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Court of Appeals
Division II
State of Washington
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No. 51919-4-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

RICKY SEXTON,

Appellant.

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

The Honorable Jack Nevin, Judge

REPLY BRIEF OF APPELLANT

Peter B. Tiller, WSBA No. 20835
Of Attorneys for Appellant

The Tiller Law Firm
Corner of Rock and Pine
P. O. Box 58
Centralia, WA 98531
(360) 736-9301

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A. ARGUMENT IN REPLY

**1. MR. SEXTON WAS DENIED HIS
CONSTITUTIONAL RIGHT TO SELF-
REPRESENTATION**

“Criminal defendants have an explicit right to self-representation under the Washington Constitution and an implicit right under the Sixth Amendment to the United States Constitution.” *State v. Madsen*, 168 Wn.2d 496, 503, 229 P.3d 714 (2010) (citing Wash. Const. art. I, § 22; *Faretta v. California*, 422 U.S. 806, 819, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975)). Article I, section 22 of the Washington Constitution and the Sixth Amendment to the United States Constitution guarantee a criminal defendant both the right to assistance of counsel and a right to self-representation. *State v. Howard*, 1 Wn. App. 2d 420, 424, 405 P.3d 1039 (2017).

There is a “tension” between the constitutional right to self-representation and the right to proceed with adequate counsel. *State v. Curry*, 191 Wn.2d 475, 482, 423 P.3d 179 (2018); *State v. DeWeese*, 117 Wash.2d 369, 376, 816 P.2d 1 (1991). The United States Supreme Court and the Washington Supreme Court have directed courts to indulge in “every reasonable presumption’ against a defendant’s waiver of his or her right to counsel.” *In re Det. of Turay*, 139 Wash.2d 379, 396, 986 P.2d 790 (1999) (quoting *Brewer v. Williams*, 430 U.S. 387, 404, 97 S.Ct.

1232, 51 L.Ed.2d 424 (1977)). When reviewing the denial of a defendant's request to proceed pro se, the presumption is against the waiver of counsel. See also *State v. Burns*, No. 95528-0, slip op. at 14 ___ Wn.2d ___, 438 P.3d 1183 (2019) "Both the United States Supreme Court and [the Washington Supreme Court] have directed courts to indulge in 'every reasonable presumption against a defendant's waiver of his or her right to counsel.' " *Burns*, slip op. at 13 (internal quotation marks omitted) (quoting *Turay*, 139 Wn.2d at 396).

On the other hand, the right of self-representation is "so fundamental that it is afforded despite its potentially detrimental impact on both the defendant and the administration of justice." *Madsen*, 168 Wn.2d at 503.

The fact that self-representation may be detrimental to the defendant is not a proper basis for denying a self-representation request. *Madsen*, 168 Wn.2d at 505. "A court may not deny a motion for self-representation based on grounds that self-representation would be detrimental to the defendant's ability to present his case." *Id.*

In its response in this case, the State argues that Mr. Sexton's request for self-representation was equivocal. Brief of Respondent at 37-38. The issue regarding the status of Mr. Sexton's representation was initially brought as a motion by Mr. Sexton's counsel to withdraw. 3RP

(3/26/18) at 3-5. The State argued that the motion was the “very same motion and request” made to the court in his previous case (Pierce County Cause no. 17-1-00988-3),¹ and asked the court “to rule consistently with the ruling that the Court handed down in the last proceeding[.]” 3RP at 5. Mr. Sexton’s counsel informed the trial court that Mr. Sexton “is questioning my ability as a lawyer, questioning my ability as trial counsel, and will not meet with me, will not discuss the case with me, will not discuss any offer with me so that I can lay it out.” 3RP (3/26/18) at 7.

Mr. Sexton, in the course of addressing the court, clearly stated his request for self-representation, telling the court: “I’m putting in a motion for a new trial and I want to proceed thus far on my own pro se.” 3RP (3/26/18) at 9. The State responded to Mr. Sexton and corrected inaccuracies regarding the previous case in Mr. Sexton’s statement to the court. 3RP at 10-11. The question of appointment of new counsel was introduced by Mr. Sexton’s attorney, who stated:

I’m not totally familiar with how I should respond other than from what I have said. But I think that there’s a difference between pro se representation and discharging or allowing previous counsel to withdraw. If the relationship is broken down, which I say it is, and it is not reparable, then the question arises in the context of this case and the proposed witnesses to be called whether Mr. Sexton should be allowed to go pro se or whether the trial should be recessed, counsel appointed for Mr. Sexton, and see if that procedure leads to resolution or trial. I think it has to be one way

¹Court of Appeals No. 52401-5-II.

or the other.

3RP at 14.

The discussion careened away from an inquiry regarding self-representation to Mr. Sexton's belief that the judge should "dismiss himself" and for reconsideration of the suppression ruling regarding execution of the search warrant. 3RP (3/26/18) at 20. The court then asked Mr. Sexton if he wanted "to represent yourself if this matter," to which he responded "[t]hat is correct." 3RP (3/26/18) at 22.

The court engaged in a colloquy, during which the focus of the questioning changed when the court inquired: "[s]o if you had a choice, again, the same question, Mr. Sexton, I'm still trying to find out whether you wish to represent yourself, or, rather, you just wish not to be represented by Mr. Short?" 3RP (3/26/18) at 27. Mr. Sexton answered the court's question, stating that he wanted to be represented by somebody that's competent, but added, again emphasizing that he wanted to represent himself, "I believe I'm competent." 3RP (3/26/18) at 27. The court asked again if he wanted to have an attorney represent him, and Mr. Sexton answered: "[i]f I had an attorney that would listen to me and—I believe, yeah, I believe yeah, an attorney could be helpful, of course, but last time around I was unable to say a word about anything." 3RP (3/26/18) at 28. He also stated he would want to have an attorney

represent him “[i]f I could get a competent one.” 3RP (3/26/18) at 28.

The record shows that Mr. Sexton was answering the court’s questions in a logical manner, indicating that if he had his druthers, he would want a competent attorney, but always returning to the theme that that his attorney for the first trial did not listen to him and that he believed that he was competent to represent himself. The contention that he equivocated in his request is created by the way the questions were framed, not by an affirmative request for new counsel by Mr. Sexton.

An unequivocal request to proceed pro se is valid even if combined with an alternative request for new counsel. See *State v. Stenson*, 132 Wn.2d 668, 741, 940 P.2d 1239 (1997). The *Stenson* Court stated:

While a request to proceed pro se as an alternative to substitution of new counsel does not necessarily make the request equivocal, *Johnstone v. Kelly*, 808 F.2d 214, 216, n. 2 (2d Cir.1986), such a request may be an indication to the trial court, in light of the whole record, that the request is not unequivocal.

Stenson, 132 Wn.2d at 741 (citations omitted).

The State’s argument that Mr. Sexton’s request was equivocal because it was coupled with an alternative request overlooks *Stenson*. Mr. Sexton at least twice clearly stated his intent to represent himself. 3RP (3/26/18) at 9, 27. The contention that the request was equivocal was based on Mr. Sexton’s responses to the court’s colloquy, not a request for

new counsel. Until the court shifted the focus of the inquiry, there was no apparent equivocation on Mr. Sexton's part. Mr. Sexton's logical and understandable inclusion of an alternative remedy is irrelevant to whether Mr. Sexton's request was unequivocal.

The judge asked if Mr. Sexton a series of questions, including the maximum penalty he faced and whether he knew the rules of criminal procedure. 3RP (3/26/18) at 24-25. Mr. Sexton said that he did not know the rules of criminal procedure and that he did not know the maximum penalty he faced other than "death," stating "that's what I'm looking at probably[.]" 3RP (3/26/18) at 24. A trial court "may not deny pro se status merely because the defendant is unfamiliar with legal rules." *Madsen*, 168 Wn.2d at 505-06. The trial court may not consider the defendant's skill and judgment. *In re Personal Restraint of Rhome*, 172 Wn.2d 654, 663, 260 P.3d 874 (2011). Mr. Sexton's response that he was facing "death" is probably attributable to his stated frustration with the legal process and his age,² rather than an actual belief that he faced the death penalty. Moreover, the court's vague question "what are the rules of criminal procedure" is not a reasonable method to determine a prospective pro se litigant's understanding of the law, since even an experienced trial attorney cannot reasonably be expected to have each and every rule of

²The hearing took place the day before Mr. Sexton's 67th birthday.

criminal procedure committed to memory. The judge's failure to adequately inquire into Mr. Sexton's request to represent himself eliminates any basis to conclude it was not knowing, voluntary and intelligent. *Madsen*, 168 Wn.2d at 505-06. As a final note, Mr. Sexton accurately demonstrated knowledge of consecutive and concurrent sentencing. 3RP (3/26/18) at 25.

The erroneous denial of a defendant's motion to proceed pro se requires reversal without any showing of prejudice. *State v. Breedlove*, 79 Wn.App. 101, 110, 900 P.2d 586 (1995). Where a conviction is reversed for a violation of the right to self-representation, the case must be remanded for retrial. *State v. Vermillion*, 112 Wn.App. 844, 848, 51 P.3d 188 (2002).

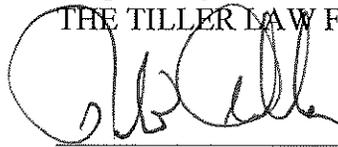
When considered as a whole, the record fails to provide a valid basis for denying Mr. Sexton's demand to proceed pro se. Mr. Sexton made an unequivocal, knowing, voluntary, intelligent and timely demand to exercise his right to self-representation and it should have been granted. *Madsen*, 168 Wn.2d at 505-06. Because Mr. Sexton was denied his constitutional right to proceed pro se, his conviction must be reversed and his case remanded for a new trial. *Madsen*, 168 Wn.2d at 510

B. CONCLUSION

For the reasons stated herein and in the appellant's opening brief, this Court should grant the relief previously requested.

DATED: June 12, 2019.

Respectfully submitted,
THE TILLER LAW FIRM

A handwritten signature in black ink, appearing to read 'P. Tiller', is written over the printed name 'THE TILLER LAW FIRM'.

PETER B. TILLER-WSBA 20835
Of Attorneys for Ricky Sexton

CERTIFICATE

I certify that I sent by JIS a copy of the Reply Brief of Appellant to Clerk of Court of Appeals and to Ms. Michelle Hyer, Deputy Prosecuting Attorney, and mailed copies, postage prepaid on June 12, 2019, to appellant, Ricky Sexton:

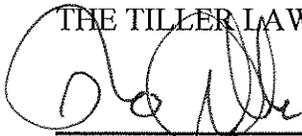
Michelle Hyer
Pierce County Prosecutor
930 Tacoma Ave S Rm 946
Tacoma, WA 98402-2102
PCpatcecf@co.pierce.wa.us

Mr. Derek M. Byrne
Clerk of the Court
Court of Appeals
950 Broadway, Ste.300
Tacoma, WA 98402-4454

Mr. Ricky Sexton
DOC #753204
Stafford Creek Correction Center
191 Constantine Way
Aberdeen, WA 98520
LEGAL MAIL/SPECIAL MAIL

DATED: June 12, 2019.

THE TILLER LAW FIRM



PETER B. TILLER – WSBA #20835
Of Attorneys for Appellant

THE TILLER LAW FIRM

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