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Court of Appeals
Division III
State of Washington
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NO. 358542

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

STATE OF WASHINGTON

Respondent,

v.

JARED WINTERER,

Appellant.

Appeal from the Superior Court of Kittitas County

Cause No. 16-1-00196-2

The Honorable Scott R Sparks

APPELLANT'S REPLY BRIEF

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I. ARGUMENT IN REPLY

The right to proceed *pro se* is neither absolute nor self-executing. *State v. Woods*, 143 Wn.2d 561, 586, 23 P.3d 1046 (2001). A waiver of counsel must be knowing, voluntary, and intelligent, as with any waiver of constitutional rights. *Argersinger v. Hamlin*, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972). *If counsel is properly waived*, a criminal defendant has a right to self-representation. *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975) (*emphasis added*).

Here, the record does not support Mr. Winterer having been aware of the consequences of his waiver of his right to counsel at the time the Court accepted this latest iteration and expression of his waiver. The State asserts that because Mr. Winterer asked to represent himself many times previously across several contexts and proceedings, this somehow demonstrates an inherent understanding of the consequence of his request at the time of the specific waiver of counsel that was actually accepted by the trial court. It does not. The sheer quantity and repetitive nature of his prior expressions of this request do not aggregate to an awareness of the actual consequences that would flow from his waiver of his constitutional right.

MR. WINTERER'S REQUEST TO REPRESENT HIMSELF WAS EQUIVOCAL IN SPITE OF THE STRENUOUS, FREQUENT, AND REPETITIVE NATURE OF THE REQUESTS.

The State's reliance upon *State v. Curry*, 191 Wn.2d 475 (2018), to illustrate Mr. Winterer's waiver of counsel was unequivocal, made knowingly, and intelligently is misplaced given the substantial factual differences between the

cases. The issue in *Curry* was limited to the narrow question of whether the defendant's request to represent himself was unequivocal. *Id.* at 483. While *Curry* indeed discusses the standards for reviewing a court's decision on a defendant's request to waive their right to counsel, overlaying that analysis onto this case does not support the adequacy of the waiver. In *Curry*, the trial judge engaged the defendant in a lengthy colloquy before granting his request to proceed *pro se*:

The colloquy addressed the following subjects: confirmation of Curry's desire to proceed to trial; a recitation of the charges against Curry and the potential sentences for those charges; confirmation that Curry understood the charges, potential sentences, and standard ranges; Curry's reason for wanting to proceed pro se, which was to avoid further delay; Curry's education and ability to read and write; Curry's prior experience representing himself, with mixed results; cautionary warnings about self-representation, e.g., "if you are representing yourself, you're on your own,"; admonition that if Curry represented himself, he "would still be required to follow the very same rules that the attorney the prosecutor would have to follow,"; Curry's reasons for dissatisfaction with current and confirmation that Curry had not been influenced, threatened, or promised anything for representing himself, and that this was "a voluntary decision just from [Curry's] own thinking about it,"

Id. at 480-81.

Additionally, the trial judge repeatedly cautioned Curry that self-representation was not a wise choice: "I don't think it's a wise choice to represent yourself...You're facing a lot of downside here if convicted ... and the danger of being convicted of these matters would result in a lot of prison time." *Id.*

Ultimately, the trial judge granted the motion, permitted Curry to represent himself, and published an order that outlined the findings from the hearing,

including a finding that Curry's request to proceed *pro se* was unequivocal. *Id.* at 482.

Ultimately, whether *Curry*'s expression of waiver was equivocal was decided by looking at three criteria: whether the trial court applied the correct legal standard; whether substantial evidence supported the trial court's decision; and whether the trial court's decision was reasonable. Applying the reasoning expressed in *Curry* to this case, substantial evidence did not support the decision, nor was it reasonable given what the court knew of Mr. Winterer's overall lack of understanding of the proceedings.

Here, although there was a colloquy, it did not reveal the underlying request was made clearly or demonstrate Mr. Winterer's awareness of the ramifications at the time the waiver was accepted. The written order here also somewhat muddles the issues of competency with both his advisement of rights and "choice" to represent himself. CP 66. Competency is not the legal standard for acceptance of a waiver of the right to counsel. Advisement of rights absent meaningful responses from the defendant does not meet the standard either.

In *Curry*, the motion filed on Curry's behalf outlined the relevant legal standards and then declared that those standards were met. *Curry*, 191 Wn.2d at 491. During the hearing on Curry's request to proceed *pro se*, the trial court engaged Curry in an extensive colloquy regarding his wish to represent himself. The trial court inquired about Curry's motivation, his education, his knowledge of trial procedures, his experience representing himself in other matters, and whether he was threatened or promised anything by any outside sources or if the

decision was his alone. The trial court also ensured that Curry was aware of his possible prison time if convicted and was “aware that there are dangers and pitfalls of self-representation.” *Id.* After orally granting Curry’s request to represent himself, the trial court filed an order that outlined the trial judge’s findings with respect to Curry’s self-representation, including the unequivocal nature of Curry’s request. *Id.* at 492.

Moreover, it bears mention that Curry sought to represent himself purely because he did not want further delays in his trial date as a result of new counsel’s need to prepare. *Curry*, 191 Wn.2d at 480. Winterer’s waiver was premised upon a misunderstanding that a defense attorney’s role was to fetch evidence for him. Additionally, the competency of Mr. Curry was not apparently at issue in his case. Issues pertaining to the competency of the defendant were well known to the trial court with regard to Mr. Winterer. CP 34-39; 41-42; 44-45; 46-51; 66.

There is insufficient evidence in the record supporting the trial court’s decision. While the trial court is in the most favorable position to evaluate the nature of Mr. Winterer’s request compared to this Court, the trial court’s familiarity with Mr. Winterer would seem to cut against accepting the waiver as unequivocally made. Precisely because Mr. Winterer had been making requests, filing *pro se* motions, and writing letters to the court, the Court knew Mr. Winterer was already struggling to grasp the nature of the proceedings. Indeed, in the context of the specific expression of waiver at issue, Mr. Winterer never explicitly invoked his right to proceed *pro se*. RP at 9, Ins. 15-22. Rather,

Winterer primarily requested different counsel, and repeatedly sought the help of an attorney as illustrated by the volume of his written correspondence to the trial court in which he sought different counsel. CP 20-23; CP 30-31; CP 41-42; CP 44-45; CP 58-62. Winterer repeatedly expressed to the court his unhappiness with his current counsel. *Id.* Mr. Winterer's comments generally show that he preferred to go forward with actual help, albeit with a different attorney than the one currently assigned. While he "wanted to call the shots", he also expressed a desire for an attorney to explain things to him to help him understand (RP at 13, lns. 18-19) and to get things for him (RP at 9, lns. 19-20).

Whether a request for self-representation is unequivocal must be determined on a case-by case basis, but aggregating the sheer quantity of requests with a clear expression or a knowing, intelligent, and voluntary waiver is not a sound approach. The inquiry is necessarily fact specific. The decision is inevitably fact intensive and involves the weighing of numerous factors. *See State v. DeWeese*, 117 Wn.2d 369, 816 P.2d 1 (1991) (noting that the validity of a waiver of counsel depends on the facts of the case and that "there is no checklist of the particular legal risks and disadvantages attendant to waiver which must be recited to the defendant"). Here, several standard points were raised in the colloquy (You will be the one asking questions/doing all the legal writing/held to the same rules as an attorney), and the cautionary tale about the lawyer who represents himself as fool was shared. RP at 10-13. Mr. Winterer's responses were generally brief, in the affirmative with whatever the trial judge said, and display little understanding

of what he should expect. Critically, this occurred at a status hearing to address a return on competency. RP at 9; CP 66.

The record does not illustrate the trial court's decision was reasonable. Mr. Winterer did not understand the consequences attached to the Amended Information and the aggravator sought by the State. RP at 22-23. Mr. Winterer actually said he didn't understand. RP at 23, ln. 6. When Mr. Winterer later referred to stand-by as his counsel, the trial court had to remind Mr. Winterer that he was, in fact, representing himself. RP at 222, lns. 9-11. In contrast, Curry, in addition to having been warned that it was unwise for him to represent himself, was also made aware of the potential sentence that his charges carried, was not being pressured by any outside source, and nonetheless made a clear, unequivocal request to represent himself. *Curry*, 191 Wn.2d at 495.

While there is no bright-line rule instructing the trial court when to grant and when to deny a criminal defendant's request for self-representation, the trial court did not here indulge in every reasonable presumption against Mr. Winterer's waiver of his right to counsel. *In re Det. of Turay*, 139 Wn.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)); *See also Curry*, 191 Wn.2d at 486.

II. CONCLUSION

It is respectfully requested that this Court reverse Mr. Winterer's convictions and remand his case back to the trial court.

Respectfully submitted this 11th day of December, 2018.

A handwritten signature in black ink, consisting of several overlapping, slanted strokes that are difficult to decipher.

Zachary W. Jarvis, WSBA # 36941
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DECLARATION OF SERVICE

I hereby declare that on December 11, 2018, I filed APPELLANT'S
REPLY BRIEF via Electronic Filing for the Court of Appeals for Division III
and delivered via E-mail and US Mail the same to:

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I further declare that I delivered via US Mail the same to:

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

Dated December 11, 2018.


By _____
Zachary W. Jarvis, WSBA #36941
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