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No. 51474-5-II

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

STATE OF WASHINGTON,

Respondent,

v.

Sage C. Bear

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

The Honorable John C. Skinder
Cause No. 17-1-01469-34

BRIEF OF RESPONDENT

Joseph Jackson
Attorney for Respondent

2000 Lakeridge Drive S.W.
Olympia, Washington 98502
(360) 786-5540

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Does a trial court abuse its discretion if it denies a defendant's request for new counsel after the attorney has also motioned to withdraw?
2. Does a trial court's refusal to allow a defendant to represent themselves violate Article 1, § 22, of the Washington Constitution or the Sixth Amendment to the United States Constitution?

B. STATEMENT OF THE CASE.

On June 10, 2017, the appellant, Sage Creek Bear was imprisoned in Cedar Creek Correctional Facility pursuant to a felony conviction. CP 56. On June 11, 2017, it was discovered that he and another inmate -Harvell- were no longer in the facility. RP¹ 169-172; RP 196. Neither Harvell nor Bear were authorized to leave the facility at the time. RP 197-198. A rug was found draped over the razor wire at the top of the fence surrounding the facility, there was blood on the wire, and two pairs of the kind of boots issued to the individuals were found outside the perimeter. RP 197. The next day Bear and Harvell were apprehended on a logging road in Capital Forest, which surrounds the facility. RP 301; RP

¹ For the purposes of this brief the verbatim reports of proceedings from September 27, 2017, January 3, 2018, January 8, 2018, January 16, 2018, January 17, 2018, January 22-24 2018, and February 6, 2018 will be referred to as RP.

321-322. There were reports from citizens of two individuals attempting to break into a vehicle in the parking lot of Fall Creek Campground, near where they were eventually captured. RP 320-321. When they were found Bear's hand was bloody and injured. RP 324. On August 15, 2017, he was charged with one count of Escape in the First Degree. CP 1.

On September 17, 2017, he requested his court appointed attorney- Mr. Shackleton- be discharged. CP 6. This motion was denied on October 5, 2017. CP 17. Mr. Shackleton said they were still communicating and it was too early in their professional relationship for him to be able to say there was a conflict or breakdown in communication. 2 RP 4-5.²

On October 12, 2017 Mr. Bear filed a pro se motion to proceed without counsel. CP 18. Bear also filed a notice of hearing setting his motion to proceed pro se for November 2, 2017. CP 112-113. An omnibus hearing occurred on October 18, 2017, and the parties entered an agreed order allowing Bear to be released back to Department of Corrections Custody. CP 21, 114. The jointly presented omnibus order did not mention a hearing for Bear's pro se motion. CP 22-25. The hearing on November 2,

² For the purposes of this brief the verbatim report of proceedings from October 5, 2017 will be referred to as 2 RP.

2017, was subsequently stricken due to Bear not being present. CP 115. The State later filed a motion to transfer Bear back to Thurston County for status and trial on December 20, 2017. CP 116-117.

On January 3, 2018, the matter was confirmed for trial. CP 28. Bear appeared with Mr. Shackleton at that hearing, and Shackleton stated, "I can tell you we're ready to confirm for trial." RP 22. The trial court asked, "Are you suggesting there's motions that are out of the ordinary standard motions in limine?" and Mr. Shackleton responded, "No, but I think those will probably take about an hour or so in the morning." RP 26. There was no indication that Bear wanted to litigate a motion to proceed pro se.

The matter went before the court for trial on January 8, 2018 but Mr. Shackleton was ill, so a one week continuance was ordered. CP 30. Attorney Larry Jefferson stood in for Mr. Shackleton at the hearing and requested a one week continuance. RP 36. The trial court asked, "And Mr. Bear, do you understand that your attorney's too ill to proceed this morning?" RP 36. Bear responded, "Yes, your Honor." RP 36. The trial court followed that question up with "Was Mr. Jefferson able to talk to you and answer any questions you had about that?" RP 36-37. Bear responded,

“Yes, Your Honor.” RP 37. Bear entered a plea of not guilty to an amended information on January 8, 2018. CP 30; RP 48. Again, there was no mention of an intent on Bear’s behalf to proceed pro se.

The matter was once again confirmed for trial on January 10, 2018. CP 33. On January 16, 2018 the matter was continued with a status hearing set for the following day. CP 34. This was due to the state’s attorney’s involvement in another trial. CP 35; RP 52. Once again, there was no mention of an intent for Bear to proceed pro se at that hearing.

On January 17, 2018, the matter was once again confirmed for trial. CP 36. During that hearing, Mr. Shackleton notified the trial court that Bear wished to proceed pro se. In bringing the request to proceed pro se to the trial court’s attention, Mr. Shackleton stated,

“Your Honor, I’m ready to confirm for trial. My client just told me he wishes to proceed pro se. I didn’t file any motion because I just found out about it, but that’s why I felt we should be on the record today, but I am ready to report for trial today. Or next week.”

RP 59. The Court ruled:

“At this point the court understands an oral motion to go pro se has been made by the defendant as relayed by defense counsel. The court understands the case

law well enough having been confronted with this issue before that a motion to go pro se must be made timely and unequivocally. Without question the request by Mr. Bear is untimely.”

RP 61. The Court continued, “So the court is not going to permit the motion to be made given we are at status having already been confirmed once before.” RP 61. The denial of the motion was noted on the Trial Confirmation Order that was entered. CP 37.

On January 18, 2018, Bear filed a Motion to Withdraw from Assigned Counsel, noting

“It will be a conflict of interest if Mr. James Shakleton continues to represent me. I say that due to the fact that Mr. James Shackleton 18174 now knows I filed a bar complaint an [sic] knows I wish to withdraw from his counsel.”

CP 38.

In an Inmate Request Form sent to Judge Skinder on January 17, 2018, Bear stated he filed the complaint due to a “conflict of interest” because “he [Mr. Shackleton] knows how I [Mr. Bear] very much dislike his counsel.” CP 40. The court responded on January 19, 2018, informing him that they could not respond to the request because it would be ex parte communication, but they had noted receipt of the form in the court’s file. CP 41.

On January 22, 2018, the matter was again before the court for trial. RP 69. The trial court asked Mr. Shackleton, "Were you aware that your client filed some materials at the end of last week – end of last week?" RP 69. Mr. Shackleton responded, "Yes, I talked with him on Friday, and he disclosed some new information to me that I will be making a motion to continue the trial date today for approximately four weeks." RP 70. Mr. Shackleton also filed a motion to continue the trial so he could investigate a potential defense based upon facts recently disclosed to him by Mr. Bear. CP 51.

The trial court inquired about Bear's request to have Mr. Shackleton recuse or withdraw from the case and about the inmate request for that Bear had sent the Court. RP 71-72. Bear stated,

"Regarding that matter, Your Honor, I would like to ask for a continuance to the next available slot for trial due to the fact that me - - I have - - I am on the docket for the motion hearing, the miscellaneous hearing, and I would like to go in front of a judge and explain my situation, and if I'm denied, then I guess me and Mr. Shackleton are going to be able to prepare for trial."

RP 72. Mr. Shackleton stated,

"[Bear] alerted me right before the status conference that he would like me to withdraw because he had filed a bar complaint against me. I notified Judge Price that the defendant wished to have me removed

as counsel. I did not mention the bar complaint to the judge mainly because I hadn't seen it, and I don't believe that - - that just the filing of a bar complaint is the basis for a withdrawal. And since I hadn't seen it, I didn't mention it or its contents to Judge Price. Mr. Bear may well be correct. There may be a conflict that he mentioned in the bar complaint, but without me looking at it I didn't feel I could represent to Judge Price that there was a conflict because I did not know of one. I did make the motion to let the court know that it was his motion to withdraw, but because I hadn't seen the bar complaint, I couldn't comment on Mr. Bear's motion."

RP 73. Mr. Shackleton then explained that he would like to look into the complaint; however the primary basis for his motion to continue was to investigate a newly disclosed defense. RP 73-76.

Stating, "this type of last-minute, I'm going to call it maneuvering, to have a continuance is not something that is viewed with favor by the court," the trial court denied the motion to continue. RP 84.

The matter proceeded toward trial and the court conducted a hearing regarding restraints during trial. The court became aware through the testimony of Corrections Officer Jones that Mr. Bear had indicated that he "would do whatever for trial not to begin today" and that he "didn't trust [him]self with the restraints removed around Mr. Shackleton." RP 96-97.

Based upon this information, Mr. Shackleton moved to withdraw based on “personal safety concerns.” RP 105. The trial court admonished, “There will be no violence in this courtroom.” RP 110-111. The trial court then denied the motion, stating

“The idea that [the defense attorneys] would be threatened or assaulted for doing their job is reprehensible. But I do agree with the State that these are, in the court’s view, more maneuvering to impact the ability of this trial to go forward. The trial will go forward.”

RP 111.

Mr. Shackleton requested a brief recess to contact his supervisor and his director and see if they wanted his office to file a motion for interlocutory appeal. RP 112. Following a recess, the trial court heard from the director of the Thurston County Office of Public Defense, Patrick O’Connor, who renewed the defense motion to allow Mr. Shackleton to withdraw. RP 117-118. Again making the “observation that it appears there is quite a bit of maneuvering to prevent this trial from going,” the trial court indicated that it was not certain that either Mr. O’Connor or Mr. Jefferson could offer anything more than Mr. Shackleton had already stated. RP 119-120.

Mr. Jefferson, who is Mr. Shackleton's supervisor, then made argument that Bear's conduct was sufficient for the court to find that Bear had forfeited his right to counsel. RP 120-121. He further argued that the information caused a complete breakdown of the attorney-client relationship. RP 121-122. The Court ruled, "I don't find that there's been any conduct yet. I'm taking Mr. Bear as he was concerned. He voiced that concern to corrections. He's been advised by this court that that will not be put up with in any way, and from the court's standpoint, the trial will proceed." RP 123.

Mr. O'Connor made further argument that there was a "complete breakdown in client communication literally to the point that I don't know how Mr. Shackleton can sit near or next to the defendant during the course of this trial." RP 126. Mr. O'Connor also stated, "There's been no clarification on whether or not Mr. Bear wishes Mr. Shackleton to remain his attorney, whether or not he's going to communicate with him during this trial to allow Mr. Shackleton to provide effective assistance." RP 127. Mr. O'Connor asked the court to

"make a decision whether or not Mr. Bear by his own actions has forfeited his right to counsel and whether or not based on Mr. Bear's action and any additional

supplemental information you need from Mr. Shackleton whether he feels there's a total breakdown in client communication to the point he needs to withdraw."

RP 128.

The court explained its expectations for trial and asked Bear, "Can you follow those expectations and conduct yourself appropriately in court?" RP 131. Bear responded:

"The way I've been the - - follow those expectations. Due to the fact that he is feeling scared I guess you could say, probably me and him can have, like, while I'm restrained talk privately and try to make sure that communication skills is still there because at first I was fearful that since I filed a bar complaint against him he might not give forth his full effort in trying my case, and throughout my whole time I've been on his counsel I've talked to him probably about five times. Each time was probably about five to ten minutes. I've reviewed my file one time, which is for about ten minutes. I've requested copies of my files, certain things from my file. The prosecution refuses to give it to me. And I've stated to Mr. Shackleton back in September all I want is my discovery, copy of my discovery. I would - - I would take a plea offer and go back to DOC. And that didn't happen. So I tried to follow the legal bi - - the legal laws and filed a motion back in October to withdraw him from my counsel then which Judge Price refused."

RP 131. Bear continued,

"So I mean, I'm at the end of my rope right now, your Honor. I mean, I've tried - - tried repeatedly, you know to follow the laws, you know what I mean? It's like being incarcerated since I was 17 years old, we're taught to - - in the prison yards and institutions to go

force aggressively if there's an issue. I understand that in this proceeding, in this type of environment, that's not a mindset to have. And I'm - - I'm set for release on my manslaughter case in a few months, and with this probably get out next year. So I'm trying to rehabilitate my mindset and get into the right state of mind to get back into society, but when I'm really trying to follow the law and go about it the right way and file all the motions and request my documents, I'm being denied that. So then it gets me back in the state of mind of aggressiveness."

RP 132.

The trial court responded, "I think you've demonstrated to my satisfaction that you can conduct yourself appropriately, and I understand your desire to rehabilitate." RP 132. Bear asked for a resource so he could resume communication with Mr. Shackleton.

RP 135.

Following the recess, Mr. Shackleton again renewed his motion to withdraw stating,

"I think communication has completely broken down. I don't think it's come close to repairing to a point where I can represent him, and I don't see any way it will repair. The relationship has completely broken down. In addition, Mr. Bear told me right as he was leaving he wants to proceed pro se and he wants to make a motion to proceed pro se."

RP 138. When the Court asked for clarification, Mr. Shackleton stated:

"I think we've always had a difference on the strengths and weaknesses of the case or what would be the best way to proceed, but I've never considered that to be a basis to withdraw....(portion omitted)...It's just - - I think the level of distrust that he feels towards me and certainly that I feel towards him since hearing the disclosure this morning is it does make it impossible to communicate. I mean, I feel like he's basically just not really working on communicating on the case with me, just basically expressing discontent, and my guess is he feels that way about me as well."

RP 140. The trial court denied the request for Mr. Shackleton to withdraw and stated, "I would also, if you were making a request for another layer, I would deny that. Are you requesting to represent yourself?" RP 142.

Bear indicated, "Yes, Your Honor," and the trial court stated, "The difficulty with that request, Mr. Bear, at this point is it is untimely. The court has to look at that request to represent yourself differently depending upon what stage the case is at. So for example, it's looked at one way when it's made very much in the beginning of the case. It's looked at in a slightly different way when it gets to the middle of the case, and then it's looked at differently when it's during trial, which is what this is. At this point, based upon the fact that we're in trial, it causes me concern because it appears in large part your request is being made because you are

dissatisfied with Mr. Shackleton. Is that a fair way to characterize it?”

RP 142-143.

Bear responded, “I would say so, but to my understanding it’s - - it’s also his discomfort.” RP 143. Later in his response, Bear stated,

“when I asked for a two-week continuance so I can at least go in front of a judge on my motion on the first to try to withdraw from my counsel, and like I said, if we’re - - we’re going - - if that is denied, then I’ll be prepared to go to trial then. But if I’m not, then he’s - - he’s already told me that he’s going to be distracted throughout the trial because of his fear of me, and I can set myself up for failure, you know. I’ll go pro se.”

RP 144. The trial court ultimately ruled, “based upon the fact that the request to represent yourself today is not timely and I’m finding that it’s more about your dissatisfaction with your current counsel, the court is going to deny that request.” RP 145.

The trial proceeded and the jury found Mr. Bear guilty of the crime of Escape in the First Degree as charged. CP 76. He was sentenced on February 6, 2018 to 19 months of confinement. CP 99-107. Mr. Bear filed a notice of appeal the same day. CP 98.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING MR. BEAR’S REQUEST FOR NEW COUNSEL.

The Sixth Amendment does not guarantee a meaningful relationship between an accused and his counsel. In re Personal Restraint of Stenson, 142 Wn.2d 710, 723, 16 P.3d 1 (2001). The Washington Supreme Court adopted a test from a Ninth Circuit Court of Appeals decision to determine “whether a trial court erred in failing to substitute counsel to the determination of whether an irreconcilable conflict exists between a defendant and his counsel: (1) the extent of the conflict, (2) the adequacy of the inquiry, and (3) the timeliness of the motion.” In re PRP of Stenson at 723-724.

An appellate court reviews a trial court’s denial of new court appointed counsel for abuse of discretion. State v. Varga, 151 Wn. 2d 179, 200, 86 P.3d 139 (2004). A reviewing court will find an abuse of discretion when the trial court's decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons. State v. Dixon, 159 Wn.2d 65, 75-76, 147 P.3d 991 (2006), citing State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). A decision is based “on untenable grounds” or made “for untenable reasons” if it rests on facts unsupported in the record or was reached by applying the wrong legal standard. Id. A decision is “manifestly unreasonable” if the court, despite applying

the correct legal standard to the supported facts, adopts a view that “no reasonable person would take,” and arrives at a decision “outside the range of acceptable choices.” Id.

The appellant bears the burden of proving abuse of discretion. State v. Hentz, 32 Wn. App. 186, 190, 647 P.2d 39 (1982), *reversed on other grounds*, 99 Wn.2d 538 (1983). Judicial discretion is a composite of many things, among which are conclusions drawn from objective criteria; it means a sound judgment exercised with regard to what is right under the circumstances and without doing so arbitrarily or capriciously. Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion.

A defendant is not inherently entitled to substitute counsel due to disagreements regarding case strategy, even if their counsel motions to withdraw themselves. State v. Thompson, 169 Wn. App. 436, 290 P.3d 996 (2012). There, the defendant refused to speak to his counsel and threatened to kill counsel if he attempted to visit him. Id. at 449. Counsel tried multiple times to withdraw from the case. Id. Their disagreement regarded what strategy to pursue at trial. Id. The defendant wished to pursue a mental illness defense,

but his counsel felt it would be fruitless. Id. Division I of this Court held that conflict regarding trial strategy is not grounds for substitution of counsel. Id. at 459-460.

“A disagreement over defense theories and trial strategy does not by itself constitute an irreconcilable conflict entitling the defendant to substitute counsel because decisions on those matters are properly entrusted to defense counsel, not the defendant.”

Id.

Here, the original request to discharge Mr. Shackleton was based on Bear’s statement, “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. Mr. Shackleton, informed the court that a breakdown in communication had not occurred. 2 RP 5. The court subsequently ruled that there was no good cause to substitute counsel. 2 RP 7-8.

When the request was renewed and again addressed by the court, with the new knowledge that Mr. Bear had filed a bar complaint against Mr. Shackleton it was again determined that there was no good cause because Mr. Shackleton was not aware of the complaint and thus did not know if it created any conflict. RP 71-73. Again, the only basis for this request was dissatisfaction with

counsel and a “conflict of interest...because he [Mr. Shackleton] knows how I [Bear] very much dislike his counsel.” CP 40.

After, the revelation by Corrections Officer Jones regarding Bear’s comments about assaulting Mr. Shackleton if he was unable to secure a trial continuance, Mr. Shackleton requested to withdraw. RP 96-97; RP 105. The court properly exercised its discretion and denied the motion because the Court found Bear’s threat to be “maneuvering” to attempt to delay the beginning of the trial. RP 111; RP 119.

Here, Bear was simply dissatisfied with the tactics Mr. Shackleton planned to use in preparing for the case and at trial. While it was repeatedly argued that there was a breakdown in communications, “It is well settled that a defendant is not entitled to demand a reassignment of counsel on the basis of a breakdown in communications where he simply refuses to cooperate with his attorneys.” Thompson, 169 Wn.App. 457-458; *citing* State v. Schaller, 143 Wn.App. 258, 271, 177 P.3d 1139 (2007), review denied, 164 Wn.2d 1015.

When a conflict is engineered by the defendant they are not entitled to substitute counsel. State v. Fualaau, 155 Wn. App. 347, 359-360, 228 P.3d 771, 777-778 (2010). There, the defendant

attacked his attorney in the courtroom in front of the jury and the attorney asked to withdraw. Id. at 355. The court found it was a calculated move to create a conflict of interest and denied the request. Id. at 359.

“Substitution of counsel is an instrument designed to remedy meaningful impairments to effective representation, not to reward truculence with delay.’ *People v. Linares*, 2 N.Y.3d 507, 512, 813 N.E.2d 609, 780 N.Y.S.2d 529 (2004). Other jurisdictions have refused to recognize a rule of law that would empower criminal defendants to inject reversible error into their trials by threatening their lawyers: We rely in the first instance on our trial courts to determine whether a criminal defendant is represented by an attorney truly laboring under conflicting interests or whether the defendant has simply engineered an apparent conflict in an attempt to delay the ultimate moment of truth, the jury’s verdict.”

Id. at 359-360.

Here, the trial court found there was no conflict of interest and that Bear was simply attempting to delay the trial. Additionally, the claim that Bear thought Officer Jones would keep his comments private is illogical. Bear drafted a letter to the court and made the comments when asking Officer Jones to deliver the letter, as someone responsible for safety and security in the courtroom it is obvious that Officer Jones would have to inform the court of the threat. Furthermore, Bear tried to create a conflict of interest by

filing a bar complaint on the grounds of not agreeing on trial strategy. Similar to Fualaau, Bear engaged in multiple attempts to delay the course of the proceedings by engineering “conflicts.” Though, he did not engage in such extreme conduct as assaulting his lawyer in court he still undertook every possible effort to create a conflict. The trial court acted within its discretion when it denied his requests.

Even if there had been a conflict, it is clear from the record that Bear received effective representation. When the defendant receives effective representation they must prove prejudice from the conflict to warrant reversal. State v. Schaller, 143 Wn. App. at 270; Thompson, 169 Wn. App. 436 (where the alleged conflict did not lead to inadequate representation and the defendant was unable to prove prejudice the conviction was affirmed). In Schaller, the court held that a defendant’s refusal to cooperate with his attorneys did not entitle him to substitute counsel.

“Because the purpose of providing assistance of counsel is to ensure that defendants receive a fair trial, **the appropriate inquiry necessarily must focus on the adversarial process**, not only on the defendant's relationship with his lawyer as such. ‘[T]he essential aim of the [Sixth] Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will

inexorably be represented by the lawyer whom he prefers.”

State v. Schaller, 143 Wn. App. at 270 (emphasis added). The Court held that because the record did not reflect inadequate representation Schaller's rights had not been violated. Id.

Here, Bear also received adequate representation. Mr. Shackleton pursued Bear's theory that he escaped because he was under duress during cross-examination of the state's witnesses. RP 177-178, 182-184, 289-295. Additionally, Mr. Shackleton questioned the state's witnesses regarding physical evidence, such as DNA and where a survival magazine had been found. RP 212-213, 289-295. Mr. Shackleton did the best job that he could against overwhelming facts supporting Bear's guilt.

Prior to making the decision to testify, Bear acknowledged that he and Mr. Shackleton had in fact been able to work together. RP 333. At sentencing, Bear apologized to Mr. Shackleton stating that the occurrence on the first day of trial was a “misunderstanding” and that Mr. Shackleton “did everything he can to represent me [the defendant Bear].” RP 395. It is clear from the facts recited above that Mr. Bear received more than adequate

representation at trial thus the adversarial process was not harmed and his rights were not violated.

The trial court was clearly within its discretion when it denied the Bear's requests to remove Shackleton as counsel and Mr. Shackleton's requests to withdraw.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING MR. BEAR'S REQUEST TO PROCEED PRO SE.

A defendant in a criminal case has a constitutional right to waive the assistance of counsel and represent himself. Faretta v. California, 422 U.S. 806, 834, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); State v. Stenson, 132 Wn.2d 668, 940 P.2d 1239. The right is not absolute; the presumption is against waiver of the right to counsel. State v. Madsen, 168 Wn.2d 496, 504, 229 P.3d 714 (2010). The request must be made knowingly and intelligently. A defendant may not, by representing himself, disrupt a trial or other hearing and he must comply with procedural rules and substantive law. State v. Breedlove, 79 Wn. App. 101, 106, 900 P.2d 586 (1995). A court's decision to grant or deny a motion to proceed *pro se* is reviewed for abuse of discretion.

A reviewing court will find an abuse of discretion when the trial court's decision is manifestly unreasonable, or is exercised on

untenable grounds, or for untenable reasons. State v. Dixon, 159 Wn.2d 65, 75-76, 147 P.3d 991 (2006), citing State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). A decision is based “on untenable grounds” or made “for untenable reasons” if it rests on facts unsupported in the record or was reached by applying the wrong legal standard. Id. A reviewing court will sustain a trial court’s ruling on any appropriate ground supported by the record, even if not the ground identified by the court. State v. Fritz, 21 Wn. App. 354, 364, 585 P.2d 173, 179 (1978).

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION
IN DENYING MR. BEAR’S REQUEST TO PROCEED
PRO SE BECAUSE IT WAS NOT TIMELY.

If not exercised in a timely fashion, the defendant’s right to proceed pro se is relinquished and the matter of defendant’s representation is at the discretion of the trial judge. State v. Deweese, 117 Wn.2d 369, 377 (1991); State v. Bebb, 108 Wn.2d. 515, 524 (1987). The Washington Supreme Court rejects Federal procedural rule that pro se motion is timely as a matter of law if made prior to the swearing of the jury as long as not used as a tactic to delay this process. Stenson, 132 Wn. 2d at 738; *see also* Fritz v. Spalding, 682 F.2d 782, 784 (9th Cir. 1982). In analyzing the timeliness of a pro se motion, unless the request is made in

ample time prior to the start of trial, the court should consider: 1) whether the request is made for purposes of delay or to gain tactical advantage; and 2) whether the lateness of the request may hinder the administration of justice. Stenson, 132 Wn. 2d at 738 (citing to People v. Mogul, 812 P.2d 705, 708 (Colo. App. 1991)).

Here, the requests to proceed pro se that the trial court was obligated to consider were made during a status conference hearing only a week before trial, RP 59-61, and after the trial had already begun, RP 139-140. The court denied the first request as untimely, because the trial had already been confirmed and then postponed once before. RP 59-61. The court denied the second request as untimely because the trial had already begun and the request appeared to be made only due to dissatisfaction with Mr. Shackleton and as a maneuver to delay trial. RP 142-145; RP 111; RP 119. The fact that these requests were made either immediately prior to trial or during trial demonstrates that the trial court did not abuse its discretion by denying them.

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING MR. BEAR'S REQUEST TO PROCEED PRO SE BECAUSE IT WAS MADE FOR AN IMPROPER PURPOSE.

A motion for self-representation may be denied if it is made for improper purposes or if granting it would “obstruct the orderly administration of justice.” Breedlove, 79 Wn. App. at 108. A trial judge may terminate a defendant’s self-representation if the defendant is engaging in “serious and obstructionist misconduct.” Fritz, 21 Wn. App. at 363. A trial court has the discretionary authority to manage its own affairs so as to achieve an orderly and expeditious disposition of cases. Woodhead v. Discount Waterbeds, 78 Wn. App. 125, 129, 896 P.2d 66 (1995). While a defendant cannot be prevented from representing himself on the grounds that he lacks legal knowledge or skills, he can be prevented from interfering with the efficient administration of justice. Stenson, 132 Wn. 2d. at 738. Those cases in which the reviewing court has upheld the right of a defendant to represent himself involve records showing no disruption or disrespect on the part of the defendant. State v. Hemenway, 122 Wn. App. 787, 795, 95 P.3d 408 (2004).

In Fritz, the court held that the trial court did have the discretion to deny the defendant’s request to represent himself because it was simply a tactic to delay trial. The defendant had engaged in numerous methods to try to postpone the trial,

including attempts to flee and numerous motions to change counsel and continue the trial. Fritz, 21 Wn. App. at 365.

Here, Bear made numerous attempts to delay the trial. RP 119. The Corrections Officer testified that he had been given a letter by Bear indicating that he “would do whatever for trial not to begin today.” RP 96. Additionally, the court ruled that the threat made towards Mr. Shackleton was just “more maneuvering to impact the ability of the trial to go forward.” RP 111. Furthermore, the trial court observed that there was a “strong wish on the part of Mr. Bear and Mr. Harvell [co-defendant] to not have this trial proceed today.” RP 119. The record clearly reflects that Mr. Bear engaged in numerous tactics to postpone the trial-similar to Fritz-and while the court denied the motion to proceed pro se based off its untimeliness and dissatisfaction with counsel, the court also could have denied it based off of its improper purpose. Even if this court finds that the motions were in fact timely, the record adequately supports an additional ground to affirm because the motion to proceed pro se was for an improper purpose.

C. THE TRIAL COURT WAS NOT REQUIRED TO CONSIDER BEAR’S MOTION MADE ON OCTOBER 12, 2017, BECAUSE BEAR DID NOT PURSUE IT AND BEAR WAS ADEQUATELY REPRESENTED BY COUNSEL.

When a defendant is adequately represented by counsel, the court is not required to consider pro se motions. State v. Blanchey, 75 Wn.2d 926, 938, 454 P.2d 841 (1969); State v. Bergstrom, 162 Wn.2d 87, 97, 169 P.3d 816 (2007). In Blanchey, a defendant claimed to have filed pro se motions, which according to the record the court never ruled on. The Supreme Court of Washington said while that, if true, would be unfortunate it was not a deprivation of the defendant's rights. Blanchey 75 Wn.2d at 938.

"A person who chooses to be represented by counsel has no constitutional right to personally conduct his defense. See *People v. Mattson*, 51 Cal. 2d 777, 336 P.2d 937 (1959). Although the trial court should make every effort to hear such motions, defendant was deprived of no constitutional right by the court's failure to hear a pro se motion when defendant was adequately represented by counsel." Id.

Mr. Bear was adequately represented at the time he made his pro se motion to proceed without counsel on October 12, 2017. He was represented by Mr. Shackleton and the court had just ruled on October 5, 2017 that Mr. Shackleton's representation was adequate when they denied Mr. Bear's motion to discharge assigned counsel. CP 16. At this point the only grounds Mr. Bear put forth to show the inadequacy of Mr. Shackleton's representation

was that they did not see “eye to eye on the direction” to take the case. CP 6.

Moreover, prior to the date that Bear had noted for the hearing, the parties agreed made a joint request allowing Bear to be transported back to the Department of Corrections. The hearing was stricken because he was not present for it, and it does not appear that there was any attempt to re-note the matter for a hearing with Bear’s presence. Further, neither Bear nor his counsel raised the motion in subsequent hearings until January 17, 2018. At that hearing, Mr. Shackleton stated “My client just told me he wishes to proceed pro se. I didn’t file any motion because I just found out about it.” RP 59. It is clear from the record that between the time that Bear filed the motion on October 12, 2017, and the status hearing held on January 17, 2018, Bear did not pursue the motion and was working toward a trial with his counsel.

Bear relies upon State v. Breedlove, 79 Wn.App. 101, 900 P.2d 586 (1995) to support his argument that the timeliness of his requests should date back to the original motion. However, the facts of this case are easily distinguishable from that case. In Breedlove, defendant brought a motion to proceed pro se before the trial court twelve days before the trial was scheduled to begin

and the trial court declined to hear his motions at that time and agreed to hear arguments at a later court hearing. Breedlove 79 Wn. App at 104-105. On that date Breedlove filed more motions, again requesting that he be allowed to proceed pro se. Id. At the hearing Breedlove stated “I would ask that I be able to handle my own defense.” Id. The court denied Breedlove’s motion. Id. The appellate court found, “where a trial 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 must be measured from the date of the initial request.” Id. at 109.

In contrast, here Bear did not bring forth his request at subsequent hearings nor did the trial court put off hearing argument. By agreed order, Bear chose to return to DOC custody and did not pursue the hearing he had scheduled. Upon his return to Thurston County, he did not mention the motion for several hearings and gave every indication that he had abandoned the motion. Even his attorney stated that he was just made aware of the motion as of the January 17, 2018, hearing. As soon as the motion was made in a manner the trial court was obligated to consider, it immediately heard argument and ruled on the motion.

As discussed above, disagreement regarding trial strategy does not constitute inadequate representation. Thompson, 169 Wn. App. 436. Because Bear was adequately represented at the time he filed the motion pro se, the court was not obligated to consider it. Blanchey, 75 Wn.2d at 938; Bergstrom, 162 Wn. 2d at 97. Bear had more than ample opportunity to pursue his request if he had genuinely wished to, but it was only when doing so had the benefit of delaying trial that he actively pursued it. Prior to January 17, 2018, Bear had abandoned his request to proceed pro se.

D. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING MR. BEAR'S REQUEST TO PROCEED PRO SE BECAUSE BEAR DID NOT MAKE AN UNEQUIVUCAL REQUEST IN THE CONTEXT OF THE PROCEEDINGS AS A WHOLE.

If a request to proceed pro se is predicated by a denial for new counsel the request must be unequivocal when considered in the context of the entire record. Stenson 132 Wn. 2d. at 741-742. There, the defendant's request to represent himself was denied because he repeatedly discussed his desire for new counsel, and when taken in the context of the entire record it was not an unequivocal request but instead simply indicative of his dissatisfaction with his current counsel. Id. When a request to

proceed *pro se*, in the context of the entire record, is simply an expression of frustration with the proceedings it is not unequivocal. State v. Luvene, 127 Wn.2d 690, 698-699, 903 P.2d 960, 966 (1995).

“While Mr. Luvene [the defendant] did state that he was "prepared to go for myself," he also stated, "I'm not even prepared about that," and "this is out of my league for doing that." Taken in the context of the record as a whole, these statements can be seen only as an expression of frustration by Mr. Luvene with the delay in going to trial and not as an unequivocal assertion of his right to self-representation.”

Id.

Here, Bear replied affirmatively to the court when it inquired if his desire to proceed *pro se* was due to dissatisfaction with Mr. Shackleton. RP 143. The court held that his request was mainly due to dissatisfaction with his current representation and as such denied the request. RP 145. This is comparable to Luvene where the trial court held that due to the defendant's repeated requests for substitute counsel his request to proceed *pro se* was not unequivocal in the context of the entire record. The reviewing court then held that the trial court did not abuse their discretion in making that decision. Id. Bear made numerous requests to substitute counsel and the court denied them due to the lack of good cause

for substitution, like Luvene, when viewed in the context of the complete record the court did not abuse its discretion in denying Mr. Bear's motion to proceed pro se because his requests were due to frustration with counsel, and as such were not unequivocal.

In the total context of the record, even if this Court determines that Bear's request to proceed pro se was timely, the entirety of the record reveals that the request was equivocal at best. Bear's initial written motion to proceed pro se was immediately following denial of his motion to have Mr. Shackleton discharged as counsel. Bear then chose not to pursue that motion, and the matter was confirmed for trial, with counsel, on multiple occasions.

When Bear discussed his request before the trial judge, Bear acknowledged that the request was in large part being made because of his dissatisfaction with defense counsel. RP 143. That statement was supported by Bear's previous statement that his motions dating back to October had been based on disagreements with Mr. Shackleton regarding discovery. RP 131. In the entire context of the record, Bear's request was equivocal. The trial court specifically noted, "based upon the fact that the request to represent yourself today is not timely and I'm finding that it's more

about your dissatisfaction with your current counsel, the court is going to deny that request.” RP 145. This is tantamount to a finding that the request being made was equivocal. That finding was clearly supported by the record. The trial court was clearly acting within its discretion.

D. CONCLUSION.

Bear has failed to meet his burden of proving abuse of discretion by the trial court in denying his motions for substitute counsel and to proceed *pro se*. The motions for substitute counsel were made due to disagreement over trial tactics, not legitimate conflict, thus the trial court properly denied them. Additionally, he received adequate representation and has shown no prejudice resulting from the alleged “conflict.” Bear’s requests to proceed *pro se* were untimely, equivocal, and made to delay the trial, as such the court properly denied them. The conviction should be affirmed.

Respectfully submitted this 17 day of September, 2018.



Joseph Jackson, WSBA #37306
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of State's Response to Appellant's Motion Objecting to Trial Court's Denial of Release Pending Appeal on the date below as follows:

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TO: DEREK M. BYRNE, CLERK
COURT OF APPEALS DIVISION II
950 BROADWAY, SUITE 300
TACOMA WA 98402-6045

VIA E- MAIL

TO: JOHN A. HAYS
ATTORNEY AT LAW
1402 BROADWAY ST
LONGVIEW WA 98632-3714

JAHAYSLAW@COMCAST.NET

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

Dated this 17th day of September, 2018, at Olympia,
Washington.



JENA GREEN, PARALEGAL

THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE

September 17, 2018 - 9:40 AM

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