

FILED

OCT 21, 2016

Court of Appeals
Division III
State of Washington

33934-3-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

KEVIN LEE GALLO,

Appellant.

DIRECT APPEAL
FROM THE SUPERIOR COURT
OF WALLA WALLA COUNTY

RESPONDENT'S BRIEF

Respectfully submitted:



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I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Walla Walla County Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

The Respondent State asserts no error occurred in the trial, conviction, and sentence of the Appellant/Defendant.

III. ISSUES

1. Was the court's decision to reappoint counsel manifestly unreasonable where the Defendant equivocated in his request for self representation and eventually withdrew his request and where the Defendant used his pro se status to obstruct and delay?
2. Was the imposition of a polygraph condition proper to monitor the drug treatment condition?
3. Should this Court impose some costs if the State substantially prevails in this case?

IV. STATEMENT OF THE CASE

The Defendant Kevin Gallo has been convicted of possessing methamphetamine and using drug paraphernalia. CP 121-31.

Initially, the court imposed bail in the amount of \$25,000. CP 9.

Two weeks later, the amount was reduced to \$5000. CP 25. A month after that, the bail was reduced to \$1000. CP 35. The next day, on May 12, 2015, there was a change of counsel (perhaps for a conflict of interest) and Jerry Makus was appointed to represent the Defendant. CP 36; Supp RP 13-14. On that same day, the Defendant filled out an advisement form, waiving the right to counsel. CP 37-39.

The very next day, on May 13, the court heard the Defendant's motion for self-representation. Supp RP. His attorney "advised against it in the strongest possible way" and informed the court that the request was "foolish." Supp RP 2. The court advised the Defendant of the consequences of being found guilty of the charges against him and inquired into his familiarity with the legal process. Supp RP 2-4, 6; CP 37-38.

The Defendant said he had "observed the process" in Benton County as a criminal defendant. Supp RP 3. He said he had represented himself in changes of plea in Superior Court in Benton and Thurston Counties and had observed a trial in Benton County District Court for which he had been represented by counsel. Supp RP 7, 8-9. He said he thought he could do a better job than an attorney in examining witnesses and admitting evidence. Supp RP 8.

The Defendant said he had “a couple of college classes,” but no law school. Supp RP 5. He said he had been in a law library and knew how to study. Supp RP 8. He did not think there was “much to go over” in the two weeks before trial. Supp RP 8. The one thing he would “have to study a little” was how to question himself on the stand. Supp RP 8.

The Defendant explained that he wanted to represent himself despite his extremely limited understanding, because he did not feel the attorneys would have the same drive that he would, he did not like their attitudes, and he believed they were withholding information from him. Supp RP 6 (“I don’t believe that they fight as though it would be their life at stake in jeopardy as I would.”) He said they refused his requests, “[t]hat’s probably my main problem is with the attorneys’ refusal to do as I ask.” Supp RP 9.

The Honorable Judge Wolfram found the waiver to be voluntary, and appointed Mr. Makus on a standby basis only. CP 38-39; Supp RP 11. Immediately upon receiving permission to proceed pro se, the Defendant attempted to use that change in status to obtain yet a further reduction in bail. Supp RP 13. The court denied the request. Supp RP 13.

The Defendant then promptly asked for legal advice both from the judge and from the prosecutor. Supp RP 13, ll. 3-8; Supp RP 14, ll. 21-23.

Each informed him that they could not advise him. Supp RP 13, l. 9; Supp RP 14, l. 24. He then asked the court to instruct his standby counsel to advise him. Supp RP 14-15 (“I just need, you know, some advice on stuff that I don’t know from him”). The court recommended the Defendant meet privately with Mr. Makus. Supp RP 15.

Two weeks later, on May 27, the Defendant failed to appear for his trial and a bench warrant issued for his arrest. CP 40-41, 46, 51-52. He was arrested a few days later. CP 52. The Defendant reported that he had no mailing address. CP 53.

On June 17, the Defendant appeared for himself for the first time. RP 8. The Defendant provided new contact information. RP 19. Again, he used his pro se status as leverage for his bail argument. RP 17. This time, despite the Defendant’s previous failure to appear on the very day of trial, the different judge released the thousand dollar bail. RP 17-18.

The Defendant advised the Honorable Judge Lohrmann that he had a high school diploma and had been employed as a horse trainer and in labor and construction. RP 8-9. He said he had observed one trial as a criminal defendant and had been a witness or victim in another case. RP 9. Where he had previously told Judge Wolfram that he had represented himself in changes of plea in Benton and Thurston, he told Judge

Lohrmann that he was “right now” representing himself in those matters. RP 9-10; *see also* CP 122 (the Defendant was sentenced in 2014 for possessing a stolen vehicle in Benton County and in 2004 for attempting to elude in Thurston County). He said he had been evaluated for competency in Benton County a year ago. RP 10.

The Defendant had anticipated going to trial two weeks earlier. Supp RP 8. However, despite having represented that he was motivated to fight as if his life were in jeopardy, the Defendant informed Judge Lohrmann that two weeks after the anticipated trial date he still did not know even the elements of the offenses with which he was charged and could not know them without a continuance to use the law library. RP 10; Supp RP 6. In fact, he had been in possession of that information for over a month. Supp RP 12-13 (Mr. Makus providing the Defendant the charging information, discovery, the plaintiff’s jury instructions, and the WPIC for unwitting possession). He also said he had yet to make it to the law library to look at the court rules. RP 12.

Although he had been in possession of the State’s offer (which includes the offender score) and discovery¹ for over a month (Supp RP

¹ CrR 4.7(a)(1)(vi) requires the prosecutor to provide the Defendant’s criminal history in discovery.

12), and despite having acknowledged that he had already pled guilty to felonies in Benton and Thurston (Supp RP 7, 8-9; CP 122), the Defendant claimed he did not know his offender score and believed that it was zero. RP 11. Concerned, Judge Lohrmann engaged in a further colloquy which was less inquisitive than forewarning. RP 11-15.

The court set the next hearing for July 31 for omnibus. RP 16-17.

Two months later, on July 31, the Defendant failed to appear resulting in a second bench warrant for his arrest. CP 59, 68-69. He remained on warrant status for over two months until his arrest on October 9 and transfer from jail in the Tri-Cities. CP 69; RP 21.

At the next hearing, on October 12, bail of \$10,000 was imposed, and the court appointed Mr. Makus to represent the incarcerated Defendant. CP 64-66; RP 21. Although the record is that the Defendant requested to represent himself *on the very day* Mr. Makus had been appointed to him on May 12 (CP 36-37), the Defendant claimed that he had made an effort to work with counsel. RP 22. The Defendant claimed it was a conflict of interest for Mr. Makus to tell the client that what he wanted could not be accomplished. RP 22. However, in response to the judge's inquiry, Mr. Makus clarified that there was no ethical concern. RP 22. "He does have his own independent thinking, and doesn't like the

advice I give. But other than that [-].” RP 22.

Judge Lohrmann explained that he could not order an attorney to obey the client, because the lawyer is bound by legal ethics. RP 23. The judge expressed that he had grave concerns that the Defendant had not shown that he was able to represent himself. RP 23. The Defendant acquiesced – “I understand. ... I will try to work with him. Thank you, Your Honor.” RP 23.

About a week later on October 21, the Defendant sent a letter to the court indicating no longer a desire to represent himself, but a desire for a *different* attorney. CP 71-73. He believed that his attorney’s frustration with the client’s intransigence was a “conflict of interest.” CP 71. He believed that the State should pay for him to be represented by “outside” counsel. CP 71. However, he did not pursue this beyond the single letter. And trial began on November 30, over a month later, with no further comment on this matter. RP 24.

At trial, the jury acquitted the Defendant on a charge of criminal trespass and, on defense motion, the court dismissed the bail jumping charge. CP 112, 122-23; RP 92-94, 98-102, 121-23, 135, 143-44. A bail jumping conviction with an offender score of three would have resulted in a standard sentencing range of 9-12 months. RCW 9.94A.510; RCW

9.94A.515 (Bail Jumping with class C Felony has a seriousness level of III). As a result of his attorney's efforts, the Defendant had a sentencing range of only 0-6 months. CP 122.

At sentencing, the Defendant expressed an appreciation for his attorney's assistance and even requested his reappointment:

THE COURT: Mr. Gallo, I -- just out of curiosity, it is my observation in this case that you were greatly assisted by legal counsel representing you. Without getting a dismissal of those two additional counts you would be looking at substantially more time. I'm just curious, do you understand the helpfulness of legal counsel by now?

THE DEFENDANT: I do, Your Honor. Yes, it is very confusing and overwhelming not to have one if I did not take advantage of it.

THE COURT: I just hope in the future that you understand that these lawyers sometimes aren't real polite. They are very busy people and don't have the greatest bedside manners in the world but they are darn good attorneys and that is just an observation I have had as well.

THE DEFENDANT: You Honor, could I ask, would I be able to get Mr. Makus or another attorney to help me with the matter in Benton County since I'm going to

be here, and, you know, probation here, if I could get an attorney here to be able to file that stuff for me over there?

THE COURT: That's not possible. The only way you could do that is by way of hiring him personally. And if you don't have money to do that, obviously, I can't appoint local counsel in Walla Walla to represent you on a Benton County matter. Doesn't work that way.

THE DEFENDANT: Even though it is a Superior Court matter?

THE COURT: Even though. Okay. Good luck to you. Court is in recess.

THE DEFENDANT: Okay. Thank you, Your Honor.

RP 148-50.

The court sentenced the Defendant to 106 days, with credit for having already served all of that time. CP 125. Defense counsel asked the court not to impose all the legal financial obligations requested by the State, because they were "rather extreme" considering the Defendant had not worked in two or three years and would be focusing on substance abuse treatment. RP 140-41. The Defendant explained that he had not been working only because of his arrests on various criminal cases. RP 143. The court only imposed \$600 in mandatory LFO's to be paid at \$10

per month. CP 123.

The court imposed 12 months of community custody. CP 125. The court found the Defendant has a chemical dependency, which contributed to his offenses, and ordered him to obtain an evaluation from a chemical dependency treatment provider and participate in an outpatient drug program. CP 121, 126, 129. The court ordered the Defendant, *inter alia*, to submit to polygraph and/or urinalysis testing upon request of the probation or supervision officer. CP 129.

V. ARGUMENT

A. THE COURT DID NOT ABUSE ITS DISCRETION IN APPOINTING AN ATTORNEY TO REPRESENT THE DEFENDANT.

As the Defendant acknowledges, the trial court's decision whether to allow a criminal defendant to represent oneself is afforded deference and reviewed for abuse of discretion. AOB at 7.

[B]oth the United States Supreme Court and this court have held that courts are required 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)). As a request for pro se status is a waiver of the constitutional right to counsel, appellate courts have regularly and properly reviewed denials of requests for pro se status under an *abuse of discretion standard*. *E.g.*, *State*

v. Hemenway, 122 Wash.App. 787, 792, 95 P.3d 408 (2004). Discretion is abused if a decision is ***manifestly unreasonable*** or “rests on facts unsupported in the record or was reached by applying the wrong legal standard.” *State v. Rohrich*, 149 Wash.2d 647, 654, 71 P.3d 638 (2003).

State v. Madsen, 168 Wn.2d 496, 504, 229 P.3d 714, 717 (2010)
(emphasis added.)

The court may deny a defendant the right to self-representation when the defendant’s request is “equivocal, untimely, involuntary, or made without a general understanding of the consequences.” *State v. Madsen*, 168 Wn.2d at 504-05. The trial judge is in the better position to assess a defendant’s abilities, understanding, and resoluteness. *State v. Floyd*, 178 Wn. App. 402, 410, 316 P.3d 1091 (2013) (appellate courts owe considerable deference to a trial court’s finding in regard to self-representation because the trial court has the opportunity to observe a defendant’s demeanor and nonverbal conduct).

The Defendant claims once self-representation is permitted, the court may terminate pro se status “only if” the defendant engages in serious obstruction is incorrect. AOB at 8. No such “only if” language appears in the cases cited.

In this case, the Defendant was equivocal in his request for self-

representation, withdrawing his request on October 12, after Judge Lohrmann expressed that he had grave concerns. Faced with an equivocal request and indulging in every reasonable presumption against waiver, the court did not abuse its discretion in appointing counsel.

After the order May 13, granting the Defendant permission to proceed pro se, he had proven that he was manifestly incapable of representing himself. Insofar as the Defendant claimed that he would be more motivated or zealous in his own matter than any attorney, this was demonstrably false. On June 17, more than two weeks after his May 27 trial date, the Defendant still did not even know what elements the State had to prove. He did not know what his offender score was, information essential to understanding his likely range of punishment if convicted. Yet all of this information had been provided to him on May 13. All he had to do was review the file in his possession. Weeks after the trial date, he was not sufficiently motivated even to read his file, and he could not manage to visit a law library.

In fact, in the short period of his self-representation, the Defendant had significantly harmed his case. He could not manage to make his court appearances or communicate in a timely manner the reason for any anticipated absences. This was highly prejudicial to his case. He incurred

a second felony charge and an increase in bail. Previously, with an offender score of two, the Defendant had been looking at a sentencing range of 0-6 months. CP 122. However, the additional bail jumping charge and an offender score of three resulted in a standard sentencing range of 9-12 months. RCW 9.94A.510; RCW 9.94A.515.

His failures to appear prolonged the pretrial period. CrR 3.3(c)(2)(ii) (failing to appear moves the commencement date to the date of the defendant's next appearance). It was a period he would have to spend in jail, because his failures to appear also resulted in a significant bail of \$10,000. The Defendant would not be able to obtain further pretrial release, further complicating his ability to represent himself. By the time he got to trial, he had been incarcerated for a longer period of time than the State had recommended in its plea offer.

The likely reason the Defendant requested self-representation was that, earlier on, it gave him an argument for requesting the court reduce or exonerate bail. He then used his release to delay the trial repeatedly. He failed to appear at trial, resulting in a delay. Then when he reappeared, he used his pro se status and utter lack of preparation to secure a significant continuance. The Defendant's use of self-representation to obtain delays and so postpone the administration of justice is another basis to terminate

pro se status. *State v. Madsen*, 168 Wn.2d at 509; *State v. Floyd*, 178 Wn. App. at 409. When release/delay was no longer an option, the Defendant's enthusiasm for self-representation waned.

The Defendant's failures to appear, including on the very day of trial, and his failure to prepare in any way for trial was serious misconduct and obstructionist misconduct, justifying the termination of his pro se status. *Faretta v. California*, 422 U.S. 806, 834, 95 S. Ct. 2525, 2541, 45 L. Ed. 2d 562 (1975) (court may terminate self-representation for serious and obstructionist misconduct); *State v. Floyd*, 178 Wn. App. at 409.

Insofar as the Defendant felt that attorneys were obligated to do his bidding, the court explained the ethical duties of the profession. And the Defendant came around. In the end, the Defendant acquiesced – "I understand. ... I will try to work with him. Thank you, Your Honor." RP 23. There was a temporary intervening moment of panic when the Defendant requested a *different* attorney, but no longer did he ask to represent himself.

Where the Defendant's request was equivocal and ultimately rescinded, where the Defendant used the pro status for obstruction and delay, the court's decision to reappoint counsel was not manifestly unreasonable.

B. THE COURT PROPERLY IMPOSED THE COMMUNITY CUSTODY CONDITION PERMITTING POLYGRAPHS TO MONITOR COMPLIANCE WITH DRUG TREATMENT.

The Defendant challenges the sentencing condition which requires him to “submit to a polygraph and/or urinalysis upon the request” of the community correctional officer. AOB at 12; CP 129. The Defendant was also ordered to participate in an outpatient drug program at his own expense. CP 129. The Defendant does not challenge the drug treatment condition or the monitoring condition that he submit to urinalyses, but only objects to the monitoring condition of a polygraph.

The court has discretion to require an offender to “perform affirmative conduct reasonably related to the circumstances of the offense, the offender’s risk of reoffending, or the safety of the community.” RCW 9.94A.703(3)(d). *See also State v. Irwin*, 191 Wn. App. 644, 656, 364 P.3d 830, 837 (2015) (crime-related conditions reviewed for abuse of discretion). An abuse of discretion is a decision that is “manifestly unreasonable” or exercised “on untenable grounds or for untenable reasons.” *State v. Irwin*, 191 Wn. App. at 656.

There need only be “some basis” connecting the offense to the condition. *State v. Irwin*, 191 Wn. App. at 657. Under this lax standard, where a defendant was found to have molested the children of a platonic

male friend, the court properly prohibited him from dating women with minor children or forming new relationships with families with minor aged children. *State v. Kinzle*, 181 Wn. App. 774, 785, 326 P.3d 870 (2014). A defendant who committed computer trespass can be prohibited from possessing a computer of his own even though it does not connect to the internet or any other computer. *State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993).

In 1997, the Legislature amended the community custody laws, adding the authority to order affirmative conditions in order to assure offenders' compliance with sentence conditions. *State v. Riles*, 135 Wn.2d 326, 342, 957 P.2d 655 (1998) (citing WASH. LAWS of 1997, c. 144). “These amendments suggest the Legislature intended to confirm the practice of allowing testing, such as polygraphs, for monitoring compliance with sentencing conditions.” *State v. Riles*, 135 Wn.2d at 343, *abrogated on other grounds by State v. Valencia*, 169 Wn.2d 782, 792, 239 P.3d 1059 (2010). Under the new law, affirmative acts necessary to monitor compliance are mandatory. *State v. Riles*, 135 Wn.2d at 343. *See also* RCW 9.94A.703(1)(b) (requiring the court to order the offender to comply with the conditions department imposes under RCW 9.94A.704 in order to monitor compliance).

Where the offender has been ordered to submit to treatment, it is proper to require the offender to submit to polygraph testing to monitor compliance with that treatment. *State v. Riles*, 135 Wn.2d at 342, *abrogated on other grounds by State v. Valencia*, 169 Wn.2d 782, 792, 239 P.3d 1059 (2010). If no treatment is ordered, however, then the testing serves no purpose. *State v. Riles*, 135 Wn.2d at 345.

Here treatment has been ordered. The testing serves a purpose.

The Defendant relies on a decision of a lower court which found a polygraph condition on a drug offender to be overbroad. AOB at 14 (quoting *State v. Flores-Moreno*, 72 Wn. App. 733, 745-46, 866 P.2d 648, 655 (1994)). Not only did this opinion issue prior to the statutory amendments authorizing affirmative conditions to monitor compliance, but the specific language the Defendant relies upon has also been identified as dicta. *State v. Holland*, 80 Wn. App. 1, 4, 905 P.2d 920, 921 (1995), *publication ordered* (Nov. 29, 1995), *abrogated by State v. Riles*, 135 Wn.2d 326, 957 P.2d 655 (1998).

The court properly ordered the condition which is mandatory for monitoring compliance with drug treatment and which is reasonably related to his drug offense.

C. IF THE STATE SUBSTANTIALLY PREVAILS ON APPEAL, THE COURT SHOULD IMPOSE SOME COSTS ON THE DEFENDANT.

The 43 year old Defendant informed the trial court that he had worked for “decades” in horse training and industrial labor. RP 9. “Before that it was construction supervisor.” RP 9. When the court inquired why he had not worked in the last two or three years, he said, “Because of my court troubles here and Benton County, I haven’t been able to work. I have been in and out of jail and had court dates scheduled since June 2013.” RP 142-43.

However, the Indigency Report indicates that the Defendant is receiving \$197/mo through ABD, i.e. the Aged, Blind, or Disabled Cash Assistance Program. Because ABD is only a state bridge program pending the more thorough application process to the federal program, a person qualifies by merely establishing that one is “likely to be” disabled. WAC 388-400-0060. “Disabled” means unable to engage in substantial gainful activity due to a medically determinable impairment expected to last for not less than twelve months. WAC 388-449-0001(1)(c). Substance abuse is not a qualifying disability. WAC 388-449-0001(4).

The lower court has already shown him great lenience. The State had requested LFO’s of \$3892. CP 123; RP 145. These fees would have

included booking fees for the Defendant's multiple failures to appear, the jury demand fee where the Defendant failed to appear on the day of trial after the clerk had summoned a jury pool at significant expense, and the criminal filing fee. CP 123; RCW 36.18.020(2)(h); *State v. Malone*, 193 Wn. App. 762, 764, 376 P.3d 443 (2016) (the \$200 criminal filing fee is mandatory irrespective of ability to pay). The court only imposed \$600.

There should be some deterrent to wasteful, frivolous appeals.

In this case, the Defendant is encouraged to proceed with an appeal, because he does not expect that there is any risk of costs, win or lose. However, an appeal will not secure his release from confinement, because he is not incarcerated. And Defendant has expressed thankfulness for Mr. Makus' free and able assistance at trial, even requesting the court appoint Mr. Makus to the Defendant's cases in other counties. Without that assistance, he may have been incarcerated three times longer. For the Defendant to turn around on appeal and complain about appointment of counsel is offensive and wasteful of public resources.

If this Court finds the State substantially prevails, this is the sort of appeal that is deserving of some sort of deterrent response. Some costs should be imposed.

VI. CONCLUSION

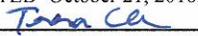
Based upon the forgoing, the State respectfully requests this Court affirm the Appellant's conviction.

DATED: October 21, 2016.

Respectfully submitted:



Teresa Chen, WSBA#31762
Deputy Prosecuting Attorney

<p>Jill S. Reuter <Wa.Appeals@gmail.com></p>	<p>A copy of this brief was sent via U.S. Mail or via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED October 21, 2016, Pasco, WA  Original filed at the Court of Appeals, 500 N. Cedar Street, Spokane, WA 99201</p>
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