

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.

FILED  
COURT OF APPEALS  
DIVISION II  
08 OCT 27 PM 1:10  
STATE OF WASHINGTON  
BY DEPUTY

---

---

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

The Honorable Robert A. Lewis, Judge

---

---

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

## TABLE OF CONTENTS

<b>TABLE OF CONTENTS</b> .....	<b>I</b>
<b>TABLE OF AUTHORITIES</b> .....	<b>II</b>
<b>A. ASSIGNMENTS OF ERROR</b> .....	<b>1</b>
ISSUES PERTAINING TO ASSIGNMENTS OF ERROR .....	1
<b>B. STATEMENT OF THE CASE</b> .....	<b>2</b>
1. PROCEDURAL HISTORY .....	2
2. SUBSTANTIVE FACTS .....	2
<i>a. Denial of Bilyeu's request to represent himself</i> .....	2
<i>b. Refusal to redact exhibits</i> .....	4
<i>c. Denial of request for DOSA consideration</i> .....	5
<b>C. ARGUMENT</b> .....	<b>7</b>
1. THE UNJUSTIFIED DENIAL OF BILYEU'S RIGHT TO SELF REPRESENTATION REQUIRES REVERSAL.....	7
2. THE COURT'S REFUSAL TO REDACT IRRELEVANT AND UNFAIRLY PREJUDICIAL INFORMATION FROM THE STATE'S EXHIBITS DENIED BILYEU A FAIR TRIAL. ....	13
3. THE SENTENCING COURT ERRONEOUSLY CONCLUDED THAT BILYEU WAS INELIGIBLE FOR DOSA CONSIDERATION. ....	18
<b>D. CONCLUSION</b> .....	<b>22</b>

## TABLE OF AUTHORITIES

### Washington Cases

<u>State v. Bolar</u> , 118 Wn. App. 490, 78 P.3d 1012 (2003), <u>review denied</u> , 151 Wn.2d 1027 (2004).....	12
<u>State v. Breedlove</u> , 79 Wn. App. 101, 900 P.2d 586 (1995).....	9
<u>State v. Estabrook</u> , 68 Wn. App. 309, 842 P.2d 1001, <u>review denied</u> , 121 Wn.2d 1024 (1993).....	7, 13
<u>State v. Fritz</u> , 21 Wn. App. 354, 585 P.2d 173 (1978), <u>review denied</u> , 92 Wn.2d 1002 (1979).....	8, 9
<u>State v. Grayson</u> , 154 Wn.2d 333, 111 P.3d 1183 (2005) .....	18
<u>State v. Green</u> , 119 Wn. App. 15, 79 P.3d 460 (2003), <u>review denied</u> , 151 Wn.2d 1035 (2004).....	16
<u>State v. Harding</u> , 161 Wash. 379, 297 P. 167 (1931) .....	7
<u>State v. Hemenway</u> , 122 Wn. App. 787, 95 P.3d 408 (2004).....	11
<u>State v. Herzog</u> , 112 Wn.2d 419, 771 P.2d 739 (1989).....	18
<u>State v. Kane</u> , 101 Wn. App. 607, 614, 5 P.3d 741 (2000).....	21
<u>State v. LeFever</u> , 102 Wn.2d 777, 690 P.2d 574 (1984), <u>overruled on other grounds by State v. Brown</u> , 113 Wn.2d 520, 782 P.2d 1013 (1989). ...	16
<u>State v. Perrett</u> , 86 Wn. App. 312, 936 P.2d 426, <u>review denied</u> , 133 Wn.2d 1019 (1997).....	14
<u>State v. Pogue</u> , 104 Wn. App. 981, 17 P.3d 1272 (2001).....	17
<u>State v. Renneberg</u> , 83 Wn.2d 735, 522 P.2d 835 (1974).....	17
<u>State v. Vermillion</u> , 112 Wn. App. 844, 51 P.3d 188 (2002), <u>review denied</u> 148 Wn.2d 1022 (2003).....	8, 13
<u>State v. White</u> , 123 Wn. App. 106, 97 P.3d 34 (2004) .....	18

State v. Williams, 149 Wn.2d 143, 65 P.3d 1214 (2003) ..... 18

**Federal Cases**

Faretta v. California, 422 U.S. 806, 45 L. Ed. 2d 562, 95 S. Ct. 25254  
(1975)..... 7, 8

McKaskle v. Wiggins, 465 U.S. 168, 104 S. Ct. 944, 79 L. Ed. 2d 122  
(1984)..... 13

**Statutes**

RCW 9.35.020 ..... 2, 15

RCW 9.94A.660..... 18

RCW 9.94A.660(1)..... 19, 21

RCW 9.94A.660(2)..... 21

RCW 9A.60.020..... 2, 15

RCW 9A.60.040..... 2, 15

**Constitutional Provisions**

Const., art. I § 22..... 7

U.S. Const. amend. XIV ..... 7

U.S. Const., amend. VI..... 7

**Rules**

ER 401 ..... 13

ER 402 ..... 13

A. ASSIGNMENTS OF ERROR

1. The trial court denied appellant his right to self-representation.

2. The court's refusal to redact irrelevant and unfairly prejudicial information from the state's exhibits denied appellant a fair trial.

3. The sentencing court erroneously concluded that appellant was ineligible for DOSA consideration.

Issues pertaining to assignments of error

1. Appellant made an unequivocal request to represent himself prior to trial, without requesting a continuance, expressing his dissatisfaction with appointed counsel's representation. Where there was no evidence in the record to support the court's conclusion that appellant's request was a stall tactic, does the denial of his right to self representation require reversal?

2. Appellant was charged with criminal impersonation, identity theft, and forgery for using his brother's name on a charge of unlawful possession of heroin. The court admitted a guilty plea statement and judgment and sentence form from that case, refusing appellant's request to redact the name of the crime from the documents. Where the nature of the prior charge was irrelevant to the current charges, and where

evidence of appellant's drug addiction likely influenced the jury's verdict, must appellant's convictions be reversed?

3. The lower court denied appellant's request to be considered for a DOSA, under the erroneous belief that appellant was ineligible for DOSA consideration because he was not under the influence of controlled substances at the time of his offenses. Must appellant's sentence be reversed and the case remanded for resentencing?

B. STATEMENT OF THE CASE

1. Procedural History

The Clark County Prosecuting Attorney charged appellant Charles Bilyeu with second degree identity theft, forgery, and first degree criminal impersonation. CP 8-9; RCW 9.35.020(3); RCW 9A.60.020(1); RCW 9A.60.040(1)(a). The case proceeded to jury trial before The Honorable Robert A. Lewis, and the jury returned guilty verdicts. CP 96-98. The court imposed standard range sentences, and Bilyeu filed this timely appeal. CP 198-99; 209.

2. Substantive Facts

a. **Denial of Bilyeu's request to represent himself**

Two days before trial began, Bilyeu moved for substitution of counsel. Bilyeu requested that his attorney file the motion because he did

not feel he was being adequately represented, and counsel asserted that there had been a complete breakdown in communication. Supp. CP (Sub. No. 80, Motion and Declaration for Substitution of Attorney, filed 5/12/08, at 1-2). The motion was heard the next day. At that time, Bilyeu informed the court that he felt his defense had gotten nowhere and he did not want his attorney. 1RP<sup>1</sup> 4-6. Bilyeu told the court he would defend himself, saying counsel had told him he had a 99.9% chance of losing at trial, and he could do at least that well himself. 1RP 6.

The state opposed the motion for substitution of counsel, saying that when Bilyeu's previous substitution motion was granted, the court was concerned Bilyeu would again seek new counsel. The state asked to proceed to trial with current defense counsel. 1RP 7-8. Bilyeu responded that he wanted to represent himself and did not want anything more to do with defense counsel. 1RP 11.

The court noted that normally a defendant has a constitutional right to represent himself, but the court has a right to refuse that request when it appears to be a stall tactic. 1RP 11. Although Bilyeu had not sought a continuance, the court found his motion to represent himself was intended to delay the trial, and it denied Bilyeu's request. 1RP 11. Bilyeu renewed his motion during the first witness's testimony, saying he would do the

---

<sup>1</sup> The Verbatim Report of Proceedings is contained in three volumes, designated as follows: 1RP—5/13/08; 2RP—5/14/08; 3RP—5/29/08.

trial himself. 2RP 46. The court denied the motion based on its previous finding that Bilyeu was attempting to stall the proceedings. 2RP 46.

**b. Refusal to redact exhibits**

At trial, the state presented testimony that Bilyeu used his brother's name and date of birth at a traffic stop. 2RP 38. There was evidence that he continued to use that name and birth date at court appearances and that he signed that name on a scheduling order, guilty plea statement, and judgment and sentence form. 2RP 79-80, 89-90, 95-99. In addition, the state presented evidence that after the charges in this case were filed, Bilyeu said in a court hearing that he just signed his brother's name at a traffic stop and ended up with three felonies. 2RP 103.

Prior to trial the defense had moved to exclude ER 404(b) evidence. CP 15-16; 2RP 15. The state indicated the only such evidence it was offering related to the proceedings which resulted in these charges. Bilyeu had pleaded guilty to possession of heroin using his brother's name, and the state would be offering documents from those proceedings in evidence. 2RP 15. The court granted the defense motion as to all prior conduct except that case. 2RP 16.

Defense counsel next argued that the name of the offense to which Bilyeu pleaded guilty 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.

The un-redacted Statement on Plea of Guilty and Judgment & Sentence were admitted into evidence and sent to the jury. 2RP 56, 58. Both documents identified the charge as possession of controlled substance, heroin. Exhibits 4 and 5.

**c. Denial of request for DOSA consideration**

At sentencing, Bilyeu asked to be considered for a Drug Offender Sentencing Alternative. 3RP 13. The court noted that Bilyeu was in custody and presumably not using controlled substances during the time he committed identity theft and forgery. 3RP 13. It denied Bilyeu’s request for DOSA consideration, finding he was not eligible because he

was not under the influence of controlled substances at the time he committed those offenses:

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.

Defense counsel pointed out that Bilyeu committed his offenses after being arrested for possession of heroin. The court responded that while Bilyeu might have been under the influence when he committed criminal impersonation, he was not under the influence when he committed the other offenses. 3RP 15. It refused to consider a DOSA, stating, “I 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.

C. ARGUMENT

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. In fact, a defendant “may conduct his entire defense without counsel if he so chooses.” State v. Estabrook, 68 Wn. App. 309, 317 n. 3, 842 P.2d 1001(quoting State v. Harding, 161 Wash. 379, 383, 297 P. 167 (1931)), review denied, 121 Wn.2d 1024 (1993). The criminal defendant’s right to defend is necessarily personal because the defendant will bear the personal consequences of a conviction should the defense fail. Faretta v. California, 422 U.S. 806, 820, 45 L. Ed. 2d 562, 95 S. Ct. 25254 (1975).

In Faretta, the United States Supreme Court discussed the nature of the right of self representation. The court pointed out that the right to assistance of counsel, guaranteed by the sixth amendment, is not the same as “compulsory counsel.” Faretta, 422 U.S. at 833. Counsel should function as an assistant to a willing defendant,

not an organ of the state interposed between an unwilling defendant and his right to defend himself personally. . . . Unless the accused has acquiesced in such representation, the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not his defense.

Faretta, 422 U.S. at 820-21. Thus, forcing a criminal defendant to accept, against his will, the services of a court appointed public defender, deprives the defendant of his constitutional right to conduct his own defense. Faretta, 422 U.S. at 836.

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.” State v. Vermillion, 112 Wn. App. 844, 851, 51 P.3d 188 (2002), review denied 148 Wn.2d 1022 (2003). But the right is not absolute. 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.

The disposition of a request to proceed pro se is reviewed for an abuse of discretion, and the later in the proceedings the request is made, the broader is the court’s discretion. State v. Fritz, 21 Wn. App. 354, 361, 585 P.2d 173 (1978), review denied, 92 Wn.2d 1002 (1979). When the request is made well before trial and is unaccompanied by a motion for continuance, the defendant has a right to proceed pro se as a matter of law. If the request is made at the start of trial or shortly before, the right depends on the facts of the case, and the trial court has a measure of

discretion. If the request is made during trial, the right rests largely in the informed discretion of the trial court. Fritz, 21 Wn. App. 361.

Here, since Bilyeu made his request to proceed pro se the day before trial commenced, the request falls within the second category, and the court had a measure of discretion. The court must exercise its discretion by balancing the defendant's interest in self-representation against society's interest in the orderly administration of justice. State v. Breedlove, 79 Wn. App. 101, 107, 900 P.2d 586 (1995). The timeliness requirement may not be used as a bar to the defendant's constitutional right of self-representation, however. Breedlove, 79 Wn. App. at 109-10. The requirement is intended only to prevent the defendant from misusing the Faretta mandate "to unjustifiably delay a scheduled trial or to obstruct the orderly administration of justice." *Id.* (quoting Fritz, 21 Wn. App. at 362).

In Breedlove, the defendant made an unequivocal request to represent himself shortly before trial. He also requested a continuance to prepare his defense. In addition, Breedlove's appointed counsel moved to withdraw, stating there had been a complete breakdown in communication and Breedlove did not trust his professional judgment. Breedlove, 79 Wn. App. at 105. The trial court granted a one-week continuance but denied Breedlove's motion to proceed pro se. *Id.*

On appeal, this Court held that the lower court had abused its discretion. Although Breedlove's motion to represent himself was accompanied by a motion for continuance, there was no evidence that the motion was made for the purpose of delay or harassment. *Id.* at 108. An improper purpose could not be inferred from the timing of the motion, and the request for additional time could have reflected Breedlove's desire to prepare the defense he believed his attorney failed to prepare. Since the record failed to establish an improper motive, the trial court abused its discretion in denying Breedlove's request to represent himself. *Id.* at 109-10.

Here, as in Breedlove, Bilyeu made an unequivocal request to represent himself shortly before trial. He told the court his defense had gotten nowhere, he did not want his attorney, and he would defend himself. 1RP 4-6, 11. 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. Without further inquiry, however, the court denied Bilyeu's request to represent himself, finding it appeared to be a stall tactic. 1RP 11.

As in Breedlove, the court's denial of Bilyeu's right of self representation was an abuse of discretion and requires reversal. 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. Since counsel had predicted a 99.9% chance of losing at trial, Bilyeu 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 nothing supports the court's determination that Bilyeu was simply trying to delay the proceedings.

The prosecutor pointed out below that the court had granted a request for substitution of counsel five months earlier and suggested that his request for another attorney one day before trial was intended to delay the proceedings. 1RP 7-8. A pattern of unruly behavior which disrupts the orderly administration of justice may justify denial of a request for self representation. State v. Hemenway, 122 Wn. App. 787, 792, 95 P.3d 408 (2004) (defendant refused to respond to court's questions, refused to waive speedy trial when requesting new attorney, repeated arguments after motions were denied, alleged ineffective assistance of counsel by several attorneys, and vacillated in request to proceed pro se); State v. Bolar, 118 Wn. App. 490, 516-17, 78 P.3d 1012 (2003) (defendant's vacillation regarding self representation, disruptive conduct in courtroom, and threats

of violence against attorney indicated intent to disrupt orderly administration of justice), review denied, 151 Wn.2d 1027 (2004).

No such pattern exists in this case. While Bilyeu's previous motion for substitution of counsel was granted, he attempted to work with counsel for five months before again moving for substitution. When that motion was heard, however, he explained that he was prepared to proceed pro se. He did not ask for a continuance so that new counsel could prepare a defense; he asked to defend himself without seeking additional time. This record does not demonstrate an intent to disrupt the orderly administration of justice.

Bilyeu was still frustrated with his attorney's performance at trial, and during the first witness's testimony he interposed some objections. 2RP 41, 43-44. The court then explained to Bilyeu outside the jury's presence that he could not interrupt. 2RP 45. Bilyeu said he understood, and he renewed his motion to represent himself, which the court denied. 2RP 45-46. As this exchange took place at trial, it does not support the court's pretrial denial of Bilyeu's request to represent himself. In any event, Bilyeu's objections demonstrate his desire to present his own defense due to the belief that appointed counsel was doing inferior job, rather than a desire to disrupt the proceedings. In fact, there were no further interruptions from Bilyeu after the court's warning.

The record does not support the court's finding that Bilyeu sought to represent himself solely as a tactic to delay the proceedings. The court abused its discretion in denying Bilyeu's motion to proceed pro se. 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. Estabrook, 68 Wn. App. at 317. Bilyeu's convictions must be reversed.

2. THE COURT'S REFUSAL TO REDACT IRRELEVANT AND UNFAIRLY PREJUDICIAL INFORMATION FROM THE STATE'S EXHIBITS DENIED BILYEU A FAIR TRIAL.

Evidence that is not relevant is not admissible in a criminal trial. ER 402. "Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. Even if relevant, evidence may be excluded if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury ...." ER 403.

A trial court's ruling on admissibility of evidence is reviewed for an abuse of discretion. A court abuses its discretion when its decision is

manifestly unreasonable or based upon untenable grounds. State v. Perrett, 86 Wn. App. 312, 319, 936 P.2d 426, review denied, 133 Wn.2d 1019 (1997).

In Perrett, the defendant was arrested for second degree assault with a deadly weapon after he pointed a shotgun at a tenant. 86 Wn. App. at 314. Police arrested the defendant and, after advising him of his Miranda rights, asked him to produce the shotgun he used. Perrett refused, saying the last time the sheriffs took his guns, he did not get them back. Id. at 315. Perrett moved to exclude this statement, but the trial court admitted it, explaining that the jury needed to understand the totality of the circumstances to judge Perrett's demeanor on arrest. Id. at 319.

On appeal, this Court held that admission of the statement was an abuse of discretion. Perrett's demeanor on arrest was not relevant to any element of the crime charged. Moreover, the statement was unfairly prejudicial, as it raised the inference that he had committed a prior crime with a gun and thus it was more likely he committed the charged offense. Id. at 319-20.

In this case, 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. The defense argued that the nature of the prior offense was irrelevant to the

current charges and unfairly prejudicial and asked that name of the offense be redacted from the judgment and sentence and plea statement admitted into evidence. 2RP 16.

Like the court in Perrett, the court below denied the motion, reasoning that the case had to be tried the way it is, and since the alleged crimes occurred in the course of criminal proceedings, the jury needed to know about those proceedings. 2RP 17. Also as in Perrett, because of the court's ruling, the jury was presented with irrelevant, prejudicial information regarding Bilyeu's prior offenses.

The information the defense sought to exclude was not relevant to any element of the offenses charged in this case. In order to convict Bilyeu of identity theft, the state had to prove Bilyeu knowingly used the means of identification or financial information of another person with intent to commit a crime. See RCW 9.35.020. To convict Bilyeu of forgery, the state had to prove he falsely made, completed, or altered a written instrument or put off as true a written instrument he knew to be forged. See RCW 9A.60.020. And to convict of criminal impersonation, the state had to prove Bilyeu assumed a false identity and did an act in that character for an unlawful purpose. See RCW 9A.60.040. There is no question that the documents Bilyeu signed were relevant and necessary to the state's case. But there is also no question that the exact nature of the

previous proceedings was not. The name of the crime to which Bilyeu pleaded guilty using his brother's name has no bearing on the state's case.

Evidence is not admissible merely because it is contained in an exhibit; references to irrelevant or prejudicial matters should be redacted. State v. Green, 119 Wn. App. 15, 24, 79 P.3d 460 (2003) (while immunity agreement was admissible after witness's credibility was attacked, prejudicial information should have been redacted), review denied, 151 Wn.2d 1035 (2004). The court below improperly denied counsel's request to redact the state's exhibits<sup>2</sup>, because the name of Bilyeu's previous crime was both irrelevant and prejudicial.

Even if the nature of the prior charge had some relevance, its prejudicial impact mandated its exclusion. As the Washington Supreme Court has recognized, "The impact of narcotics addiction evidence upon a jury of laymen [is] catastrophic.... It cannot be doubted the public generally is influenced with the seriousness of the narcotics problem ... and has been taught to loathe those who have anything to do with illegal narcotics ...." State v. LeFever, 102 Wn.2d 777, 783-84, 690 P.2d 574 (1984) (citations omitted), overruled on other grounds by State v. Brown, 113 Wn.2d 520, 782 P.2d 1013 (1989).

---

<sup>2</sup> 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.

Here, the jury was informed, unnecessarily, that Bilyeu was unlawfully in possession of heroin at the time he committed the charged offenses. Reversal is required if there is a reasonable probability that the erroneous admission of evidence materially affected the outcome of the case. State v. Pogue, 104 Wn. App. 981, 988, 17 P.3d 1272 (2001).

There were brief passing references to the previous charge at trial, which appeared to be inadvertent. 2RP 19-20, 88, 92. But because of the court's erroneous ruling, documents containing the prejudicial and irrelevant information that Bilyeu was in possession of heroin were sent to jury as exhibits, increasing the likelihood that the jury would be unduly influenced by that information. "In view of society's deep concern today with drug usage and its consequent condemnation by many if not most, evidence of drug addiction is necessarily prejudicial in the minds of the average juror." State v. Renneberg, 83 Wn.2d 735, 737, 522 P.2d 835 (1974).

Defense counsel argued that the state failed to prove Bilyeu acted for the purpose of obstructing law enforcement because he was arrested, pleaded guilty, and served the sentence imposed. 2RP 154. Nor did the state prove Bilyeu used his brother's name with the intent to commit a crime, since he pleaded guilty, or that he acted with intent to injure or defraud, since he and not his brother served the time. 2RP 155-56. It is

reasonably likely the jury overlooked the problems in the state's proof, concluding that Bilyeu, a "loathsome" drug addict, must be guilty. The court's error was "catastrophic" to the defense, and reversal is required. See LeFever, 102 Wn.2d at 783-84.

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

The Legislature created the DOSA program in an attempt to provide treatment to offenders likely to benefit from it. It authorizes trial judges to give eligible offenders a reduced sentence, treatment, and increased supervision to help them overcome their addictions. State v. Grayson, 154 Wn.2d 333, 337, 111 P.3d 1183 (2005); RCW 9.94A.660. 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. Grayson, 154 Wn.2d at 338 (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).

By statute, an offender is eligible for a DOSA if:

(a) The offender is convicted of a felony that is not a violent offense or sex offense and the violation does not involve a sentence enhancement under RCW 9.94A.533 (3) or (4);

(b) The offender is convicted of a felony that is not a felony driving while under the influence of intoxicating liquor or any drug under RCW 46.61.502(6) or felony physical control of a vehicle while under the influence of intoxicating liquor or any drug under RCW 46.61.504(6);

(c) The offender has no current or prior convictions for a sex offense at any time or violent offense within ten years before conviction of the current offense, in this state, another state, or the United States;

(d) For a violation of the Uniform Controlled Substances Act under chapter 69.50 RCW or a criminal solicitation to commit such a violation under chapter 9A.28 RCW, the offense involved only a small quantity of the particular controlled substance as determined by the judge upon consideration of such factors as the weight, purity, packaging, sale price, and street value of the controlled substance;

(e) The offender has not been found by the United States attorney general to be subject to a deportation detainer or order and does not become subject to a deportation order during the period of the sentence;

(f) The standard sentence range for the current offense is greater than one year; and

(g) The offender has not received a drug offender sentencing alternative more than once in the prior ten years before the current offense.

RCW 9.94A.660(1).

Bilyeu meets the statutory eligibility requirements for DOSA consideration. His offense was not a sex offense or violent offense, and

no sentence enhancement applied; his offense did not involve driving under the influence; he has no convictions for sex offenses or violent offenses within ten years; his offense was not a violation of the Uniform Controlled Substances Act; he is not subject to deportation; the standard range for two of his offenses exceeds one year; and he has not received more than one DOSA in the past ten years. CP 207. None of these statutory eligibility requirements was disputed at sentencing.

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). It is true that DOSA is a treatment-oriented alternative to a standard range sentence for offenders with substance abuse problems. State v. Kane, 101 Wn. App. 607, 609, 614, 5 P.3d 741 (2000). The DOSA statute provides that if the offender meets the statutory eligibility requirements, the court can order an examination of the offender to address, among other factors, whether the offender suffers from drug addiction, whether that addiction will probably lead to future criminal behavior, whether treatment is available, and whether the offender and the community will benefit from a DOSA. RCW 9.94A.660(2). But the statute does not require proof that the current offense was drug related before the court can order a DOSA examination.

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

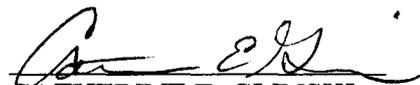
heroin when he committed criminal impersonation.<sup>3</sup> 3RP 14-15. Thus, the court's refusal to consider Bilyeu's DOSA request was not based on a determination that Bilyeu had no drug problem and was not in need of treatment. Rather, the court's refusal to consider Bilyeu's request for a DOSA was based on its erroneous legal conclusion that Bilyeu was ineligible for the sentencing alternative. The error requires reversal of Bilyeu's sentence.

D. CONCLUSION

Bilyeu was denied his constitutional right to self representation, and his convictions must be reversed. Further, the court's refusal to redact irrelevant and unfairly prejudicial information from the state's exhibits also requires reversal. In addition, the court's erroneous conclusion that Bilyeu was ineligible for DOSA consideration requires remand for resentencing.

DATED this 22<sup>nd</sup> day of October 2008.

Respectfully submitted,



CATHERINE E. GLINSKI

WSBA No. 20260

Attorney for Appellant

---

<sup>3</sup> The standard range for criminal impersonation does not exceed one year, and that offense is not subject to the DOSA provisions.

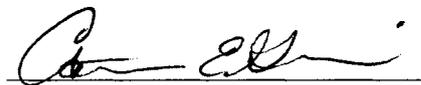
Certification of Service by Mail

Today I deposited in the mails of the United States of America, postage prepaid, properly stamped and addressed envelopes containing copies of the Brief of Appellant and Supplemental Designation of Clerk's Papers and Exhibits 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  
Post Office Box 1899  
Airway Heights, WA 99001-1899

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  
October 22, 2008

FILED  
COURT OF APPEALS  
DIVISION II  
08 OCT 27 PM 1:10  
STATE OF WASHINGTON  
BY  DEPUTY