts' September 19, 2013 oral decision – and consistent written order incorporating that oral decision – in which she found that, although Del Duca had not knowingly, intelligently, and voluntarily waived his right to counsel, he had forfeited that right. See 14RP 24; CP 260.

Anticipating the above argument, the State argues that – although Judge Roberts mistakenly denied Del Duca the assistance of counsel based on forfeiture – this Court can affirm on any grounds and should do so by finding a knowing, voluntary, and intelligent waiver of counsel. See Brief of Respondent, at 44. In other words, the State asks this Court to find what Judge Roberts ultimately recognized she could not.

The State cites several cases for the proposition that a defendant can be deemed to have voluntarily waived his right to counsel when he declines to proceed with counsel. See Brief of Respondent, at 38-43. With one critical caveat discussed below, this is true. The three Washington cases upon which the State relies for this proposition – State v. DeWeese, 117 Wn.2d 369, 816 P.2d 1 (1991), State v. Staten, 60 Wn. App. 163, 802 P.2d 1384, review denied, 117 Wn.2d 1011, 816 P.2d 1224 (1991), and State v.

Sinclair, 46 Wn. App. 433, 730 P.2d 742 (1986), review denied, 108 Wn.2d 1006 (1987) – were brought to Judge Roberts' attention prior to the hearing on September 25, 2013. See CP 590-591.

Yet, having seen these decisions, Judge Roberts did not ultimately enter an order finding voluntary waiver. This is not surprising because, as DeWeese makes clear, even in cases where the defendant is told he will not be provided new counsel, there is a requirement that "[t]he defendant's request to proceed pro se must be stated unequivocally" for there to be a knowing and valid waiver of the right to counsel. DeWeese, 117 Wn.2d at 377 (citing State v. Imus, 37 Wn. App. 170, 180, 679 P.2d 376 (1984)). The DeWeese court expressly held, "this requirement extends to a defendant's choice to represent himself rather than remain with current appointed counsel after the court has rejected an unjustified request for substitute counsel." Id. If there is an unequivocal stated request to go pro se, the trial court must then also engage in the standard inquiry necessary to establish a knowing and intelligent waiver under Faretta and Acrey. Id. at 377-378.

DeWeese, Staten, and Sinclair each involved an unequivocal statement by the defendant that – given the choice of self-representation or staying with counsel – the defendant was

choosing to represent himself. DeWeese, 117 Wn.2d at 373; Staten, 60 Wn. App. at 167-168; Sinclair, 46 Wn. App. at 435. In contrast, Del Duca clearly did not make an unequivocal statement that he would represent himself. Rather, just as he had done throughout earlier hearings, on September 25, 2013, Del Duca made it clear he did not want to represent himself. Although at one point he indicated representing himself was the "better of two evils," he immediately launched into argument on the need for counsel's help. 15RP 3-12. Judge Roberts appears ultimately to have recognized that, under DeWeese, she could not enter an order finding a knowing and voluntary waiver of counsel in the absence of Del Duca's unequivocal stated request to go it alone. Hence, the absence of a written order finding voluntary waiver.

The State even concedes Del Duca never unequivocally requested to proceed pro se. See Brief of Respondent, at 35 (describing Del Duca as a defendant who "refuses to unequivocally waive counsel."). But rather than acknowledge, under DeWeese, that this is fatal to its position, the State cites United States v. Garey, 540 F.3d 1253 (11th Cir. 2008), and cases from other jurisdictions that have dispensed with the requirement that defendants expressly invoke the right to self-representation before

a waiver can be found. See Brief of Respondent, at 41. In light of DeWeese, however, Washington is not one of these jurisdictions.

Ultimately, Judge Roberts was correct in failing to find a knowing, voluntary, and intelligent waiver of Del Duca's right to counsel. Any such finding fails under DeWeese. But the proper course was not to find forfeiture where it did not exist. Rather, the proper course was that taken in the 2011 case and taken earlier in the 2012 case – to simply require Del Duca (as unhappy as he was) to continue with appointed counsel unless and until he stated his desire to represent himself. That approach would have avoided any constitutional violation and the need for a new trial.

2. JUDGE ROBERTS ERRED WHEN SHE FAILED TO DECIDE DEL DUCA'S POST-TRIAL MOTIONS.

Judge Roberts indicated on the record she would issue a written decision on Del Duca's post-trial motions. 51RP 47. This promise suggests she merely forgot to do so.

The State argues she should be relieved from issuing an order because, under CrR 7.4(b) and CrR 7.5(b), post-judgment motions are to be filed within 10 days following the jury's verdict. Brief of Respondent, at 45-46. However, as pointed out in Del Duca's opening brief, these same provisions allow the trial judge to

extend this period. Since Judge Roberts did not find Del Duca's motion untimely, and instead heard argument from both sides on the issues, she chose to extend the filing period.

The State also argues a written order is useless in light of Judge Roberts' prior rulings on many of the same issues found in the post-trial motions. Brief of Respondent, at 45. But given Judge Roberts' promise to file a written decision, she apparently did not agree. Assuming this Court does not reverse Del Duca's convictions based on the outright denial of counsel, this case should be remanded for entry of the promised order.

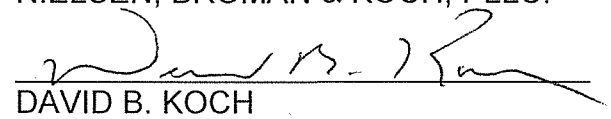
B. CONCLUSION

For the reasons argued in the opening brief and above, this Court should reverse Del Duca's convictions and remand for a new trial.

DATED this 13th day of July, 2017.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



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	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 13TH DAY OF JULY, 2016, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JON DEL DUCA
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AIRWAY HEIGHTS, WA 99001

SIGNED IN SEATTLE WASHINGTON, THIS 13TH DAY OF JULY, 2016.

X Patrick Mayovsky