

NO. 37797-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

CHARLES RAY BILYEU,

Appellant.

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

The Honorable Robert A. Lewis, Judge

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REPLY BRIEF OF APPELLANT

CATHERINE E. GLINSKI
Attorney for Appellant

CATHERINE E. GLINSKI
Attorney at Law
P.O. Box 761
Manchester, WA 98353
(360) 876-2736

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A. ARGUMENT IN REPLY

1. THE UNJUSTIFIED DENIAL OF BILYEU'S RIGHT TO SELF REPRESENTATION REQUIRES REVERSAL.

The state and federal constitutions guarantee a criminal defendant the right to self representation. U.S. Const., amend. VI and XIV; Const., art. I § 22. The right is not absolute, however. State v. Vermillion, 112 Wn. App. 844, 851, 51 P.3d 188 (2002), review denied 148 Wn.2d 1022 (2003). The defendant must personally ask to exercise the right, and the request must be unequivocal, knowing and intelligent, and timely. Moreover, the right may not be exercised for the purpose of delaying the trial or obstructing justice. Id.

In this case, Bilyeu told the court his defense had gotten nowhere, he did not want his attorney, and he would defend himself. 1RP 4-6, 11. In its brief the state argues that Bilyeu's request to represent himself was equivocal and merely an expression of frustration rather than a true desire to proceed without an attorney. Br. of Resp. at 5-6. In support of this argument, the state cites State v. Woods, 143 Wn.2d 561, 23 P.3d 1046 (2001); State v. Luvane, 127 Wn.2d 690, 903 P.2d 960 (1995); and State v. Modica, 136 Wn. App. 434, 149 P.3d 446 (2006).

In both Woods and Luvane, the defendants were frustrated that their attorneys had requested continuances and sought to represent

themselves only as a way to avoid delay. The Supreme Court held that these were not unequivocal assertions of the right of self representation. Woods, 143 Wn.2d at 585-87; Luvenc, 127 Wn.2d at 698-99. In Modica, although the defendant was motivated by his desire to proceed to trial more quickly than his new attorney could prepare, the court found his request to proceed pro se was a strategic and unequivocal choice. Modica, 136 Wn. App. at 442.

Here, unlike the cases cited by the state, defense counsel did not seek a continuance but was prepared to proceed to trial. Bilyeu did not ask to represent himself because of frustration with the trial process or to avoid delay. Instead, he made it clear to the court that he was not satisfied with his attorney's representation and he wanted to present his own defense. Bilyeu told the court that defense counsel had predicted a 99.9% chance of losing at trial, and he believed he could do at least that well representing himself. 1RP 6. The record reflects Bilyeu's desire to present the defense he did not believe his attorney would provide, and there was nothing equivocal about his request to represent himself.

The state also argues it is not clear from the record that Bilyeu could represent himself adequately, suggesting that Bilyeu's lack of knowledge of the rules of evidence would preclude the court from allowing him to proceed pro se. Br. of Resp. at 6-7. It is well established,

however, that a defendant need not demonstrate technical knowledge of the law and the rules of evidence to exercise the right of self representation. Faretta v. California, 422 U.S. 806, 835, 45 L. Ed. 2d 562, 95 S. Ct. 25254 (1975); Vermillion, 112 Wn. App. at 851. In fact, the constitutional right of self representation is guaranteed despite the fact that exercise of that right “will almost surely result in detriment to both the defendant and the administration of justice.” Vermillion, 112 Wn. App. at 851.

The state suggests that because the record does not demonstrate that Bilyeu understood the risks of self representation, there was no error. Br. of Resp. at 8. However, once a defendant unequivocally waives his right to counsel, the trial court bears the responsibility of determining whether that decision is knowing and intelligent. Bellevue v. Acrey, 103 Wn.2d 203, 210, 691 P.2d 957 (1984).

[T]he preferred procedure for determining the validity of a waiver involves the trial court's colloquy with the defendant, conducted on the record. This colloquy should include a discussion about the seriousness of the charge, the possible maximum penalty involved, and the existence of technical procedural rules governing the presentation of the accused's defense.

Modica, 136 Wn. App. at 441.

Here, Bilyeu made an unequivocal request to represent himself. The court understood Bilyeu's request as a motion to proceed pro se, and

it began the required colloquy, asking Bilyeu if he understood the charges against him. 1RP 7. As the state acknowledges, the record is scant as to Bilyeu's understanding of the risks involved because the court made no real effort to determine whether Bilyeu's waiver of counsel was valid. Instead of discussing the risks with Bilyeu, the court rejected his request based on its conclusion that the request was no more than a stall tactic. 1RP 11. Where the court failed to make the necessary inquiry, its denial of Bilyeu's request to represent himself cannot be justified on the ground that the record is insufficient.

Finally, there was no evidence in the record that Bilyeu's motion to proceed pro se, despite its timing, was designed to delay his trial. Significantly, Bilyeu did not seek a continuance. Instead, Bilyeu expressed his dissatisfaction with appointed counsel's efforts on his behalf. The record reflects Bilyeu's desire to present the defense he did not believe his attorney would provide, and nothing supports the court's determination that Bilyeu was simply trying to delay the proceedings.

The right to self-representation is either respected or denied; its deprivation cannot be harmless. Vermillion, 112 Wn. App. at 851 (citing McKaskle v. Wiggins, 465 U.S. 168, 177 n.8, 104 S. Ct. 944, 79 L. Ed. 2d 122 (1984)). Thus, the unjustified denial of a defendant's right of self representation requires reversal; no showing of prejudice is required.

State v. Estabrook, 68 Wn. App. 309, 317 842 P.2d 1001, review denied, 121 Wn.2d 1024 (1993). Bilyeu's convictions must be reversed.

2. BILYEU'S CHALLENGE TO THE IMPROPER ADMISSION OF IRRELEVANT AND HIGHLY PREJUDICIAL EVIDENCE IS PRESERVED FOR APPEAL.

Bilyeu was charged with identity theft, forgery, and criminal impersonation based on evidence that he used his brother's name in a previous criminal proceeding for unlawful possession of heroin. Defense counsel argued that the name of the offense in the prior proceeding was not relevant to the charges in this case, and reference to possession of heroin could prejudice the jury's opinion of Bilyeu. 2RP 16. Counsel requested that the documents offered in evidence be redacted so that the jury would not know what Bilyeu was charged with. 2RP 16-17.

The court denied the motion to redact reference to the specific charges, saying that the case had to be tried the way it was, the jury was going to know there was a criminal proceeding, and it might be more harmful to allow the jury to speculate as to the charge involved. 2RP 17. The court stated, "So I'm not going to order any specific redactions. If you see a redaction that you'd like to make, if you can propose it; and I'll rule on that. But unfortunately, the jury's going to know that there's a criminal proceeding involved." 2RP 17.

In its brief, the state argues that Bilyeu's challenge to the court's refusal to redact the documents has not been preserved for appeal, because defense counsel did not again move to redact the name of the crime. Br. of Resp. at 11. To the contrary, while the trial court indicated it would rule on any further requests for redactions counsel proposed, it clearly denied counsel's request to redact reference to the name of the crime from the documents the state was offering into evidence. 2RP 16-17. Since the court's initial ruling regarding the requested redaction was definitive, no further request from counsel was required to preserve the issue for appeal. See State v. Powell, 126 Wn.2d 244, 257, 893 P.2d 615 (1995); Kramer v. J.I. Case Mfg. Co., 62 Wn. App. 544, 557 n.9, 815 P.2d 798 (1991).

3. THE SENTENCING COURT ERRONEOUSLY CONCLUDED THAT BILYEU WAS INELIGIBLE FOR DOSA CONSIDERATION.

Bilyeu meets the eligibility requirements for DOSA consideration set forth in RCW 9.94A.660(1). See CP 207. The sentencing court nonetheless ruled that Bilyeu was ineligible for DOSA consideration under the mistaken belief that an offender is only eligible for a DOSA if he commits the current offense while under the influence of controlled substances:

I wouldn't consider DOSA a – I have to – as I understand it, I have to look at DOSA as relating to dealing with controlled

substance-related offenses. So the controlled substance-related offenses I'd have to be worried about are the Identity Theft, the Forgery, and the Criminal Impersonation in the First Degree. Those all occurred at a time when he wasn't using controlled substances, because he was in custody. So I can't – I couldn't find that those were related to his use of or abuse of controlled substances, because I'd have to really stretch to do that.

The fact that, maybe, before and after those things, he used controlled substances, or that he has a drug problem, may be true; but identity theft, forgery, and criminal impersonation – he apparently did those without being under the influence of controlled substances.”

3RP 14. The sentencing judge denied Bilyeu's request to be screened for a DOSA “because [he] couldn't find that it qualifies for DOSA in any event. DOSA is for people who commit crimes under the influence of controlled substances or as a result of their drug problem.” 3RP 15.

Contrary to the court's belief, there is no requirement in the statute that the offender committed the current offense while under the influence of controlled substances, or that the current offense was drug related. See RCW 9.94A.660(1). While the DOSA statute provides that if the offender meets the statutory eligibility requirements, the court can order an examination to address issues relating to substance abuse and treatment, the statute does not require proof that the current offense was drug related before the court can order a DOSA examination. RCW 9.94A.660(2).

The state argues in its brief that since a court's decision not to apply a DOSA is not reviewable, Bilyeu can challenge the court's decision

only on constitutional grounds. Br. of Resp. at 12. The state appears to misunderstand the issue on appeal. Although a sentencing court's decision whether to grant a DOSA is generally not reviewable, an offender can always challenge the procedure by which a sentence is imposed. State v. Grayson, 154 Wn.2d 333, 338, 111 P.3d 1183 (2005) (citing State v. Herzog, 112 Wn.2d 419, 423, 771 P.2d 739 (1989)); State v. Williams, 149 Wn.2d 143, 146, 65 P.3d 1214 (2003). Thus, it is well established that appellate review is available for correcting legal errors or abuses of discretion in sentencing decisions. State v. White, 123 Wn. App. 106, 114, 97 P.3d 34 (2004).

The offenses Bilyeu was convicted of in this case arose from Bilyeu's arrest for unlawful possession of heroin, and the court agreed that it was likely Bilyeu had a drug problem and was under the influence of heroin when he committed criminal impersonation. 3RP 14-15. Thus, the court's refusal to consider Bilyeu's DOSA request was not based on a determination that Bilyeu had no drug problem and was not in need of treatment. Rather, the court's refusal to consider Bilyeu's request for a DOSA was based on its erroneous legal conclusion that Bilyeu was ineligible for the sentencing alternative. The error requires reversal of Bilyeu's sentence.

B. CONCLUSION

For the reasons set forth above and in Appellant's opening brief, this Court should reverse Bilyeu's convictions and sentence.

DATED this 5th day of February, 2009.

Respectfully submitted,



CATHERINE E. GLINSKI

WSBA No. 20260

Attorney for Appellant

Certification of Service by Mail

Today I deposited in the mails of the United States of America, postage prepaid,
properly stamped and addressed envelopes containing copies of the Reply Brief of
Appellant in *State v. Charles Ray Bilyeu*, Cause No. 37797-7-II directed to:

Michael C. Kinnie
Clark County Prosecutor's Office
PO Box 5000
Vancouver, WA 98666-5000

Charles Bilyeu, DOC# 267446
Airway Heights Corrections Center
C-4-B-S-3
Post Office Box 2048
Airway Heights, WA 99001-2048

I certify under penalty of perjury of the laws of the State of Washington that the
foregoing is true and correct.



Catherine E. Glinski
Done in Port Orchard, WA
February 5, 2009

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