

68138-9

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No. 68138-9-I

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

STATE OF WASHINGTON,
Plaintiff-Appellee,

v.

SASSAN MEHRABIAN,
Defendant-Appellant.

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

The Honorable Sharon Armstrong, Judge

APPELLANT'S REPLY BRIEF

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I.
REPLY ARGUMENT

A. THE TRIAL COURT PROPERLY CONCLUDED THAT
MEHRABIAN'S 1992 CONVICTION FOR FIRST DEGREE
THEFT HAD "WASHED OUT" AND THUS SHOULD NOT BE
INCLUDED IN HIS OFFENDER SCORE

Mr. Mehrabian was sentenced on his two 1992 cases on January 27, 1993. He was sentenced to 60 days in jail. The judgment and sentence required that he report to jail no later than February 12, 1993. Thus, he was released on or before April 12, 1993. Based upon these facts his convictions washed out no later than April 12, 2003.

RCW 9.94A.525 provides, in relevant part:

(b) Class B prior felony convictions ... shall not be included in the offender score, if since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent ten consecutive years in the community without committing any crime that subsequently results in a conviction.

Under the State's interpretation of the statute, if Mr. Mehrabian had been convicted of these offenses on April 13, 2003, the 1992 conviction would have "washed." But, because – more than 10 years after his release from custody, Mehrabian was rearrested for a supervised release violation, the 1992 conviction was revived for purposes of sentencing in this case.

There is no support in the case law or statute for the notion that a conviction that has “washed” can be revived by a subsequent arrest on the “washed” case. In fact, such an interpretation would mean that no conviction would ever completely “wash out” if there was some remote possibility that the defendant could be rearrested and confined on the charge. Clearly, the Legislature intended that at some point, the prior conviction would no longer be relevant.

In this case, the trial court correctly found that Mehrabian’s 18 year old conviction washed out and should not be counted in the offender score in this case.

Although the State now argues that Mehrabian was convicted of Driving without a Valid Operator’s License in September 1993, that crime would still not interrupt the “washout period.” This argument is without merit for two reasons. First, the State has failed to show that Mehrabian was confined for that conviction. Second, confinement under a misdemeanor conviction, not a felony conviction, does not interrupt the washout period. *State v. Ervin*, 169 Wn.2d 815, 239 P.3d 354 (2010).

B. THIS COURT MUST REVERSE BECAUSE THE STATE FAILS TO DEMONSTRATE AN UNEQUIVOCAL WAIVER OF THE RIGHT TO COUNSEL IN THIS CASE

Throughout the Brief of Respondent [BOR] the State suggests that Mehrabian “demanded” to represent himself or somehow made a motion

to do so. The State also suggests that somewhere in the record there is a “ruling” that permitted Mehrabian to proceed pro se. But the record demonstrates that the only time Mehrabian made a request to represent himself was on June 28, 2011, before Judge Eadie. At that time Judge Eadie properly engaged in a lengthy colloquy with Mehrabian. At the close of that colloquy, Mehrabian realized that he needed the assistance of counsel and asked that Mr. Zulauf remain as standby counsel. Thus, Judge Eadie entered an order conditioned on the employment of stand-by counsel. The prosecutor present at the hearing clearly believed that Mehrabian’s request was equivocal and stated as much on the record.

As to the remaining hearings, the State simply asks this Court to presume some new unequivocal waiver based upon the fact that Mehrabian did not appear with new counsel – either retained or appointed. The law prohibits the presumption of a waiver from this record.

The State also ignores the two most analogous cases decided by our State Supreme Court – *State v. Woods*, 143 Wn.2d 561, 23 P.3d 1046, *cert. denied*, 534 U.S. 964, 122 S.Ct. 374, 151 L.Ed.2d 285 (2001), and *State v. Stenson*, 132 Wn.2d 668, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008, 118 S.Ct. 1193, 140 L.Ed.2d 323 (1998). In both those cases, discussed in Appellant’s Opening Brief, the Court held that a request to proceed pro se accompanied by an indication that the request was

occasioned by the defendant's dissatisfaction with counsel was equivocal. Thus, the State's assertion, BOR at 18, that "the fact that Mehrabian would have preferred to proceed with standby counsel does not render his decision to proceed pro se equivocal" is simply not true. The case law is clear. Such a request does indicate the request to proceed pro se is equivocal. *Woods*, 143 Wn.2d at 586-87. *See also United States v. Kienenberger*, 13 F.3d 1354 (9th Cir. 1994) (Even though defendant requested that he be counsel of record, where his requests were always accompanied by his insistence that court appoint "advisory" or "standby" counsel to assist him on procedural matters. Thus, defendant's request to proceed pro se was equivocal.).

Absent an unequivocal waiver, Mehrabian's convictions must be reversed.

C. REVERSAL OF COUNT ONE IS REQUIRED BECAUSE THE "TO-CONVICT" INSTRUCTION PERMITTED THE JURY TO CONVICT MEHRABIAN BASED SOLELY UPON ACTS COMMITTED BEYOND THE STATUTORY LIMITATION PERIOD

The State argues this crime was not completed until the "City relied on Mehrabian's deception." But the State does not cite to any case that so holds. As to Count One, there are facts to establish that, as to Mehrabian, the entire crime of theft by deception was completed on the date Geek Deal submitted the two purchase orders to Woodinville rather

than on the date that Woodinville paid Geek Deal for the items. Those two invoices were submitted more than 3 years before March 6, 2009. Thus, a jury could find that Mehrabian's "criminal impulse" was completed on that date. But the jury was not given the proper jury instructions on this issue.

Because this Court cannot determine whether the jury convicted Mehrabian based upon a continuing criminal impulse that extended into the statutory limitation period – that is, until at least March 6, 2006 – this Court must reverse Mehrabian's conviction and remand for a new trial on Count One.

D. THERE WAS INSUFFICIENT EVIDENCE THAT WOODINVILLE RELIED ON ANY DECEPTION BY MEHRABIAN WHEN IT DECIDED TO BUY COMPUTER EQUIPMENT

On appeal the State argues new theories to support the claim that Mehrabian deceived the City of Woodinville. But in the trial court the State's primary argument for "deception" was:

That means that when Sam has Mr. Moisant bill the City on Geek Deal invoices for products that he purchased at a lower amount and tells Ron, as you can see in the emails, Here's what I want you to bill them, here's a higher amount, that's deception. Because (A) he's paid far less and has, as Mr. Katica told you, an ethical obligation to not do that; and (B) he's also representing that these items are coming from Geek Deal and that they are legitimately purchased under warranty.

And, again, Mr. Moisant told you that that certainly wasn't the case because he was sending it all back to Sam - - excuse me, Mr. Mehrabian, when they had questions about those items and, again, wouldn't have done so if anyone had said, Well, gee this isn't working or it's defective or what have you.

RP 947-948.

There was evidence that Geek Deal did not warranty the products it invoiced to Woodinville. But the State's evidence was that the manufacturers – not the resellers – were entities that provided the warranties. There was no evidence that any of the items purchased by Mehrabian for Woodinville did not have manufacturer warranties. RP 443. At best, the State's evidence was that items purchased off Ebay “probably” had no warranty. RP 494.

Moreover, while Mr. Katica testified that Mehrabian had an obligation to disclose his relationship with ITTSI, his testimony alone was insufficient to convict Mr. Mehrabian beyond a reasonable doubt. The State did not present any proof that Woodinville had a prohibition against doing outside business with companies owned by employees. And, there was evidence that Woodinville had done business with ITTSI before the charging period. Gene Powers had worked for ITTSI and fully disclosed that to Woodinville. Even though ITTSI made money on the products it

wholesaled to Woodinville via Geek Deal, there was no evidence that – even with a markup – ITTSI was not the lowest bidder.

Worse yet, there was no evidence that Woodinville relied on any deception by Mehrabian. Mehrabian followed the proper procurement procedures for items that Woodinville needed. Woodinville would have purchased the products regardless of who was the lowest bidder. Thus, no “theft” occurred.

E. COUNTS FOUR AND FIVE ARE THE SAME CRIMINAL CONDUCT

Here, the evidence is that on March 19, 2007, Mehrabian had the same criminal intent, the checks were issued at the same time and place and Woodinville wrote both checks. The fact that the bank processed the checks on different days did not change Mehrabian’s criminal intent from one crime to the next. In fact, it was completely serendipitous that the checks were “processed” at separate times.

**II.
CONCLUSION**

This Court must reverse Mehrabian’s convictions for the reasons stated above.

DATED this 28th day of November, 2012.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by First Class United States Mail, postage prepaid, one copy of this brief on the following:

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28 Nov 2012
Date


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