

70222-0

70222-0

NO. 70222-0-1

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

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STATE OF WASHINGTON,

Respondent,

v.

MARWAN HASAN,

Appellant.

---

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

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying Mr. Hasan's timely, unequivocal request to proceed pro se.

2. The trial court erred in failing to engage in a Faretta<sup>1</sup> colloquy after Mr. Hasan unequivocally asked to proceed pro se.

3. The trial court abused its discretion in failing to enter written findings regarding Mr. Hasan's request to proceed pro se.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

A defendant's timely, unequivocal request to proceed pro se must be granted as a matter of law unless the trial court has determined that the defendant is incompetent to stand trial or that his waiver of counsel is not knowing, intelligent and voluntary. More than four months before trial, Mr. Hasan stated that he did not want to be represented by the Office of Public Defense. 7/7/12 RP 3. When a serious conflict arose between Mr. Hasan and his appointed counsel, Mr. Hasan moved to proceed pro se. 1/7/13 RP 10. He renewed his motion to proceed pro se several days later. 1/10/13 RP 12. He never sought a continuance. Did the trial court err in repeatedly denying Mr. Hasan's requests to proceed pro se without finding that he was

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<sup>1</sup> Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

incompetent or that his waiver was not knowing, intelligent and voluntary?

C. STATEMENT OF THE CASE

On August 30, 2012, Marwan Hasan went to the Lakeway Fred Meyer store in Bellingham. 1/15/13 RP 33. After a confrontation with the manager of the home department, Mr. Hasan punched the manager in the mouth and left the store. Id. at 34-35. Mr. Hasan was soon apprehended by local police officers and arrested. Id. at 38-40.

Because a lifetime no-trespass order had been issued against Mr. Hasan by the same Fred Meyer store in May 2010, he was charged with burglary in the first degree. CP 4-5;1/16/13 RP 116-18.

At a pre-trial hearing on September 7, 2012, Mr. Hasan informed the trial court that he would not sign any papers if his present attorney (assigned by the Office of the Public Defender - also “OPD”) continued to represent him. 9/7/12 RP 3.<sup>2</sup> The trial court said it would appoint “conflict counsel” and continued the case. 9/7/12 RP 4-5.

At the next hearing, the public defender again appeared and sought permission to remain on Mr. Hasan’s case. 9/12/12 RP 6-7. The public defender argued it was OPD’s position that Mr. Hasan

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<sup>2</sup> A week earlier, Mr. Hasan had voluntarily absented himself from court and counsel had been appointed in his absence. 8/31/12 RP.

should not get a new attorney “just because they don’t like us.”

9/12/12 RP 8. Mr. Hasan argued that this public defender lied to him in his last case, and that he tried to file a lawsuit against their office. Id. at 9. “This is a corrupt Public Defender’s Office and I don’t see why they should represent me again,” responded Mr. Hasan. Id. The court permitted withdrawal and asked Mr. Hasan to discuss his complaints concerning the public defenders’ office with conflict counsel. Id. at 11.

Two months later, after Mr. Hasan had been appointed new “conflict counsel,” Jonathan Raney, Mr. Hasan still refused to speak with his counsel. 11/15/12 RP 3. Assigned counsel and the State then requested a competency evaluation over Mr. Hasan’s objection. Id.

On November 21, 2012. Mr. Hasan again argued to the trial court that his newly assigned attorney was working against him, and was part of a “conspiracy,” particularly following counsel’s request for a competency evaluation. 11/21/12 RP 5-6. Mr. Hasan also informed the trial court that he wanted to proceed to trial immediately, although with different counsel. Id. at 6. The trial court did not appoint new counsel or relieve Mr. Raney, in response to Mr. Hasan’s request. Id.

Over a month later, on January 7, 2013, Mr. Hasan again reiterated his frustration with his “conflict counsel,” Mr. Raney. When

the court asked him to put in writing his conflicts with his counsel, Mr. Hasan said, “The list is long of what he’s done to me – he is biased and prejudiced to me. I have no confidence in him – he is not my attorney. He is my enemy. It will be the disaster if you force him to represent me. I asked two months ago...” 1/7/13 RP 8-9.<sup>3</sup>

When the court refused to hear Mr. Hasan’s complaints about his attorney, or to appoint new counsel, Mr. Hasan asked to proceed pro se: “If you can do that, if the Court can do that, I want to represent myself. That’s my final decision.” 1/7/13 RP 10 (emphasis added). The trial court did not conduct a colloquy, but told Mr. Hasan that he could address the pro se issue “on Thursday.” Id.

On Thursday of the following week, January 10<sup>th</sup>, Mr. Hasan appeared in another courtroom, before the Honorable Ira J. Uhrig, for what Mr. Raney termed Mr. Hasan’s motion for new counsel. 1/10/13 RP 9. Initially, Mr. Raney drew the court’s attention to Mr. Hasan’s letter to the court, expressing his displeasure with Mr. Raney’s representation. CP 12-13; 1/10/13 RP 9. Mr. Raney stated that since Mr. Hasan sought his removal, he, too, would ask the trial court to allow him

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<sup>3</sup> In response to the court’s request that he put his complaints in writing, Mr. Hasan had earlier filed a one-page letter with the court, listing his complaints against Mr. Raney, dated December 27, 2012. CP 12-13.

to withdraw from the representation. 1/10/13 RP 9. Mr. Hasan thanked Mr. Raney for acknowledging that since the conflict between them had grown so acrimonious, that at a human level, Mr. Raney was confirming he could no longer fairly represent him. 1/10/13 RP 10.<sup>4</sup>

Mr. Hasan also renewed his request to proceed pro se on January 10<sup>th</sup>, before Judge Uhrig. 1/10/13 RP 12. Although on January 7<sup>th</sup>, Judge Snyder had deferred the pro se decision to January 10<sup>th</sup>, Judge Uhrig similarly refused to conduct a colloquy on self-representation. 1/10/13 RP 12-13. The following colloquy occurred:

MR. RANEY: In addition, when we were here last week, Mr. Hasan indicated he would like, prefer to proceed pro se rather than have me represent him and it might be appropriate for the court to inquire.

THE COURT: To proceed with that colloquy would take quite a bit of time and that's a commodity we don't have today.

I don't see a legal or factual basis to allow the request to withdraw. I'm going to deny it. I don't know if the case is going out Monday or not.

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THE DEFENDANT: I didn't get that, sir.

THE COURT: I'm denying the motion, sir.

THE DEFENDANT: Huh?

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<sup>4</sup> The State requested to proceed to trial immediately and noted that competency was not an issue. 1/10/13 RP 12.

THE COURT: I'm denying the motion.

THE DEFENDANT: You are denying my motion or his motion?

THE COURT: I'm denying both motions.

1/10/13 RP 12-13 (emphasis added).

On January 14, 2013, Mr. Hasan again appeared before the Honorable Charles R. Snyder for trial, represented by Mr. Raney. Mr. Hasan again argued that if the court would not appoint him new counsel, that he wanted to proceed pro se. 1/14/13 RP 4-8. The court informed Mr. Hasan that there was not an "unlimited supply" of attorneys. Id. at 7. The court indicated that Mr. Hasan had the right to represent himself, and his new counsel could function as "stand-by counsel," but a colloquy was never conducted to complete Mr. Hasan's request to proceed pro se. Id. at 7-8.<sup>5</sup>

On January 15, 2013, Mr. Hasan's trial commenced before Judge Snyder. 1/15/13 RP 3. Mr. Hasan was represented by Mr. Raney. A jury found Mr. Hasan guilty of burglary in the first degree. CP 32.

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<sup>5</sup> Mr. Hasan abandoned his request to proceed pro se, after asking for the judge's "guarantee" that Mr. Raney would be fair with him and not prejudiced against him. 1/14/13 RP 7-8. He also informed the judge that he would be willing to work with Mr. Raney on the case because he had "your word as a judge that [defense counsel is] going to be fair to represent me." Id. at 8. The trial court assured Mr. Hasan that in his experience with Mr. Raney, "he would be exactly that [fair]. He's a good advocate." Id.

The trial court imposed a sentence of 24 months incarceration.<sup>6</sup>

CP 48-59; 2/28/13 RP 33-36.

Mr. Hasan appeals. CP 60.

D. ARGUMENT

THE TRIAL COURT VIOLATED MR. HASAN'S  
CONSTITUTIONAL RIGHT TO REPRESENT  
HIMSELF WHEN IT DENIED HIS TIMELY,  
UNEQUIVOCAL REQUESTS TO PROCEED PRO SE.

a. The state and federal constitutions guarantee criminal defendants the right to represent themselves. The Washington Constitution expressly guarantees the right of self-representation: "In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel . . . ." Wash. Const. art. 1, § 22; State v. Madsen, 168 Wn.2d 496, 503, 229 P.3d 714 (2010); see State v. Breedlove, 79 Wn. App. 101, 105-06, 900 P.2d 586 (1995).

The Sixth Amendment to the United States Constitution implicitly provides the right to proceed pro se.<sup>7</sup> Faretta v. California, 422 U.S. 806, 814, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). The right is rooted in respect for autonomy. State v. DeWeese, 117 Wn.2d 369,

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<sup>6</sup> The trial court, sua sponte, considered the mitigating factors pursuant to 9.94A.535(g) (multiple offense policy results in presumptive sentence that is clearly excessive), and sentenced Mr. Hasan below the standard range.

<sup>7</sup> The amendment provides, "In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense." U.S. Const. amend. 6.

375, 816 P.2d 1 (1991). Although the constitution includes safeguards – like the right to counsel – designed to protect the accused, “to deny the accused in the exercise of his free choice the right to dispense with some of these safeguards . . . is to imprison a man in his privileges and call it the Constitution.” Faretta, 422 U.S. at 815 (internal citations omitted). Thus, “although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of that respect for the individual which is the lifeblood of the law.” Id. at 834 (internal citations omitted).

Even if the defendant [is] likely to lose the case anyway, he has the right--as he suffers whatever consequences there may be--to the knowledge that it was the claim that he put forward that was considered and rejected, and to the knowledge that in our free society, devoted to the ideal of individual worth, he was not deprived of his free will to make his own choice, in his hour of trial, to handle his own case.

Breedlove, 79 Wn. App. at 110-111 (internal citations omitted).

b. A timely, unequivocal request to proceed pro se must be granted as a matter of law. A defendant’s request to proceed pro se must be (1) timely made and (2) stated unequivocally. Madsen, 168 Wn.2d at 503; State v. Woods, 143 Wn.2d 561, 586, 23 P.3d 1046 (2001). If the demand for self-representation is made well before the trial and unaccompanied by a motion for a continuance, the trial court

must grant the request as a matter of law. State v. Barker, 75 Wn. App. 236, 241, 881 P.2d 1051 (1994). The trial court does not have the discretion to deny the request unless it is made just before or during trial. Id. “Where a court is put on notice that the defendant wishes to assert his right to self-representation but it nevertheless delays ruling on the motion, the timeliness of the request must be measured from the date of the initial request. Madsen, 168 Wn.2d at 508-09; Breedlove, 79 Wn. App. at 109.

Even if the request is made just before trial, the trial court may deny the request only if (1) the motion is made for improper purposes, i.e., for the purpose of unjustifiably delaying the trial, or (2) granting the request would obstruct the orderly administration of justice. Madsen, 168 Wn.2d at 509; Breedlove, 79 Wn. App. at 107-08.

Once the accused makes a timely, unequivocal request to represent himself, the court must engage in a colloquy to determine whether the defendant is waiving his right to counsel knowingly, intelligently, and voluntarily. Faretta, 422 U.S. at 835; Madsen, Wn.2d 168 at 504; Breedlove, 79 Wn. App. at 111. In order to make this determination, the trial court must apprise the defendant of the nature of the charge, the possible penalties, and the disadvantages of self-

representation. Woods, 143 Wn.2d at 587-88. Unless the court finds the waiver is invalid, it must grant a timely, unequivocal motion to proceed pro se. Madsen, 168 Wn.2d at 504-05; Barker, 75 Wn. App. at 241.

c. The trial court improperly denied Mr. Hasan's timely, unequivocal requests to proceed pro se. Mr. Hasan's request to proceed pro se was timely and unequivocal. Accordingly, the trial court was required to grant the request after ensuring that any waiver of counsel was knowing, intelligent and voluntary. The trial court failed to do this, and therefore Mr. Hasan's conviction must be reversed and his case remanded for a new trial.

Mr. Hasan requested to proceed pro se three times – on January 7<sup>th</sup>, on January 10<sup>th</sup>, and on January 14<sup>th</sup>. 1/7/13 RP 10; 1/10/13 RP 12; 1/14/13 RP 7-8. At no time did the trial court conduct a colloquy as required. Madsen, 168 Wn.2d at 504-05; Faretta, 422 U.S. at 835.

Mr. Hasan first asked to proceed pro se on January 7, 2013. 1/7/13 RP 10. His request was timely because it was made before his case was set for trial, before a jury was chosen or his 3.5 hearing conducted. Cf. State v. Stenson, 132 Wn.2d 668, 741, 940 P.3d 1239 (1997) (pro se request found untimely when made after 21 days of jury

selection had already transpired and 60 witnesses would need to be rescheduled).

Mr. Hasan's request was also unequivocal. After Mr. Hasan's communication with his new counsel had broken down, and particularly after his new counsel had requested a competency evaluation, Mr. Hasan informed the trial court, "I want to represent myself. That's my final decision." 1/7/13 RP 10 (emphasis added).<sup>8</sup>

The judge failed to address this January 7<sup>th</sup> demand to proceed pro se whatsoever. There was no colloquy and no findings; the case was simply continued to January 10<sup>th</sup> before Judge Uhrig. On January 10<sup>th</sup>, rather than issue a ruling or conduct a colloquy, Judge Uhrig stated, "To proceed with that colloquy would take quite a bit of time and that's a commodity we don't have today." 1/10/13 RP 12-13.

When the trial court convened again on January 14, 2013, Mr. Hasan again asked the court, "so I still cannot represent myself?" 1/14/13 RP 7-8. The court informed Mr. Hasan that he could proceed pro se if he wanted to, with standby counsel, but did not conduct an actual colloquy. *Id.* In fact, Mr. Hasan abandoned his request to

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<sup>8</sup> The competency evaluation, pursuant to RCW 10.77.060, determined that Mr. Hasan was competent to stand trial. CP 10-11.

proceed pro se, only after an exchange with the judge and obtaining the court's assurances that defense counsel would treat him fairly. Id.<sup>9</sup>

Mr. Hasan's request to proceed pro se, although made in conjunction with his dissatisfaction with his counsel, was nonetheless unequivocal. Madsen, 168 Wn.2d at 507; Stenson, 132 Wn.2d at 741. Courts have even deemed requests to proceed pro se unequivocal where the trial court denied the defendant's request for new counsel and limited the defendant's choices to current counsel or self-representation. See, e.g., Barker, 75 Wn. App. at 238 (conviction reversed for improper denial of request to proceed pro se, even though defendant's first choice was appointment of new counsel); DeWeese, 117 Wn.2d at 372 (grant of request to proceed pro se affirmed even though defendant's first choice was appointment of new counsel). Even a defendant's "remarks that he had no choice but to represent himself rather than remain with appointed counsel, and his claims on the record that he was forced to represent himself at trial, do not amount to equivocation or taint the validity of his Faretta waiver." Id. at 378.

Because his request was timely and unequivocal, Mr. Hasan was entitled to proceed pro se as a matter of law unless the trial court

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<sup>9</sup> THE COURT: "I would believe in my experience with Mr. Raney, he would be exactly that [fair to you]. He's a good advocate." 1/14/13 RP 8.

determined, after a proper colloquy, that his waiver of counsel was not knowing, intelligent, and voluntary. Madsen, 168 Wn.2d at 504; Barker, 75 Wn. App. at 241; Faretta, 422 U.S. at 835; Breedlove, 79 Wn. App. at 111. The trial court did not engage in such a colloquy – nothing in the record reveals that the court advised Mr. Hasan of the nature of the charges against him or the possible penalties of proceeding pro se – or even that his pro se request was ever fully denied, as there were no findings. 1/10/13 13 (“I’m denying both motions”). Mr. Hasan’s request was timely and unequivocal, so he was entitled to represent himself as a matter of law. Madsen, 168 Wn.2d at 504. Because Mr. Hasan’s right to self-representation was violated, his conviction must be reversed and his case remanded for a new trial. Madsen, 168 Wn.2d at 504; Breedlove, 79 Wn. App. at 110.

d. Because he was improperly denied his right to represent himself, Mr. Hasan must be granted a new trial. The erroneous denial of a defendant’s motion to proceed pro se requires reversal without any showing of prejudice. Madsen, 168 Wn.2d at 504; Breedlove, 79 Wn. App. at 110. Because Mr. Hasan was denied his constitutional right to proceed pro se, his conviction must be reversed and his case remanded for a new trial.

E. CONCLUSION

Because Mr. Hasan's constitution right to represent himself was violated, his conviction must be reversed and his case remanded for a new trial.

DATED this 2<sup>nd</sup> day of December, 2013.

Respectfully submitted,

 (19271) for:

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JAN TRASEN – WSBA 41177  
Washington Appellate Project  
Attorneys for Appellant

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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 70222-0-I
v.	)	
	)	
MARWAN HASAN,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 2<sup>ND</sup> DAY OF DECEMBER, 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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		PARTIES

**SIGNED** IN SEATTLE, WASHINGTON THIS 2<sup>ND</sup> DAY OF DECEMBER, 2013.

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