

NO. 49743-3

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

SEAN ALLEN FORSMAN, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Jerry Costello

No. 12-1-00566-6

Brief of Respondent

MARK LINDQUIST
Prosecuting Attorney

By
ROBIN SAND
Deputy Prosecuting Attorney
WSB # 47838

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. On remand, was the sentencing court required to conduct a full inquiry into defendant's offender score when the Supreme Court mandate specifically limited the scope of resentencing and defendant attempted to relitigate issues previously denied at his original sentencing hearing and on appeal?

2. Did defendant have *pro se* status when he submitted his own briefing and conducting his own oral argument without the assistance of counsel?

3. If defendant was not *pro se*, was he represented by counsel when counsel agreed with defendant's argument and understood the rationale behind the court's ruling?

B. STATEMENT OF THE CASE.

1. Procedure

On April 3, 2013, defendant was convicted of three counts of Unlawful Delivery of a Controlled Substance – Cocaine. CP 5-18 at § 2.1. Two of the counts had an enhancement for delivery within 1,000 feet of a school bus stop. *Id.* At sentencing there was a dispute about defendant's offender score regarding the washout period for a 1995 conviction and whether three convictions from 1998 were considered the same criminal

conduct. 5/14/13RP 15¹. The sentencing court ruled that the 1995 conviction did not wash out and the three 1998 convictions were not the same criminal conduct. 5/14/13RP 17-18. Defendant was subsequently sentenced to a standard range of 90 months on each of the Unlawful Delivery convictions, to run concurrently to each other, and 24 months on each of the two school bus stop enhancements, to run consecutively to each other and the base sentence. CP 5-18 at § 4.5. The total time of confinement thus equaled 138 months. *Id.*

On May 19, 2014, defendant filed a Motion to Modify or Correct Judgment and Sentence in the Pierce County Superior Court. CP 19-69. Defendant argued that the 1995 conviction should have washed out and the school bus zone enhancements should run concurrently to each other, not consecutively. *Id.* The Superior Court transferred the motion to this Court as a Personal Restraint Petition (PRP). CP 70-71. On June 22, 2015, this Court dismissed the PRP. CP 145-147. Defendant subsequently filed a Motion for Discretionary Review with the Washington State Supreme Court. *In re Personal Restraint of Forsman*, 359 P.3d 789 (2015) (Mem).

On August 13, 2015, the Supreme Court ruled in *State v. Conover*, 183 Wn.2d 706, 355 P.3d 1093 (2015), that school bus stop enhancements are to run concurrently to each other, but consecutively with the

¹ The verbatim reports of proceedings are contained in two volumes. The volume titled "5/14/13RP" is from defendant's original sentencing and the volume titled "11/4/16RP" is from defendant's second sentencing, which he currently appeals.

underlying offense. *State v. Conover*, 183 Wn.2d at 719. On November 4, 2015, the Supreme Court granted defendant's Motion for Discretionary Review. *In re Forsman*, 359 P.3d 789 (2015) (Mem). Review was granted, "...only on the issue of the trial courts imposition of consecutive school bus stop enhancements." *Id.* (emphasis added). The Court also remanded the matter to the trial court for resentencing "...consistent with *State v. Conover.*" *Id.*

2. Facts

Prior to a new sentencing hearing being held, defendant, acting *pro se*, filed a Sentencing Memorandum. CP 88-115. Defendant again argued that the 1995 conviction should wash out and that the 1998 convictions were the same criminal conduct. *Id.*

On November 4, 2016, the Honorable Jerry Costello of the Pierce County Superior Court held defendant's sentencing hearing. At the hearing, defendant was allowed to argue on his own behalf, acting in a *pro se* capacity. *See* 11/4/16RP 7. Defendant argued that, even though the Supreme Court only granted remand on the school bus zone enhancement, he was allowed to relitigate his offender score under RCW 9.94A.530(2). *Id.* The court ruled it was bound by the mandate of the Supreme Court, which limited remand to only address the school zone enhancements and denied all other issues raised by defendant. 11/4/16RP 8.

Although the court allowed defendant to make his own arguments and proceed as if he was *pro se*, a question arose of whether he was represented by counsel. 11/4/16RP 12. The court was under the impression that counsel from the Department of Assigned Counsel was present only in a standby capacity. *Id.* Defendant stated that if he was not allowed to present evidence of his criminal history, it was irrelevant for him to invoke his right to proceed *pro se*. 11/4/16RP 11. The court specifically noted that it had not seen a Notice of Appearance for defense counsel. *Id.* Following argument, when the court asked defendant if he had objection to counsel's presence he stated that he did not. 11/5/16RP 14.

The court determined that in order for a clear record defense counsel should be given an opportunity to speak. 11/4/16RP 15. Defense counsel made a brief statement noting that she did not disagree with defendant's *pro se* argument or with the court's ruling. *Id.* Following defense counsel's brief statement, defendant stated "...I don't object to [defense counsel] putting forth argument on my behalf in my favor for an outcome that would be advantageous for me..." 11/4/16RP 16.

The court subsequently imposed a new sentence of 114 months. CP 116-130. Defendant timely appealed. CP 131-132.

C. ARGUMENT.

1. THE COURT PROPERLY FOUND THAT IT WAS LIMITED ON REMAND TO SENTENCING SOLELY ON THE ISSUE OF SCHOOL BUS ZONE ENHANCMENTS.

A statute is ambiguous if it can reasonably be interpreted in two or more ways. *Payseno v. Kitsap County*, 186 Wn. App. 465, 469, 346 P.3d 784 (2015). However, a statute is not ambiguous if different interpretations are conceivable. *Id.* If the statute can still be interpreted in multiple ways after a plain meaning review, than the statute is ambiguous and a court must rely on statutory construction, legislative history, and relevant case law to determine legislative intent. *State v. Rice*, 180 Wn. App. 308, 313, 320 P.3d 723 (2014). When the plain language of the statute is unambiguous, the legislative intent is apparent and a court will not construe the statute otherwise. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). Statutory construction is a question of law that is reviewed *de novo*. *State v. Soto*, 177 Wn. App. 706, 713, 309 P.3d 596 (2013).

The statutes and court rules related to sentencing on remand are unambiguous. Rules of Appellate Procedure (RAP) 12.2 states, “Upon issuance of the mandate of the appellate court..., the action taken or *decision made by the appellate court is effective and binding on the parties* to the review and *governs all subsequent proceedings* in the action

in any court.” RAP 12.2 (emphasis added). Our Supreme Court has explicitly ruled on this issue by nothing that, “The trial court's discretion to resentence on remand is limited by the scope of the appellate court's mandate.” *State v. Kilgore*, 167 Wn.2d 28, 42, 216 P.3d 393 (2009). RCW 9.94A.530(2), in relevant part, states “On remand for resentencing following appeal or collateral attack, the parties shall have the opportunity to present and the court to consider *all relevant evidence* regarding criminal history, *including criminal history not previously presented.*” (emphasis added).

Here, the Supreme Court’s mandate to the trial court was clear: remand was granted as to the sole issue of “...the trial courts imposition of consecutive school bus stop enhancements...” *In re Forsman*, 359 P.3d 789 (2015) (Mem). Resentencing was to occur consistent with the Supreme Court’s ruling in *State v. Conover*, 183 Wn.2d 706, 355 P.3d 1093 (2015), regarding school bus zone enhancements. *Id.* This was the only issue for which review was granted. *Id.* Defendant’s original motion also argued that his 1995 conviction should not have been included in his offender score. CP19-69. However, the Court did not remand on that issue. Defendant even conceded at resentencing that the Supreme Court granted review only on the school bus zone enhancements. 11/4/16RP 6. This limited the trial court to the sole issue of school bus zone enhancements.

Defendant argues that under RCW 9.94A.530(2) that he should have been allowed to present a full criminal history argument at resentencing. *See* Brf. of App. at 14. He correctly argues that the statute means what it says. *Id.* His interpretation of the statute is misguided. The statute makes it clear that only *relevant evidence* can be considered. RCW 9.94A.530(2). Evidence is relevant if it has "...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. As remand was limited to the issue of school bus zone enhancements, offender score evidence was not relevant to the action. Regardless of what defendant's offender score is, he still would have been sentenced to 24 months incarceration on the school bus zone enhancements.

The statute also states that the defendant may present criminal history "...including criminal history *not previously presented.*" RCW 9.94A.530(2) (emphasis added). Here, defendant wanted to present argument related to his 1995 and 1998 convictions. However, that criminal history had already been presented to the court. There was no need or requirement for the court to allow defendant to present evidence on his criminal history that had already been adjudicated.

Because the Supreme Court's mandate limited sentencing on remand to the issue of school bus zone enhancements, any evidence of

defendant's previously litigated offender score was barred and irrelevant. Thus, this Court should affirm defendant's standard range sentence.

2. DEFENDANT WAS EFFECTIVELY GIVEN *PRO SE* STATUS, AND, IF HE WAS NOT, HE DID NOT UNEQUIVOCALLY WAIVE HIS RIGHT TO COUNSEL.

Both the Sixth and Fourteenth Amendments of the United States Constitution provides that a criminal defendant must be given the right to the assistance of counsel; however the Sixth Amendment also guarantees that a defendant in a criminal trial has the right to waive the assistance of counsel and represent themselves. *Faretta v. California*, 422 U.S. 806, 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). Improper denial of the right of self-representation requires reversal regardless of whether prejudice results. *State v. Englund*, 186 Wn. App. 444, 455, 345 P.3d 859 (2015).

A defendant may waive the right to the assistance of counsel, so long as the waiver is made knowingly and intelligently. *State v. Hahn*, 106 Wn.2d 885, 893, 726 P.2d 25 (1986). The standard for waiver of the right to counsel is (1) competency to stand trial and (2) a knowing and intelligent waiver with "eyes open," which includes understanding the dangers and disadvantages of proceeding *pro se*. *State v. Hahn*, 106 Wn.2d at 895. The ad-hoc, fact specific analysis of questions regarding waiver of counsel are best assigned to the discretion of trial courts. *State v. Coley*, 180 Wn.2d 543, 559, 326 P.3d 702 (2014). A trial court's decision

on a defendant's request for self-representation will only be reversed if the decision is manifestly unreasonable, relies on unsupported facts, or applies an incorrect legal standard. *Id.* (quoting *State v. Madsen*, 168 Wn.2d 496, 504 229 P.3d 714 (2010) (citing *State v. Rohrich*, 149 Wn. 2d 647, 654, 71 P.3d 638 (2003))).

A defendant's request to proceed *pro se* must be timely made and stated unequivocally. *State v. Stenson*, 123 Wn.2d 668, 737, 940 P.2d 1239 (1997). If the request is made timely and stated unequivocally, the court must determine if the *pro se* request was made knowingly, intelligently, and voluntarily. *State v. Madsen*, 168 Wn.2d at 504.

Defendant effectively represented himself at sentencing. He made all of his own arguments, both written and oral. CP 88-115; 11/4/16RP 6-8. The court noted that defendant had been representing himself throughout the proceeding and that it had not seen a Notice of Appearance for defense counsel. 11/4/16RP 11. The totality of the circumstances show that defendant was acting *pro se* throughout the sentencing hearing. Because defendant acted in a *pro se* capacity, this court should affirm the defendant's standard range sentence.

Even if defendant was not acting in a *pro se* capacity, he did not unequivocally invoke his right to represent himself. Defendant stated that if he was not allowed to present evidence of his criminal history, it was irrelevant for him to invoke his right to proceed *pro se*. 11/4/16RP 11.

Defendant stating this is an equivocal attempt to exercise the right. He is not making it clear that no matter the circumstance, he wanted to proceed *pro se*. Rather, he stated that under the circumstances, he did not feel as though he needed to exercise the right. After defense counsel made a brief statement simply putting that she did not disagree with defendant's *pro se* argument or with the court's ruling, defendant stated that "...I don't object to her putting forth argument on my behalf in my favor for an outcome that would be advantageous for me, but at the same time I want to keep my *pro se* status." 11/4/16RP 16. Defendant was again equivocal about his *pro se* status. The role of a standby counsel is to assist a defendant as needed on technical issues, not put forth arguments on their behalf. *State v. McDonald*, 143 Wn.2d 506, 511, 22 P.3d 791 (2001). By agreeing that counsel could argue on his behalf, he was not unequivocal in exercising his right to proceed *pro se*. He wanted counsel to argue on his behalf, but also wanted to represent himself. Defendant cannot have it both way. Defendant did not unequivocally exercise his right to proceed *pro se* and this court should affirm his standard range sentence.

3. EVEN IF DEFENDANT WAS DENIED *PRO SE*
STATUS, HE HAD THE BENEFIT OF COUNSEL
DURING SENTENCING.

"Of course, the Sixth Amendment does not require that counsel do what is impossible or unethical. If there is no bona fide defense to the charge, counsel cannot create one and may disservice the interests of his

client by attempting a useless charade.” *United States v. Cronin*, 466 U.S. 648, 656 fn. 19, 104 S. Ct. 2039, 80 L. Ed.2d 657 (1984). *See also In re Personal Restraint of Davis*, 152 Wn.2d 647, 744 fn. 304, 101 P.3d 1 (2004); *Walls v. United States*, ___ P.3d ___ (Slip Op. at 8), 2017 WL 823300 (W.D. Washington – Tacoma, 2017).

Defendant argues he suffered from a complete denial of the right to counsel². *See* Brf. of App. at 9. This is not the case. Assigned counsel put on the record that she discussed defendant’s argument with him and the court’s possible ruling. 11/4/16RP 13. She then allowed defendant to make the argument that he wanted and had filed with the court. *Id.* When asked by the court if counsel wanted to make further argument on defendant’s behalf, counsel simply stated that, “...I do not disagree with what the Court has done here today, and what [defendant] has argued in his argument...” 11/4/16RP 15. Counsel argued that she agreed with defendant’s argument, which the court entertained, but also understood the court’s ruling and did not disagree with it legally. *Id.*

As argued above, the sentencing court was not permitted to reconsider defendant’s argument on his offender score when the Supreme Court’s mandate limited remand to the issue of school bus zone

² For purposes of this issue only, the State assumes, but does not concede, that defendant was represented by counsel and was not *pro se*.

enhancements. Defense counsel arguing otherwise would not be a bona fide defense, would have the potential to cause a disservice to defendant, and would be a “useless charade.” *Cronic* and Washington courts have made it clear that the Sixth Amendment does not require counsel to engage in such arguments. See *United States v. Cronic*, 466 U.S. at 656 fn. 19; *In re Davis*, 152 Wn.2d at 744 fn. 304. As such, defendant did not suffer a complete denial of counsel. This court should affirm defendant’s sentence.

D. CONCLUSION.

The Supreme Court’s mandate for resentencing limited remand to resentencing the school bus zone enhancements to run concurrently. At resentencing, defendant was effectively given *pro se* status, and, even if he was not, did not unequivocally waive his right to counsel. If defendant was represented by counsel, defense counsel’s minimal argument was not a complete denial of the right to counsel as counsel agreed with defendant’s

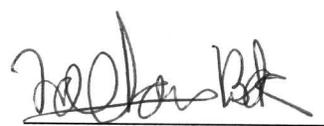
arguments and the law is clear on resentencing. For the aforementioned reasons, this Court should affirm defendant's standard range sentence.

DATED: June 9, 2017

MARK LINDQUIST
Pierce County
Prosecuting Attorney



ROBIN SAND
Deputy Prosecuting Attorney
WSB # 47838



Nathaniel Block
Rule 9 Intern

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PIERCE COUNTY PROSECUTING ATTORNEY

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