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Division II
State of Washington
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NO. 50782-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

GABRIEL MORALES,

Appellant.

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

The Honorable Edmund Murphy, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT FAILED TO EXERCISE ITS DISCRETION IN RESPONSE TO MORALES' REQUEST TO PROCEED PRO SE.

In his opening brief, appellant Gabriel Morales asserted the trial court abused its discretion when it failed to exercise discretion in response to Morales' multiple requests to represent himself. Brief of Appellant (BOA) at 5-10. In response, the State essentially asks this Court to excuse the trial court's failure to exercise its discretion and itself make – for the first time on appeal -- findings that the defendant's requests to represent himself were untimely or equivocal. Brief of Respondent (BOR) at 7-12. As explained below, it is the function of the appellate court to review a trial court's decision granting or denying a request to proceed pro se and determine whether the decision was supported by the record. It is not the function of the appellate court to make findings anew where the trial court failed to exercise any discretion.

The State's argument rests primarily upon two cases State v. Stenson, 132 Wn.2d 668, 940 P.2d 1239 (1997) and In re Detention of Turay, 139 Wn.2d 379, 986 P.2d 790 (1999). BOR at 8-9. However, these cases are easily distinguished by the fact that the trial courts there in fact affirmatively considered the defendants'

requests to proceed pro se, exercised discretion, and issued rulings denying the requests on some specific basis. Hence, in those cases, the appellate court was asked merely to review whether the trial court's rulings denying self-representation was unsupported by the record. It was not asked to make an initial ruling on the matter.

The State suggests Stenson or Turay permit the trial court to ignore a defendant's request to proceed pro se. Yet, both cases show the trial court did just the opposite, properly exercising its discretion. Stenson requested to proceed pro se. Stenson, 132 Wn.2d at 739-40. The trial court considered Stenson's request in light of the record as a whole and decided that the request was equivocal, stating: "...I also find based on your indications that you really do not want to proceed without counsel." Id. at 740. Stenson never protested this conclusion.

On appeal, the Washington Supreme Court reiterated that it is within the trial court's sound discretion whether to grant a request to proceed pro se after trial has begun. Id. at 739. It looked at the record as a whole to see if it supported the trial court's determination that Stenson's request was equivocal. It emphasized the fact that the trial court made the factual determination that Stenson really did not want to proceed pro se, and Stenson did

nothing to correct this. Id. at 742. The Supreme Court concluded the “trial court’s refusal to allow the Defendant to proceed pro se was not an abuse of its discretion.” Id. Thus, in Stenson – unlike here – the trial court actually exercised its discretion and made a ruling regarding the defendant’s request, and the appellate court merely upheld that ruling.

Similarly, in Turay, the trial court also exercised its discretion when it denied the defendant’s request to proceed pro se. Turay made several motions to either be assigned specific counsel or proceed pro se. Turay, 139 Wn.2d at 396-99. The trial court made efforts to clarify whether Turay wanted new counsel or wanted to proceed pro se. Id. Turay prevaricated on his request for pro se status and, at one point, specifically reserved the matter for a later time. Id. at 397-99.

On appeal, Turay claimed “the trial court committed reversible error when it denied [his request to represent himself].” Id. at 395. The Supreme Court upheld the trial court’s decision to appoint counsel rather than permit Turay to proceed pro se. In doing so, it reviewed the record as a whole and concluded the trial court did not err in denying Turay’s request to represent himself because the request was equivocal. Id. at 399.

Unlike here, in both Stenson and Turay, the question before the appellate court was not whether the trial court erred by not exercising its discretion; the issue was whether the record supported the trial court's exercise of its discretion. In this case, the trial court made no ruling whatsoever as to Morales' request to proceed pro se, essentially ignoring the issue and failing to exercise any discretion. This circumstance simply was not addressed by either Turay or Stenson.

The State dedicates the remainder of its briefing on this issue to its argument that Morales' request to proceed was in fact equivocal and untimely. BOR at 9-12. However, these are arguments that should have been considered by the trial court and ruled upon. Without any ruling, there is nothing tangible for this Court to review. The State's own briefing demonstrates this. It claims: "The trial court here could have determined that allowing the defendant to proceed pro se at that point would have caused a disruption to the trial and affected the orderly administration of justice." BOR at 11-12 (emphasis added). However, it is well recognized that to hold that the trial court could have found a particular fact or reached a particular conclusion says nothing about whether the trial court did or did not do so. E.g., In re Welfare of

A.B., 168 Wn. 2d 908, 924, 232 P.3d 1104, 1112 (2010). Indeed, this Court can only speculate as to what the trial court would have concluded here. This is why trial courts must make on-the-record determinations and affirmatively exercise discretion when faced with a defendant's request to proceed pro se.

Finally, even if this Court were to consider the State's argument that the trial court's failure to exercise its discretion can be excused based on the facts here, reversal would still be appropriate. Essentially, the State's argument boils down to this: if a defendant's request for new counsel is made simultaneous with an alternative request for self-represent, this is per se equivocation in terms of the request to proceed pro se. BOR at 10-11.

The case law simply does not support this, however. The Washington Supreme Court has stated such simultaneous requests do not necessarily make the request to proceed pro se equivocal. Stenson, 132 Wn.2d at 740-41 (citing Johnstone v. Kelly, 808 F.2d, 214, 216, n. 2 (2d Cir. 1986)). Instead, this is just one factor the trial court must consider when looking at the record as a whole. Stenson, 132 Wn.2d at 741 (citations omitted). In other words, it is up to the trial court to exercise its discretion.

The State also attempts to use facts that happened after the trial court ignored Morales' request to proceed pro se at sentencing to justify the trial court's failure to consider his request to proceed pro se. BOR at 12. It claims that the fact Morales obtained new counsel during sentencing somehow reveals that he never truly wanted to proceed pro se. BOR at 12. Yet, the fact Morales obtained new counsel says nothing about whether Morales' request for new counsel, at the time it was made, was indeed genuine.

Again, in the absence to the trial court's proper exercise of discretion, the State is asking this Court to speculate about facts and make factual findings anew regarding the credibility of Morales' request. This Court should reject the State's request that it fill in the trial court's silence with its own findings.

In sum, as explained in detail in appellant's opening brief, the trial court failed to exercise its discretion and render a ruling on Morales' request to proceed pro se. The State invites this Court to speculate on what the trial court might have found, had it actually exercised its discretion. However, the case law indicates that it is within the sound discretion of trial court – not the appellate court – to make a determination as to whether a defendant's request to proceed pro se is untimely or equivocal. Hence, this Court should

find the trial court abused its discretion when it failed to exercise its discretion, and it should reverse the convictions.¹

B. CONCLUSION

For reasons stated herein and in appellant's opening brief, this Court reverse.

DATED this 30th day of May, 2018.

Respectfully submitted,

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¹ The State agrees, regardless of prejudice, the proper remedy for the improper denial the right to self-representation is reversal. BOR at 7 (citing State v. Englund, 186 Wn. App. 444, 455, 345 P.3d 859 (2015)).

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