No. 38227-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JUSTIN W. GROVER,

Appellant.

COURT OF APPEALS
DIVISION II
09 APR 10 PM 12:
STATE OF WASHINGTON
BY
DEPUTY

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

The Honorable Gary R. Tabor, Judge
Cause No. 08-1-00836-7

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the court impermissibly denied Grover his right of self-representation.

2. Whether the validity of the no contact orders of which Grover was convicted of violating in 2003 is an element of the current offenses which the State must prove.

3. If the statutory basis for the orders underlying the previous convictions is an element of the current offense, whether by stipulating that he had two prior convictions for violation of a no contact order Grover waived the requirement that the State prove that element.

B. STATEMENT OF THE CASE.

The State accepts Grover's statement of the case.

C. ARGUMENT.

1. The court did not impermissibly deny Grover his right to represent himself at trial.

On the day before trial, Grover for the first time asked the court to permit him to proceed pro se. On July 31, 2008, nearly a month before trial, he had requested that a different attorney be appointed to represent him, a request that was denied. [07/31/08 RP 10] A review of the transcript of that hearing, as well as that of a pretrial hearing held on August 20, 2008, [08/20/08 RP 7-8] shows that Grover, while having been found competent, seriously misunderstood the proceedings to that point. He also demonstrated an unwillingness to listen to any explanations or to

conform his behavior to the courtroom procedures. At trial, Grover disrupted the proceedings to complain to the judge about his attorney, the police, and the prosecution. [Trial RP 91-99] Even at the time he asked to proceed pro se, he continued to insist that there had not been an omnibus hearing, even though there was an omnibus order in the file. [Trial RP 27] During the entire course of the case, he was generally intransigent.

Both the state and federal constitutions guarantee a defendant the right to represent him or herself. That right, however, is not absolute. State v. Vermillion, 112 Wn. App. 844, 850-51, 51 P.3d 188 (2002). The presumption is against a waiver of counsel. Id., at 851. A trial court's denial of a request for self-representation is reviewed for abuse of discretion. "Discretion is abused if the trial court's decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons." Id., at 855.

"The trial court's discretion lies along a continuum that corresponds with the timeliness of the request to proceed pro se." State v. Breedlove, 79 Wn. App. 101, 107, 900 P.2d 586 (1995).

> The cases which have considered the timeliness of a proper demand for self-representation have generally held: (a) if made well before the trial or hearing and unaccompanied by a motion for continuance, the right of self-representation exists as a matter of law; (b) if

> made as the trial or hearing is about to commence, or shortly before, the existence of the right depends on the facts of the particular case with a measure of discretion reposing in the trial court in the matter; and (c) if made during the trial or hearing, the right to proceed pro se is largely within the informed discretion of the trial court. (Cites omitted.)

State v. Fritz, 21 Wn. App. 254, 361, 585 P.2d 173 (1978). When weighing the defendant's right to self-representation against the interest in the orderly administration of justice, the latter becomes weightier the closer to trial the request is made. Breedlove, *supra*, at 107.

Here Grover made his first and only request to represent himself the morning before the trial began. He did not, therefore, have the right as a matter of law, but rather the decision was within the discretion of the trial court. There are two circumstances that justify denying a motion to proceed pro se made as the trial is about to begin. One is if the request is made for some improper purpose, such as delaying the trial, and the other is where granting the motion would obstruct the orderly administration of justice. Breedlove, *supra*, at 107-08. It is understood that a trial will not run as smoothly with a pro se defendant as with a represented one, and the mere fact that the trial may take longer is not a reason to deny self-representation. Vermillion, *supra*, at 858. On the other

hand, a defendant cannot use his right of self-representation to flout the law or the rules of procedure or otherwise disrupt the trial. Fritz, *supra*, at 363.

The trial court here denied Grover's motion on the grounds it did not believe he would be able to refrain from arguing rather than presenting testimony. [Trial RP 26] The court had earlier expressed concern that Grover did not understand how a trial works. [Trial RP 24] While the court did not use the words "obstruct the orderly administration of justice," that is clearly what it was referring to. And it is equally clear that the court was justified in that fear. Grover demonstrated an inability to stay on the subject, [Trial RP 21] did not understand such basic concepts as the fact that the information was an accusation rather than a verdict, [Trial RP 23-24] was obsessed with getting into evidence a shirt (which never was offered at trial), [Trial RP 21, 25, 28, 29, 38, 93] and constantly interrupted the judge. It is manifestly obvious that had Grover represented himself, the trial would have been a shambles, almost certain to result in a mistrial and a waste of scarce judicial resources.

While the court did not articulate this particularly well, an appellate court will sustain a trial court's ruling on any appropriate

ground permitted by the pleadings and the proof. Fritz, *supra*, at 364. The record here supports the court's decision to deny Grover's motion to represent himself. The court did not err.

2. The validity of the no contact orders for which Grover was convicted in 2003 is not an element of the current offenses of violation of a protection order that the State was required to prove.

Grover was convicted of two counts of violation of a protection order/domestic violence against the same victim, but occurring on different dates. He was charged under RCW 26.50.110(5), which reads:

> A violation of a court order issued under this chapter, chapter 7.90, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or of a valid foreign protection order as defined in RCW 26.52.020, is a class C felony if the offender has at least two previous convictions for violating the provisions of an order issued under this chapter, chapter 7.90, 10.99, 26.09, 26.10, 26.16, or 74.34 RCW, or a valid foreign protection order as defined in RCW 25.52.020. The previous convictions may involve the same victim or other victims specifically protected by the orders the offender violated.

Grover correctly states the law pertaining to sufficiency of the evidence. His argument is that in order to prove that he had two prior convictions for violation of a no contact order, the State had to prove that the order or orders which he was convicted of violating were issued pursuant to one of the statutes listed in RCW 26.50.110(5). He stipulated that he had been convicted of violating

a no contact order on March 26, 2003, and September 17, 2003. [Supp. CP 77]

Grover cites to State v. Arthur, 126 Wn. App. 243, 108 P.3d 169 (2005) (decided in March of 2005), a Division II case which held just as Grover asks this court to do. In Arthur, where the defendant was also charged with felony violation of a no contact order, the State introduced judgments and sentences for the prior convictions, but those judgments and sentences did not indicate the basis on which the no contact orders were issued. The Arthur court held that the validity of the prior convictions was an element of the current offense. In its opinion, the court expressly disagreed with the holding in State v. Carmen, 118 Wn. App. 655, 77 P.3d 368 (2003), a Division I case, which held that whether the prior convictions were based on violations of protection orders issued under one of the statutes listed in RCW 26.50.110(5) is a question of law for the court to decide. Id., at 663.

In December of 2005, the Supreme Court of Washington issued an opinion in State v. Miller, 156 Wn.2d 23, 123 P.3d 827 (2005). In that case, the court held that the validity of a no contact order is a question of law for the court to decide, whereas the

existence of the order is a question of fact for the jury. In its opinion, the court cited approvingly to Carmen:

> *Carmen* also noted, properly, that "[t]he very relevancy of the prior convictions depended upon whether they qualified as predicate convictions under the statute. If they had not so qualified, the jury never should have been permitted to consider them." *Carmen*, 118 Wn. App. at 664.

Miller, *supra*, at 30. The court went on to say that "the validity of the no-contact order is not an element of the crime." Id., at 31.

In State v. Gray, 134 Wn. App. 547, 138 P.3d 1123 (2006), another Division I case raising the same issue, Gray argued that Miller stands solely for the proposition that the validity of the no contact order for which a defendant is on trial for violating is not an essential element of the crime of felony violation of a no contact order. Id., at 555. The Gray court disagreed, reading Miller to apply to previously-violated no contact orders. The court, as part of its "gatekeeping" function, determines the validity of the underlying convictions before the jury is allowed to hear about them.

> *Miller's* "applicability" reasoning applies equally to issues of law about previously-violated NCOs. Whether the current NCO and the previously-violated NCOs are admissible to support a felony charge under RCW 26.50.110(5) depends on whether they were issued under the listed statutes. Acting in its "gatekeeping" capacity, a court must make this determination before the jury is allowed to hear the

> evidence. Under *Miller*, this applicability determination is "uniquely" within the province of the court.

Id., at 555-56.

Based on the holding of Miller, which noted the Arthur decision, Miller, *supra*, at 30, but cited to Carmen, the validity of the orders which Grover was convicted of violating was not an element of the current offenses which must be submitted to the jury. Because that issue was not, and should not have been, before the jury, the lack of such evidence presented at trial is irrelevant.

3. Even if the fact that the orders which Grover was convicted of violating in 2003 were issued pursuant to one of the statutes listed in RCW 26.50.110(5) was an element of the current offense, by stipulating to those convictions he relieved the State of its burden of proof. Further, his failure to raise this issue in the court below constitutes a waiver of his right to challenge the omission.

Grover stipulated that he had been convicted of violation of a no contact order on two occasions, in March and September of 2003. [Supp. CP 77] By so stipulating, he relieved the State of the burden of proving those convictions, or any underlying facts about those convictions.

> The premise of the waiver theory is that upon entering into a stipulation on an element, a defendant waives his right to put the government to its proof of that element. "A stipulation is '[a]n express waiver . . . conceding for the purposes of the trial the truth of some alleged fact,' with the effect that 'one party need

> offer no evidence to prove it and the other is not allowed to disprove it.'"

State v. Wolf, 134 Wn. App. 196, 199, 139 P.3d 414 (2006), citing to Key Design, Inc. v. Moser, 138 Wn.2d 875, 893-94, 983 P.2d 653 (1999). In Wolf, the defendant was tried for being a felon in possession of a firearm. He stipulated to the fact that he had previously been convicted of a serious offense, and agreed that this fact would be included in a jury instruction. The stipulation itself was never read to the jury, and Wolf argued that there was insufficient proof of his prior conviction, requiring reversal of the current conviction. The court disagreed, holding that by stipulating to a necessary element of the offense, he waived the right to require the State to prove that element beyond a reasonable doubt, and there was no requirement for the State to present any evidence at all as to that element. Wolf, *supra*, at 203. It follows, therefore, that if it was not necessary for the State to present any evidence at all about Grover's prior convictions, it was certainly not necessary for the State to prove that the underlying convictions were based upon violations of valid no contact orders.

Further, Grover did not make an objection to the lack of evidence at trial. In State v. Snapp, 119 Wn. App. 614, 82 P.3d

252 (2004), the defendant challenged his conviction for violation of a no contact order on the grounds that the information and the jury instructions failed to include the requirement that the no contact order was valid, arguing that the State must prove beyond a reasonable doubt that he had violated a valid order. In affirming his conviction, the court, discussing cases cited by Snapp, said:

> These cases do not require the State to anticipate any possible unspoken challenge to the validity of a protective order and to prove the validity of the order to the jury beyond a reasonable doubt.

Id., at 624. (This case was decided before Miller, *supra*, and the assumption was that the validity of the order was an element of the offense that the State would have to prove if a challenge was made in a timely manner.) If the defendant is required to challenge the State's proof of the validity of the protection order that he is on trial for violating, it reasonably follows that he has to challenge the validity of the orders violated in the prior convictions in order to preserve the issue for appeal.

The defendant in State v. Ortega, 134 Wn. App. 617, 142 P.3d 175 (2006), argued for the first time on appeal that the trial court should not have admitted evidence of his prior convictions, to which he stipulated, without first making the determination that

those convictions were for violations of orders issued under the correct statutes. The court, citing to Gray, *supra*, held that "a defendant's failure to timely object on this ground waived the issue." Id., at 626. Gray did not challenge the admissibility of the evidence at trial, instead arguing both at trial and on appeal that the State failed to prove that the previous convictions were based on violations of orders issued under the listed statutes. In that case the State offered the judgment and sentence for the prior convictions; Gray did not stipulate to the convictions. There the court said:

> By waiting until the State rested to move to dismiss based on the inadequacy of the judgment and sentence, rather than objecting to that document's admissibility under RCW 26.50.110(5) in the first instance, Gray waived any objection.

Gray, *supra*, at 558. If a defendant is required to object to the admissibility of a judgment and sentence on the grounds the underlying statutory basis for the violation has not been proven, Grover has even less ground to object to the insufficiency of evidence to which he stipulated.

D. CONCLUSION.

The court properly denied Grover's motion to represent himself at trial. The fact that the orders which he was convicted of violating in 2003 were issued pursuant to one of the predicate

statutes listed in RCW 26.50.110(5) is not an element of the offense for which he was on trial, but even if it was, by both stipulating to the convictions and failing to raise the issue at trial, he waived his ability to raise it on appeal. The State respectfully asks this court to affirm the convictions.

Respectfully submitted this 9th day of April, 2009.

Carol La Verne, WSBA# 19229
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the State's Brief of Respondent, on all parties or their counsel of record on the date below as follows:

☒ US Mail Postage Prepaid

☐ ABC/Legal Messenger

☐ Hand delivered by

_____

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

Dated this 9th day of April, 2009, at Olympia, Washington.

_____
TONYA MAIAVA