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No. 67541-9-I

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

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STATE OF WASHINGTON,

Respondent,

v.

NORRIAN PHILLIP PHILLIPS,

Appellant.

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

The Honorable Ronald Kessler  
The Honorable Theresa B. Doyle  
The Honorable Gregory P. Canova

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court denied Mr. Phillips' constitutionally protected right to counsel.

2. The trial court erred in finding Mr. Phillips unequivocally requested to represent himself.

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 himself where a request to do so is timely and unequivocal. Here, Mr. Phillips' repeated requests to represent himself resulted from his frustration with his attorney's perceived lack of trial preparation and unwillingness to listen to him and pursue a timely trial by jury. Nevertheless, the trial court found Mr. Phillips' request to be unequivocal and dismissed counsel. Is Mr. Phillips entitled to reversal of his convictions where the trial court violated his constitutionally protected right to counsel?

C. STATEMENT OF THE CASE

Norrian Phillips was charged with a number of felony offenses in three different superior court cause numbers.<sup>1</sup> At a hearing on January 6, 2011, Mr. Phillips moved for new counsel based upon a complete and total breakdown in communication between counsel and himself. RP 10-13. Counsel agreed that their relationship had broken down and the trial court ordered new counsel be appointed. RP 13-14.

On March 23, 2011, Mr. Phillips expressed his dissatisfaction with new counsel and moved to represent himself:

Well I want to – my lawyer is not handling my case properly. And, um, you know, I want to go on record, for the record that I want to actually proceed Pro Se and set my case for trial.

RP 18-19. A discussion ensued between the trial court and Mr. Phillips about what he perceived to be a conflict with counsel:

THE COURT: What is the dispute?

DEFENDANT PHILLIPS: Well, I just – I don't feel – I'm not even going to talk to her anymore about the case. So, I'm not going to, there's not going to be any more communication but the dispute is is [sic] that

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<sup>1</sup> In King County cause no. 10-1-06833-0, Mr. Phillips was charged with possession of a stolen vehicle and second degree burglary. CP 141-42; RP 64. In King County cause no. 10-1-08981-7, Mr. Phillips was charged with second degree theft and first degree trafficking in stolen property. CP 1-7; RP 77. Finally, in King County cause no. 10-1-08975-2, Mr. Phillips was charged with second degree burglary and first degree trespass, the latter charge a gross misdemeanor. CP 54-62; RP 83.

she's not actually trying to help me fight my case. She's just came right through the door talking about she's ready to negotiate a plea deal – I'm not trying to plea. I'm, I want to go to trial, so –

THE COURT: And that's fine.

DEFENDANT PHILLIPS: And, yeah, I want to be – I'm gonna do it – I'd like to do it myself. So I prefer not to, to deal with this woman anymore, so –

THE COURT: So it is your unequivocal desire to represent yourself?

DEFENDANT PHILLIPS: Absolutely.

RP 18-19. The court engaged in a colloquy with Mr. Phillips regarding his desire to represent himself and concluded he made an unequivocal, and knowing, voluntary, and intelligent waiver of his right to counsel. RP 19-25.

At the next hearing, with Mr. Phillips representing himself, during a discussion between the court, the prosecutor, and Mr. Phillips, the prosecutor indicated that the State would be seeking an exceptional sentence on the basis of the “free crimes” exception. RP 29-30.<sup>2</sup> Mr. Phillips immediately moved to retract his waiver of counsel and moved to have counsel reappointed to represent him.

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<sup>2</sup> Under RCW 9.94A.535(2)(c) the trial court may impose an exceptional sentence without a jury finding where “[t]he defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished.” Mr. Phillips offender score was 19. RP 94-95.

RP 30. The court granted Mr. Phillips' motion, cautioning that "[y]ou're not gonna get to change your mind again." RP 31-32.

Mr. Phillips again moved to discharge counsel on May 23, 2011, because counsel had failed to visit him, failed to prepare for trial, and was only interested in negotiating a guilty plea. RP 36-37. Mr. Phillips reiterated his desire to go to trial as soon as possible and with a new attorney:

THE COURT: -- you got -- your goal is to get to trial reasonably quickly, correct?

DEFENDANT PHILLIPS: My goal is to get a new attorney.

THE COURT: I know that.

DEFENDANT PHILLIPS: Right. And, and to get to trial.

THE COURT: Your goal is to get to tr [sic], also get to trial reasonably quickly?

DEFENDANT PHILLIPS: Right.

RP 37. The court refused to discharge counsel and appoint a new attorney for Mr. Phillips:

THE COURT: Well, I'm not going to give you a new lawyer. I think you've had enough lawyers here. You've had lawyers, you've been Pro Se. You went off Pro Se. So, I'm gonna deny your Motion to Discharge.

...

DEFENDANT PHILLIPS: Okay. So, that's what the, that's the issue now. And so, basically you're, my constitutional rights have been tramped upon because

you're telling me I can't go Pro Se. I'm not going with SCRAP. That's all there is to it.

RP 40-41. Mr. Phillips continued to express his displeasure with his current attorney.

Counsel for Mr. Phillips rotated out of his case and new counsel from the same agency assumed his case. On June 17, 2011, this new attorney noted that Mr. Phillips had threatened her and sought to withdraw. RP 47-49. The court denied the attorney's request:

THE COURT: All right. Mr. Phillips has, uh, discharged other lawyers before. Um, it's clear to the Court that Mr. Phillips is simply not going to get along with any lawyer that represents him. Uh, and he doesn't get to create his own conflict. I'm going to deny the Motion to Withdraw. Um, and if it's necessary to create a security situation in the courtroom and that's what will happen.

DEFENDANT PHILLIPS: I mean that's fine but I mean, I'm not gonna, she's not gonna be my attorney at trial though. I'm just gonna go Pro Se.

RP 50. Mr. Phillips reiterated his dislike of his attorney, again moving to represent himself in light of his dissatisfaction:

THE COURT: Well, then you can tell it to uh, the Appeals Court because I, that's the decision I made. All right, well, then we – uh, so you now wish to represent yourself. Is that correct?

DEFENDANT PHILLIPS: I'm gonna have to, your Honor.

THE COURT: Okay, you do not have to. You understand that you have the right to a lawyer?

DEFENDANT PHILLIPS: No. I'm – you're denying me that.

THE COURT: I am not denying you that. You have a lawyer.

RP 51.

Defense counsel then moved to continue the case:

Um, and the reason for that is cause there are witnesses that need to be interviewed in these multiple cases. Um, it's going to be difficult to maintain client communications under these circumstances, your Honor, so I anticipate this case taking a lot of my time.

RP 53. Mr. Phillips expressed his displeasure with his attorney's motion:

That's her problem. I told you I don't want her as my attorney. I, I told you I'm ready to go to trial and I'm ready to defend myself. I just got done explaining that to you.

RP 55. The court engaged Mr. Phillips in a colloquy regarding his wish to represent himself, at the conclusion of which the court found Mr. Phillips had made a knowing voluntary and intelligent waiver of his right to counsel. RP 59.

On June 28, 2011, prior to the commencement of trial, Mr. Phillips pleaded guilty as part of a negotiated disposition. CP 21-44, 81-102, 143-66. At sentencing, and as required by the plea

agreement, the prosecutor recommended standard range sentences.

RP 93-96. In response, Mr. Phillips moved to withdraw his pleas:

THE COURT: Is there anything you'd like to tell me before sentence is imposed in your case?

DEFENDANT PHILLIPS: Yeah, did you receive my, uh, my last Motion?

THE COURT: Which Motion is that?

DEFENDANT PHILLIPS: The, to retract my plea and retract my waiver of counsel, waiver of counsel and to ...

RP 97.

The prosecutor noted that Mr. Phillips had indeed filed a motion to withdraw his guilty plea, but had filed it with the judge who had taken his pleas, Judge Doyle. RP 98. The prosecutor noted that Judge Doyle had previously denied the motion without a hearing. RP 98. Judge Canova, the sentencing court, refused to hear Mr. Phillips' motion and imposed standard range sentences. CP 45-52, 119-28, 182-89; RP 98-102.

#### D. ARGUMENT

**The trial court violated Mr. Phillips' right to counsel when it wrongly found his request to represent himself was unequivocal and granted his motion to represent himself**

1. Absent an unequivocal request to represent oneself coupled with a valid waiver, a defendant has a constitutionally protected right to counsel.

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). The right to counsel may be waived, but the waiver 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). Recognizing the serious nature of the inquiry into the waiver of the right to counsel, the United

States Supreme Court has admonished that “courts [should] indulge in every reasonable presumption against waiver.” *Brewer v. Williams*, 430 U.S. 387, 404, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977).

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 requests to represent himself, 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).

A court's error in wrongly granting a defendant the right to proceed *pro se* constitutes *per se* prejudicial error of the right to counsel, and the error can never be harmless. *State v. Breedlove*, 79 Wn.App. 101, 110, 900 P.2d 586 (1995).

2. Mr. Phillips' request to represent himself was equivocal rendering his subsequent waiver of the right to counsel invalid.

When a defendant requests to represent himself, the trial court must determine whether the request is unequivocal and timely. *Madsen*, 168 Wn.2d at 504. The demand must be unequivocal in the context of the record as a whole and the choice must reflect the defendant's true subjective desire for self-representation. *State v. Luvene*, 127 Wn.2d 690, 698-99, 903 P.2d 960 (1995); *State v. Chavis*, 31 Wn.App. 784, 790-91, 644 P.2d 1202 (1982). In addition, the trial court is required to apprise the defendant of (1) the nature of the charges; (2) the possible penalties; and (3) the disadvantages of self-representation. *Woods*, 143 Wn.2d at 588, citing *United States v. Balough*, 820 F.2d 1485, 1487 (9th Cir.1987).

A request to waive the assistance of counsel that indicates dissatisfaction with a trial delay or with appointed counsel may indicate that the request to proceed *pro se* is equivocal. *Woods*, 143 Wn.2d at 585-87; *Luvene*, 127 Wn.2d at 698-99. Here, Mr. Phillips' request was equivocal in that it was an expression of frustration with his attorney and her perceived lack of trial preparation and

unwillingness to listen to him rather than a true desire for self-representation.

In *Luvene, supra*, the defendant opposed his attorney's motion for a continuance, stating:

I've been here since July. . . . You know, I don't wanna sit here any longer. It's me that has to deal with this. If I'm prepared to go for myself, then that's me. You know, can't nobody tell me what I wanna do. They say I did this, so why not-if I wanna go to trial, why can't I go to trial on the date they have set for my life? I'm prepared. I'm not even prepared about that. I wanna go to trial, sir. . . .

I don't wanna extend my time. This is out of my league for doing that. I do not want to go. If he's not ready to represent me, then forget that. But I want to go to trial on this date.

*Luvene*, 127 Wn.2d at 698. The Supreme Court concluded that the defendant's statements, taken in the context of his opposition to a continuance, were an expression of frustration with the delay rather than an unequivocal request for self-representation. *Id.* at 699.

Similarly, in *Woods*, the Supreme Court found that the defendant's statement, "I will be prepared to proceed with-with this matter here without counsel come October 21st," was merely an expression of the defendant's frustration with his counsel's request to continue the trial. 143 Wn.2d at 587. In reaching this decision, the Court noted that "telling a trial judge he 'will be prepared to

proceed without counsel' is qualitatively different than telling a judge that one wishes to proceed *pro se*." *Woods*, 143 Wn.2d at 588.

Woods's statement cannot be viewed as an unequivocal statement of his desire to proceed to trial *pro se*. His statement, like that which we examined in *Luvane*, merely revealed the defendant's displeasure with his counsels' request to continue the trial for a lengthy period of time. Woods, like the defendant in *Luvane*, was undoubtedly frustrated by the delay, and his statement to the trial court appears to have been an expression of those feelings.

*Id.* at 561.

Here, similarly, Mr. Phillips' statements evidence a frustration with his court-appointed counsel, his perception of her lack of preparation, and with counsel's request for a continuance over his desire to go to trial. The record from the numerous hearings evidences that Mr. Phillips was frustrated with his attorneys' unwillingness to listen to him and instead pursue a plea agreement over his desire to go to trial. Mr. Phillips was also frustrated with his attorneys' failure to prepare for trial and repeatedly seek additional time, apparently refusing to listen to his desire to go to trial. Every time Mr. Phillips sought to represent himself, it was only after the trial court either refused to discharge current counsel and reappoint new counsel or denied counsels'

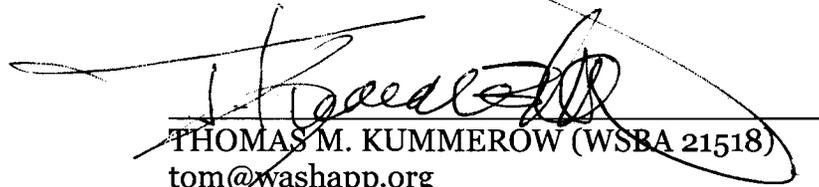
motions for continuances over his desire to go to trial. Each time, his frustration led him to turn to the only person who seemed to care about his wishes and desires: himself. Mr. Phillips' request to represent himself resulted solely from his frustrations with counsel and were not unequivocal requests to represent himself. As a result, the trial court erred when it found Mr. Phillips' self representation requests to be unequivocal and dismissed his court-appointed counsel. Mr. Phillips is entitled to reversal of his convictions and remand for trial.

E. CONCLUSION

For the reasons stated, Mr. Phillips requests this Court reverse his convictions and remand for trial.

DATED this 26th day of January 2012.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. Kummerow', is written over a horizontal line. The signature is stylized and somewhat cursive.

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