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NO. 51474-5-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

SAGE CREE BEAR,

Appellant.

BRIEF OF APPELLANT

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ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court abused its discretion when it denied the defendant's request for a new attorney after the defendant and his attorney demonstrated an irreconcilable breakdown in attorney-client communication.

2. The trial court's refusal to grant the defendant's demand to act as his own attorney denied the defendant his right of self-representation under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment.

Issues Pertaining to Assignment of Error

1. Does a trial court abuse its discretion if it denies a defendant's request for a new attorney after that defendant and the attorney demonstrate that there has been an irreconcilable breakdown in attorney-client communication?

2. Does a trial court's refusal to grant a defendant's demand to act as his own attorney deny that defendant the right of self-representation under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment?

STATEMENT OF THE CASE

As of June 20, 2017, the defendant Sage Cree Bear was an inmate at Cedar Creek Correctional Facility serving a sentence on a felony. RP 166-167.¹ Cedar Creek is a minimum security prison run by the Washington State Department of Corrections (DOC). RP 162-164. It is located in a rural part of Thurston County known as the Capital Forest. RP 240. At the end of that day an inmate count, photo identification review and search of the prison revealed that the defendant and another inmate by the name of Richard Harvell were not in the facility. RP 172-173, 190-197, 203-206. Upon investigation the DOC officers at Cedar Creek found a bag placed over the razor wire top to the perimeter fence behind the defendant's housing unit, as well as two pair of boots of the type issued to the defendant and Mr. Harvell outside the fence. RP 197, 215-218, 224-225, 260-261.

By the next day search groups from DOC and the Thurston County Sheriff's Office found the defendant and Mr. Harvell at a popular campground about five miles away. RP 298-301, 314-316. They had

¹The record on appeal includes three volumes of continuously numbered verbatim reports of the hearings from 9/27/17, 1/13/17, 1/8/18, 1/16/18, 1/17/18, the jury trial held from 1/22/17 to 1/24/17, and the sentencing hearing held on 2/6/18. They are referred to herein as "RP [page #]." There is one further volume of the hearing on 10/5/17. It is referred to as "RP 10/5/17 [page #]."

reportedly been trying to break into vehicles in the parking lot. RP 322-323. The officers arrested the pair and took them individually to the Washington State Correctional Center at Shelton. RP 301. The defendant later claimed that he had been coerced into leaving the prison, apparently by Mr. Harvell. RP 69-77, 340.

The Thurston County Prosecutor charged the defendant with one count of first degree escape for leaving the Cedar Creek prison. CP 1. The Thurston County Prosecutor also charged Mr. Harvell with the same offense and the matters were originally joined for a single trial. RP 4-5. The defendant later became dissatisfied with his court appointed attorney and on September 19, 2017, filed a written *pro se* motion seeking the appointment of new counsel. CP 6. In this motion he stated:

I respectfully request this honorable court to grant my motion to discharge my court-appointed counsel due to irreconcilable differences and a breakdown in communication. My current counsel and I are not seeing eye to eye on the direction to take my case therefore I don't believe there is any possibility of him being able to effectively represent me.

CP 6.

Two weeks later on October 5, 2017, the court heard the defendant's motion for new counsel. RP 10/5/17 1. During the hearing the defendant reiterated his desire for a new attorney upon his claim that

there had been an irretrievable breakdown in attorney-client communication. RP 10/5/17 4-5. However, upon the court's inquiry, the defendant's attorney stated that he had been communicating with the defendant and that he believed part of the defendant's frustration arose from the jail's refusal to transport and have both the defendant and the co-defendant in the courtroom at the same time. RP 10/5/17 5-8. Based upon this statement the court denied the defendant's motion "at this time." CP 17; RP 10/5/17 8.

One week later on October 12, 2017, the defendant filed a written *pro se* motion demanding his right to represent himself. CP 18. This motions stated:

I, Sage Cree Bear, request to proceed pro-se. Therefore, I request that my current counsel be discharged and I be allowed to represent myself pro-se. I am waiving my right to counsel and I ask this court to honor my right to represent myself. If the court is inclined to deny my motion, I feel that this would be a manifest injustice to the defendant's rights.

CP 18.

This case was next heard on January 3, 2018, which was a status conference five days prior to trial. RP 16. At this hearing the co-defendant unsuccessfully moved for a continuance of the trial dated. RP 16-35. Although the defendant was present the court did not address his written

motion to represent himself. *Id.* One week later the court called the case for trial and learned that the defendant's attorney was ill and unable to appear in court. RP 36-38. Based upon this fact the court continued the trial date to January 22nd with a status conference of January 17th. RP 36-47. Once again, the court did not address the defendant's written motion to represent himself. *Id.*

On January 17, 2018, the court called the case for status review. RP 56-63. At that time the defendant's attorney informed the court about the defendant's request to proceed *pro se*. RP 59. The trial court denied the motion as "untimely." RP 60-61.

Finally, on January 22, 2017, the court called this case for trial, just prior to which the co-defendant pled guilty. RP 148-149. At the beginning of that trial the defendant renewed his request for new counsel, arguing that since he had filed a bar complaint against his attorney there was a conflict of interest. RP 69-82. The defendant's attorney responded that he had not seen the complaint so could not comment on any potential conflict. *Id.* The trial court denied the motion. RP 83-85.

At this point the state called a corrections officer to testify in support of the state's request that the defendant be required to wear leg restraints during trial. RP 87-99. At the end of his testimony the

corrections officer mentioned that the defendant had not objected to being in restraints as “he didn’t trust himself being unrestrained” around his attorney given the animosity that existed between the two of them. RP 99. Following argument the court granted the state’s motion for restraints. RP 104-105.

Upon hearing about the defendant’s statement to the corrections officer the defendant’s attorney moved to withdraw, arguing that his client’s statement amounted to the crime of harassment with him as the victim, that he took the threat seriously, and that he could no longer effectively represent the defendant. RP 106-110. The trial court denied the motion. RP 111. The defendant’s attorney’s supervisor at the Thurston County Office of Public Defense then came to the court and renewed the motion on his employee’s behalf, arguing that given these new revelations attorney-client communications had so broken down that the court should allow counsel to withdraw. RP 122-140. The court again denied the motion. RP 141-142.

At this point the defendant again stated that he wanted to represent himself. RP 142-146. The trial court denied this motion, finding the request to be “too late.” RP 142-146. At no point did the trial court mention that the defendant had filed a written demand to represent himself over 90 days

prior to trial. RP 141-142, 142-146. Based upon these rulings, the case proceeded to trial with the state calling 10 witnesses. RP 162-317. The defendant then took the stand as the only witness for the defense, but invoked his right to remain silent after a few questions on direct. RP 340. Based upon this invocation of rights, the trial court instructed the jury without objection to ignore the defendant's few statements on direct. RP 341-347.

Following the presentation of evidence the court instructed the jury without objection from either party. RP 351-360. The parties then presented their oral arguments, after which the jury retired for deliberation, later returning a verdict of guilty. RP 361-376, 377-379, 380-382; CP 76. A little over two weeks after the trial the court sentenced the defendant within the standard range, after which the defendant filed timely notice of appeal. RP 82-92, 98-109.

ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED THE DEFENDANT'S REQUEST FOR A NEW ATTORNEY AFTER THE DEFENDANT AND HIS ATTORNEY DEMONSTRATED AN IRRECONCILABLE BREAKDOWN IN ATTORNEY-CLIENT COMMUNICATION.

A criminal defendant who is dissatisfied with appointed counsel must show good cause to warrant substitution of counsel, such as a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant. *Smith v. Lockhart*, 923 F.2d 1314, 1320 (8th Cir. 1991). Attorney-client conflicts justify the grant of a substitution motion only when counsel and defendant are so at odds as to prevent presentation of an adequate defense. *See e.g.*, *State v. Lopez*, 79 Wn.App. 755, 766, 904 P.2d 1179 (1995) (citing *United States v. Morrison*, 946 F.2d 484, 498 (7th Cir.1991)). By contrast, the general loss of confidence or trust alone is not sufficient to require the appointment of new counsel. *Id.* Factors to be considered in a decision to grant or deny a motion to substitute counsel are (1) the reasons given for the dissatisfaction, (2) the court's own evaluation of counsel, and (3) the effect of any substitution upon the scheduled proceedings. *State v. Stark*, 48 Wn.App. 245, 253, 738 P.2d 684 (1987).

In this case at bar, a review of the record of the three hearings in

which the defendant was requesting the appointment of new counsel, including trial counsel's repeated statements at the last hearing that he could not effectively represent the defendant, indicates that the relationship between the defendant and his attorney and their ability to communicate had completely broken down. In support of this argument it should be noted that there is no indication that the defendant at any point threatened his attorney or believed that the corrections office who testified would repeat what the defendant had said about not being able to trust himself around his attorney. Thus, there is no evidence to support a claim that the defendant in any way attempted to manufacture a conflict between him and his attorney.

This evidence unequivocally supports the conclusion that there had been a complete breakdown in the attorney-client relationship to the point that the trial court abused its discretion when it denied the defendant and his attorney's request that a new attorney be appointed. As a result, this court should vacate the defendant's conviction and remand for a new trial with the defendant given the option of having a new attorney appointed to represent him or to represent himself.

II. THE TRIAL COURT'S REFUSAL TO GRANT THE DEFENDANT'S TIMELY AND UNEQUIVOCAL DEMAND TO ACT AS HIS OWN ATTORNEY DENIED THE DEFENDANT HIS RIGHT OF SELF-REPRESENTATION UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 22, AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT.

Under both Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, a defendant in a criminal proceeding is guaranteed the right to self representation. *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); *State v. Woods*, 143 Wn.2d 561, 23 P.3d 1046 (2001). Where a defendant asserts this right, the court's duty is solely to determine whether or not the request is knowing, intelligent, and unequivocal and not made for an improper purpose such as delay. *State v. Breedlove*, 79 Wn. App. 101, 900 P.2d 586 (1995); *see also State v. Fritz*, 21 Wn. App. 354, 585 P.2d 173 (1978). A trial court's decision whether or not to grant a defendant's request for self-representation is reviewed under an abuse of discretion of standard. *State v. Madsen*, 168 Wn.2d 496, 505, 229 P.3d 714 (2010). An abuse of discretion occurs when the trial court's exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons. *State v. Neal*, 144 Wn.2d 600, 30 P.3d 1255 (2001).

In the case at bar the defendant unequivocally invoked his right to represent himself when, over 90 days prior to trial, he filed the following

written motion:

I, Sage Cree Bear, request to proceed pro-se. Therefore, I request that my current counsel be discharged and I be allowed to represent myself pro-se. I am waiving my right to counsel and I ask this court to honor my right to represent myself. If the court is inclined to deny my motion, I feel that this would be a manifest injustice to the defendant's rights.

CP 18.

Based upon this filing the trial court's ruling that the defendant's request to represent himself was untimely was erroneous. As the court noted in *State v. Vermillion*, 112 Wn.App. 844, 855, 51 P.3d 188 (2002).

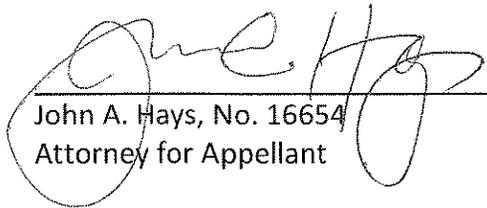
"Where a court is put on notice that the defendant wishes to assert his right to self-representation but it nevertheless delays ruling on the motion, the timeliness of the request must be measured from the date of the initial request." (quoting *State v. Breedlove*, 79 Wn.App. at 109). In the case at bar the defendant made an unequivocal written demand to represent himself over 90 days prior to trial. Thus, the timeliness of the defendant's request must be considered from that date. Viewed from the date of filing, the request was timely. Consequently the trial court abused its discretion when it summarily denied the defendant's request. As a result, the defendant is entitled to a new trial.

CONCLUSION

The defendant is entitled to a new trial based upon the trial court's error in refusing to appoint new counsel and based upon the trial court's refusal to grant the defendant's motion to represent himself.

DATED this 18th day of July, 2018.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

WASHINGTON CONSTITUTION ARTICLE 1, § 22

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station of depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

UNITED STATES CONSTITUTION, SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

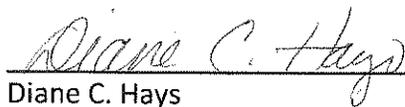
COURT OF APPEALS OF WASHINGTON, DIVISION II

STATE OF WASHINGTON, Respondent,	NO. 51474-5-II
vs.	AFFIRMATION OF SERVICE
SAGE CREE BEAR, Appellant.	

The under signed states the following under penalty of perjury under the laws of Washington State. On the date below, I personally e-filed and/or placed in the United States Mail the Brief of Appellant with this Affirmation of Service Attached with postage paid to the indicated parties:

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