

NO. 74708-8-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JOHN KIRK,

Appellant.

FILED
Aug 31, 2016
Court of Appeals
Division I
State of Washington

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

APPELLANT'S OPENING BRIEF

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A. INTRODUCTION.

This Court reversed John Kirk's conviction and remanded his case to the trial court because he had not been properly informed of the nature of his charge and punishment when he waived his right to counsel. Upon receiving the mandate, the court repeatedly continued Mr. Kirk's case for trial without conducting a hearing on the validity of Mr. Kirk's waiver of counsel. Just as jury selection was set to begin, Mr. Kirk learned that he had been considered *pro se* after the Court of Appeals remand, and the person he thought was his attorney was only appointed as standby counsel.

Because the court failed to comply with the mandate of the Court of Appeals and did not afford Mr. Kirk a meaningful opportunity to exercise his right to self-representation, he was denied his right to waive counsel. He was also denied his right to effective assistance of counsel by not being told of his attorney's limited appointment as standby and his right to due process by the court's failure to follow the dictate of the appellate court's remand order.

B. ASSIGNMENTS OF ERROR.

1. The court denied Mr. Kirk his right to counsel and his right to waive counsel under the Sixth Amendment and article I, section 22.

2. Mr. Kirk was denied his right to due process of law following an appeal of right, as protected by the Fourteenth Amendment and article I, sections 3 and 22, by the court's failure to follow the dictate of the mandate from the Court of Appeals.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

A mandate issued by the Court of Appeals constitutes the law of the case and binds the court and parties below to adhere to this Court's ruling. This Court remanded the case so that Mr. Kirk would be afforded the opportunity to knowingly, intelligently, and voluntarily decide whether he would adhere to his unequivocal request for self-representation, as constitutionally required. Did the court and attorneys' disregard the Court of Appeals mandate and violate Mr. Kirk's rights to effective representation of counsel, to validly waive counsel, and to receive due process of law?

D. STATEMENT OF THE CASE.

In 2013, John Kirk asked to represent himself. 11/7/13RP 16-17. The trial court granted this request, but misrepresented the punishment Mr. Kirk faced. CP 35. On appeal, the State conceded this error invalidated Mr. Kirk's waiver of counsel. *Id.* This Court reversed

Mr. Kirk's conviction and remanded the case for further proceedings.
CP 34-35.

Once Mr. Kirk was brought back to trial court for further proceedings, the court held no colloquy on the validity of his waiver of counsel and continued the case for trial with few in-court hearings in Mr. Kirk's presence. CP 171-79. The court never informed Mr. Kirk of the charges and punishment he faced, discussed the dangers of self-representation, or determined whether he knowingly, intelligently, and voluntarily waived counsel.

The Office of Public Defense appointed Craig McDonald as standby counsel, but Mr. McDonald did not tell Mr. Kirk of the limited nature of his appointment. 1/5/16RP 178-79, 180-81. Instead, Mr. McDonald acted as counsel, and although he promised to set a hearing on Mr. Kirk's self-representation, he never set one. 8/25/15RP 5.

Following a CrR 3.5 and 3.6 hearing and as the parties prepared to select a jury, Mr. McDonald admitted he had never filed a notice of appearance and was appointed as standby counsel, unbeknownst to Mr. Kirk. 1/5/16RP 178-79, 181. The court asked Mr. Kirk if he would agree to have Mr. McDonald represent him and Mr. Kirk consented, but requested he be permitted to dictate the questions Mr. McDonald

asked the lead detective. 1/5/16RP 180. The court did not rule on this request. 1/5/16RP 180-81.

Instead, Mr. Kirk pled guilty to the charged offense just as jury selection was set to begin. 1/5/16RP 183. He also filed a notice of appeal. CP 99. Pertinent facts are further discussed in the relevant argument section below.

E. ARGUMENT.

1. By disregarding the mandate of the Court of Appeals concerning Mr. Kirk's expressly stated request for self-representation, Mr. Kirk was denied his constitutional right to self-representation and the corollary right to effective assistance of counsel.

a. When a defendant has made a clear request for self-representation, the court is prohibited from ignoring it.

The constitution guarantees criminal defendants the right to waive counsel and represent themselves, as well as the right to representation by a competent attorney at all stages of a criminal proceeding. U.S. Const. amends. 6,¹ 14;² Const. art. I, § 22;³ *Faretta v.*

¹ The Sixth Amendment provides in part, In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

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 self-representation is “so fundamental that it is afforded despite its potentially detrimental impact on both the defendant and the administration of justice.” *Madsen*, 168 Wn.2d at 503. “The unjustified denial of this [pro se] right *requires* reversal.” *Id.* (quoting *State v. Stenson*, 132 Wn.2d 668, 737, 940 P.2d 1239 (1997), emphasis added in *Madsen*). Because the right to self-representation is substantively “guaranteed in our state constitution,” courts must ensure it is meaningfully afforded. *State v. Silva*, 107 Wn.App. 605, 620-21, 27 P.3d 663 (2001). The “clear and explicit” state constitutional right to self-representation is more strictly protected than the federal constitutional right. *Id.* at 618-19.

When an accused person requests self-representation, “the trial court *must* determine whether the request is unequivocal and timely.” *Madsen*, 168 Wn.2d at 504 (emphasis added). If the request is timely

² The Fourteenth Amendment says in part: “No state shall . . . deprive any person of life, liberty, or property, without due process of law.”

³ Article I, section 22 provides in pertinent part:

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, . . . [and] to have a speedy public trial by an impartial jury.”

and has been clearly made, “the court *must* determine if the request is voluntary, knowing, and intelligent, usually by colloquy.” *Id.* (emphasis added).

The “only bases” to deny a request for self-representation is the court’s finding that the request is equivocal, untimely, involuntary, or made without understanding its consequences. *Id.* This finding “must be based on some identifiable fact,” not merely on speculation by the court. *Id.* at 505. The court cannot “stack the deck” against the accused by failing to conduct the proper inquiry. *Id.* at 506.

In *Madsen*, the defendant asked to represent himself several times over a five month span. *Id.* at 501-03. The court deferred ruling on the first two requests. *Id.* at 501-02. When he asked a third time as trial was set to begin, the court denied the request because there was not enough time for him to prepare and his body language signaled his request was equivocal. *Id.* at 502-03.

The Supreme Court explained that a court has limited grounds for denying a request for self-representation. *Id.* at 504-05. The court may defer decision if faced with an unexpected request for self-representation, such as in the defendant’s first request for self-

representation, but the court's delay must be for the purpose of preparing to rule on the issue. *Id.* at 506.

The *Madsen* Court also ruled that a defendant's request is not rendered equivocal or waived when he fails to repeat it at later hearings, after the court deferred ruling. *Id.* at 507. A court may not find "equivocation" by "referencing future events then unknown to the trial court. Such prophetic vision is impossible for the trial court." *Id.* Therefore, the defendant's failure to repeatedly assert his request for self-representation does not excuse the court from having failed to consider and rule on the request when it was required to do so. *Id.* at 508.

In *Madsen*, the court violated the defendant's right to self-representation by delaying its ruling, treating the third request as the benchmark, and finding this request was too late and not fully unequivocal. *Id.* at 508-09. Because the defendant had previously made unequivocal and timely requests for self-representation, the court improperly stacked the deck against him. *Id.* at 506, 510.

b. This case was remanded from the Court of Appeals for the express purpose of conducting a valid colloquy for Mr. Kirk's waiver of his right to counsel.

In 2013, Mr. Kirk unequivocally asserted his right to self-representation and the court concluded he was validly waiving his right to counsel. 11/7/13RP 16-17, 23-24. However, during this colloquy, the judge misinformed Mr. Kirk of the penalty he faced if convicted. CP 35. Mr. Kirk appealed and the State conceded this error rendered his waiver of his right to counsel invalid. CP 35; *see* COA 71865-7-I (Respondent's Motion to Concede Error). This Court accepted the prosecution's concession, reversed Mr. Kirk's conviction, and remanded the case for further proceedings in accordance with the opinion. CP 34-35.

A trial court must "strictly comply" with the mandate issued by the Court of Appeals. RAP 12.2; *see State v. Schwab*, 134 Wn.App. 635, 645, 141 P.3d 658 (2006). When this Court remands a case for further proceedings consistent with its opinion, it signals this Court's expectation that the trial court will decide the issues necessary to resolve the case. *In re Marriage of Rockwell*, 157 Wn.App. 449, 454, 238 P.3d 1184 (2010). In no circumstance may the court simply ignore

the reason for the remand. *Harp v. American Sur. Co. of New York*, 50 Wn.2d 365, 368, 311 P.2d 988 (1957).

“An appellate court’s mandate is the law of the case and binding on the lower court and must be followed.” *Bank of Am., N.A. v. Owens*, 177 Wn. App. 181, 183, 311 P.3d 594 (2013). In a criminal case, the appellate court’s mandate is particularly important because it protects the constitution right to appeal “in all cases,” and disregarding this mandate undercuts this constitutional right. Art. I, §§ 3, 22.

This Court premised its decision reversing Mr. Kirk’s conviction on the trial court’s failure to properly inform Mr. Kirk of the maximum penalty he faced if convicted when he waived his right to counsel. CP 35. The remedy for this error is to conduct a valid *pro se* colloquy. *See Madsen*, 168 Wn.2d at 506. The first “further proceeding” necessitated by the mandate was for the court to consider Mr. Kirk’s previous clearly stated request to waive his right to counsel based on accurate and complete information about the charge and sentence.

But after this Court remanded the case, no colloquy regarding self-representation occurred. *See* CP 34 (mandate filed June 25, 2015); CP 171-73 (continuance orders from July 28, July 30, and August 18, 2015). These documents are the first docket entries after remand. *Id.*

They indicate the case was remanded but no in-court hearings occurred in Mr. Kirk's presence. CP 171-73.

Of the 11 court dates that occurred before trial, seven were mere continuance orders entered without any in-court proceedings. CP 171-73, 174, 175-76, 178, 179. Mr. Kirk did not even appear before a judge in open court on these dates. *Id.*

The case proceeded without conducting a colloquy regarding Mr. Kirk's waiver of counsel. The court did not apprise Mr. Kirk of the Court of Appeals ruling, inform him he was entitled to represent himself, or explain the Court of Appeals ruling and mandate to him. It did not explain the nature of the charges, the penalties he faced, of the dangers of self-representation. *See Madsen*, 168 Wn.2d at 504. On August 25, 2015, attorney Craig McDonald told the court he would "need to set a separate hearing to discuss whether he [Mr. Kirk] wishes to continue or resume pro se representation." 8/25/16RP 3. But Mr. McDonald never set such a hearing.

Only a few cursory in-court proceedings occurred before trial started January 4, 2016. Demonstrating Mr. Kirk's desire to represent himself, during an omnibus hearing on December 18, 2015, Mr. Kirk personally asked the court for a continuance and explained his interest

in reaching a negotiated settlement with the prosecution. 12/18/15RP 7-8. When the court denied the continuance, Mr. Kirk said, “Your Honor, for the record, I object to the denial and take exception.” *Id.* at 8. The court noted the objection. *Id.*

When trial proceedings started on January 4, 2016, attorney McDonald introduced himself as “Craig McDonald appearing with Mr. Kirk currently as counsel with him.” 1/4/16RP 9. Mr. McDonald explained that “we may be asking for him [Mr. Kirk] to conduct some of the examination [of witnesses at trial], but I think we can address that in due course.” *Id.*

But the following day, Mr. McDonald confessed that his appointment was as “standby” counsel only. 1/5/16RP 18-81. Mr. Kirk did not know of Mr. McDonald’s limited assigned role. 1/5/16RP 181 (“I wasn’t aware that Mr. McDonald was a . . . standby.”). Mr. McDonald admitted he had never filed a notice of appearance in the case. 1/5/16RP 178-79.

The plain directive of the Court of Appeals opinion was for the court to provide accurate information about self-representation so that Mr. Kirk could make a knowing and intelligent choice. CP 35. The

court did not give Mr. Kirk that opportunity at the inception of the remand, despite the mandate.

The result of the Court of Appeals opinion should have been to return Mr. Kirk to the position he was in at the time he waived counsel, having unequivocally asserted his right to self-representation, as the law of the case. *See Bank of Am., N.A.*, 177 Wn.App. at 183. This mandate triggered the court's obligation at the outset of proceedings to conduct a valid colloquy and determine if Mr. Kirk wanted to enter a knowing, intelligent and voluntary waiver of counsel.

After it came to light just as jury selection was to begin that Mr. McDonald was appointed on a limited basis as standby, the court asked Mr. Kirk if he was satisfied having defense counsel represent him. 1/5/16RP 179-81. Mr. Kirk agreed, but he also asserted his desire to have hybrid representation to allow him the opportunity to question the lead detective, or at least direct the questions his lawyer should ask. 1/5/16RP 180 ("My only concern" is "there will certain questions that I want to put before [the detective] to be sure that they are asked."). The court did not rule on this request.

This belated conversation many months after the mandate was issued does not satisfy the mandate or fulfill the trial court's obligation to afford a person the opportunity to represent himself when requested.

During the prior trial proceedings, where Mr. Kirk had invalidly waived counsel, he repeatedly asked the court for standby counsel. 11/7/13RP 24-25; 11/22/13RP 28-29; 2/24/14RP 51; 3/3/14RP 111-12, 116-17. These requests were repeatedly denied. *See, e.g.*, 3/3/14RP 112 (“I have been denied standby counsel to help me through the technical aspects. I just want to make an objection to the fact that had I had standby counsel, . . . I would not be forced into a guilty plea.”). Without standby counsel, he had struggled to represent himself. He had minimal access to legal resources because he was housed in the King County jail, which has no law library for inmates, and had limited access to an investigator. 11/7/13RP 22; 11/22/13RP 30.

Had Mr. Kirk understood he had received the standby counsel he long sought after his case was remanded, he may have chosen to represent himself from the outset. 1/5/16RP 181. He indicated his desire to be involved in the case as a litigator by asking for hybrid representation because he felt it was important that he shape the

questions for the State's central witness. 1/4/16RP 9, 103-05; 1/5/16RP 168-69.

He should have been openly offered and meaningfully explained his continued right to represent himself and Mr. McDonald's limited assigned role. He was entitled to have time to prepare for trial as his own attorney under the Court of Appeals mandate. Once he learned that he was considered his own lawyer, with standby counsel, he had already deferred to Mr. McDonald and could not be expected to prepare the case. By delaying any inquiry until the trial proceedings were under way, the court "stacked the deck" against his meaningful self-representation. *Madsen*, 168 Wn.2d at 506.

When the case was first remanded from the Court of Appeals, the court was required to comply with the mandate and afford Mr. Kirk a meaningful opportunity to validly exercise his right to self-representation or knowingly, intelligently and voluntarily waive that right. CP 35. But instead of conducting this inquiry, the court repeatedly continued the case without substantive in-court hearings. CP 171-73, 178-79. His assigned standby attorney never filed a notice of appearance or fully explained his role in the case. 1/5/16RP 178-79. This denied Mr. Kirk his right to meaningful self-representation under

article I ,section 22 and the Sixth Amendment, as well as the benefit of his exercise of his right to appeal.

c. The court's failure to strictly comply with the mandate and afford Mr. Kirk the opportunity to proceed pro se after a valid waiver requires reversal.

A court's improper refusal to permit self-representation is *per se* structural error. *Madsen*, 168 Wn.2d at 503; *see State v. Breedlove*, 79 Wn.App. 101, 111, 900 P.2d 586 (1995) ("Because the unjustified denial of this right [to self-representation] requires reversal, we reverse Breedlove's conviction and order a new trial.").

The court is not free to ignore a valid request for self-representation. The error is not cured by Mr. Kirk's later entry of a guilty plea and his statement that he was satisfied with being represented by counsel. He was not afforded the opportunity to prepare to represent himself before trial and was misled about his ability to do so. The Fourteenth Amendment's Due Process Clause requires that a defendant's guilty plea be knowing, voluntary, and intelligent. *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969). The guilty plea is valid only when it is the product of effective representation of counsel. *See State v. Sandoval*, 171 Wn.2d 163, 169, 249 P.3d 1015 (2011).

Due to the court's failure to promptly afford Mr. Kirk the opportunity to represent himself based on a constitutionally valid waiver of counsel, as required by the remand order, he was denied the opportunity to negotiate or challenge the State's case as his own advocate. He could not prepare for trial or understand his right to control the litigation.

His assigned counsel exacerbated the problem by failing to effectively communicate with Mr. Kirk about his status as a pro se litigant under the Court of Appeals mandate and by virtue of counsel's limited appointment. Counsel promised to set a hearing regarding Mr. Kirk's pro se status but never did. *See* 8/25/15RP 5 (Mr. McDonald promises, "I'll follow up by email to set the hearing on self-representation ."). Mr. McDonald never explained to Mr. Kirk that he was appointed as standby, with Mr. Kirk as pro se litigant, until the trial proceedings were underway, and instead simply "acted as attorney" without telling Mr. Kirk that he remained pro se. 1/5/16RP 180-81.

The violation of his right to self-representation and effective assistance of counsel undermines the plea. His case should be remanded so he has the opportunity to withdraw his plea and exercise his right to self-representation if he elects to do so.

2. Mr. Kirk lacks the financial ability to pay the costs of appeal in the event he does not substantially prevail.

The court did not impose any non-mandatory LFOs “because the defendant lacks the present and future ability to pay them.” CP 88. Mr. Kirk “has no assets, real property, stocks or bonds.” CP 180. He is presently 76 years old and confined to a wheelchair. CP 92 (date of birth Aug. 13, 1940); 1/5/16RP 159, 182. Under the terms of his lifetime community custody, he is required to pay for the cost of supervision, which will further erode his financial status. CP 95.

The presumption of indigency enshrined in RAP 15.2(f) continues unless the State can prove there is good cause to disrespect the trial court’s finding. *State v. Sinclair*, 192 Wn.App. 380, 393, 367 P.3d 612, *rev. denied*, 185 Wn.2d 1034 (2016); CP 182-83 (Order of Indigence dated February 6, 2016). An individualized inquiry demonstrates Mr. Kirk has been indigent for many years, is serving a 75-month prison term for his conviction in this case, suffers from health problems, and must pay other costs and fees. There is no basis to conclude he will be able to escape from poverty in the near future. Consequently, in the event he does not prevail on appeal, no costs

should be awarded due to his indigence. *See Sinclair*, 192 Wn.App. at 390, 393.

F. CONCLUSION.

Mr. Kirk's conviction should be reversed and his case remanded. If the prosecution elects to proceed with the case on remand, Mr. Kirk should be permitted to represent himself if he knowingly, intelligently and voluntarily waives his right to counsel.

DATED this 31st day of August 2016.

Respectfully submitted,

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

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)	
Respondent,)	
)	NO. 74708-8-I
v.)	
)	
JOHN KIRK,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 31ST DAY OF AUGUST, 2016, 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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