

FILED
Court of Appeals
Division III
State of Washington
7/27/2018 12:06 PM

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 Sparks

APPELLANT'S OPENING BRIEF

Zachary W. Jarvis, WSBA No. 36941
Attorney for Appellant

Hart Jarvis Murray Chang PLLC
155 NE 100th St., Suite 210
Seattle, WA 98125
(206) 735-7474
zjarvis@hjmc-law.com

TABLE OF CONTENTS

I. ASSIGNMENT OF ERROR.....5

Issue Pertaining to Assignment of Error.....5

II. STATEMENT OF THE CASE.....5

III. ARGUMENT.....20

A. The Trial Court Violated Mr. Winterer’s Sixth Amendment and Article I § 22 Right to Counsel by Accepting an Invalid Waiver of that Right Without Indulging in Every Reasonable Presumption Against Mr. Winterer’s Waiver.....20

i. *A Criminal Defendant’s Right to Represent Themselves Is Not Absolute*.....22

ii. *Mr. Winterer’s Expression of Waiver was Equivocal*.....23

iii. *Mr. Winterer Was Not Aware of the Consequences of Waiver of His Right to Counsel and Therefore His Waiver Was Not Knowingly, Voluntarily, or Intelligently Made*.....26

IV. CONCLUSION.....30

TABLE OF AUTHORITIES

US Supreme Court Cases

<i>Adams v. United States ex rel. McCann</i> , 317 U.S. 269, 63 S.Ct. 236, 87 L.Ed. 268 (1942).....	21, 27
<i>Argersinger v. Hamlin</i> , 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972).....	26
<i>Brewer v. Williams</i> , 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977).....	22
<i>Gideon v. Wainwright</i> , 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963).....	21
<i>Faretta v. California</i> , 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).....	21-22, 26-27
<i>Von Moltke v. Gillies</i> , 332 U.S. 708, 68 S.Ct. 316, 92 L.Ed. 309 (1948).....	28

Federal Cases

<i>United States v. Aponte</i> , 591 F.2d 1247 (9th Cir.1978).....	27
<i>United States v. Bailey</i> , 675 F.2d 1292 (D.C.Cir.1982)	27
<i>United States v. Donahue</i> , 560 F.2d 1039 (1st Cir.1977).....	27
<i>United States v. Gillings</i> , 568 F.2d 1307 (9th Cir.1978)	28
<i>Hodge v. United States</i> , 414 F.2d 1040 (9th Cir.1969)	28
<i>United States v. Kimmel</i> , 672 F.2d 720 (9th Cir.1982)	28
<i>United States ex rel. Tonaldi v. Elrod</i> , 716 F.2d 431 (7th Cir.1983)	27
<i>United States v. Welty</i> , 674 F.2d 185 (3d Cir.1982).....	27

Washington Cases

<i>City of Bellevue v. Acrey</i> , 103 Wn.2d 203, 691 P.2d 957 (1984).....	26
<i>Osborne</i> , 70 Wn.App. at 644, 855 P.2d 302.....	26
<i>State v. Breedlove</i> , 79 Wn. App. 101, 900 P.2d 586 (1995).....	23
<i>State v. Chavis</i> , 31 Wn. App. 784, 644 P.2d 1202 (1982).....	27-28
<i>State v. Dougherty</i> , 33 Wn.App. 466, 655 P.2d 1187 (1982), <i>review</i> <i>denied</i> , 99 Wn.2d 1023 (1983).....	28
<i>State v. Fritz</i> , 21 Wn. App 354, 585 P.2d 173 (1978).....	23
<i>State v. Grant</i> , 196 Wn. App. 644, 385 P.3d 184 (2016)	30
<i>State v. Madsen</i> , 168 Wn.2d 496, 229 P.3d 714 (2010).....	23-24
<i>State v. Silva</i> , 107 Wn. App. 605, 27 P.3d 663 (2001).....	25
<i>State v. Sinclair</i> , 192 Wn.App. 380, 367 P.3d 612 (2016)	30
<i>State v. Stenson</i> , 132 Wn.2d 668, 940 P.2d 1239 (1997).	22-24
<i>In re Det. of Turay</i> , 139 Wn.2d 379, 986 P.2d 790 (1999)	22
<i>State v. Vermillion</i> , 112 Wn.App. 844, 51 P.3d 188 (2002).....	21

State v. Woods, 143 Wn.2d 561, 23 P.3d 1046 (2001).....22

U.S. Constitution

U.S. Const. amend. VI..... 5, 20-21, 26

U.S. Const. amend. XIV21, 26

Washington State Constitution

Wash. Const., Art. I § 22 5, 20-21, 26

Statutes

RCW 9.94A.5357, 20

RCW 9A.46.1106

Court Rules

CrR 3.5.....14-15

I. ASSIGNMENT OF ERROR

The trial court erred in finding an adequate waiver of Mr. Winterer's Sixth Amendment and Article I § 22 Right to Counsel where his expression was equivocal and premised upon misunderstandings of the accused that were not revealed through the routine inquiry undertaken by the trial court.

Issues Pertaining to Assignments of Error

Whether the trial court erred in accepting a waiver of Mr. Winterer's Sixth Amendment and Article I § 22 Right to Counsel where the expression of waiver was equivocal and accepted without a sufficient record the accused understood the consequences to a degree the waiver was knowingly, intelligently, and voluntarily made?

II. STATEMENT OF THE CASE

1. Introduction

This case presents an obviously mentally ill individual apparently suffering the effects of a traumatic brain injury¹, Mr. Jared Winterer, who, absent any clear request, was placed in the position of representing himself in the context of a Stalking charge. The charge itself arose from his repetitive and threatening alleged contact with Ms. Rachel Massey, whom Mr. Winterer originally knew of in the community and later also as a civilian employee at the jail where he was incarcerated in Kittitas County.

The trial court's decision to permit Mr. Winterer to discharge his attorney and to proceed *pro se* absent a sufficient waiver and/or colloquy

¹ See RP at 223.

² RP at 177, lns. 12-17.

³ RP at 25, lns. 1-13.

occurred in the context of a return on competency status hearing.

Unsurprisingly, Mr. Winterer, who wore a shock vest² and orange jail garb³ throughout this jury trial, was found guilty.

2. Procedural History of the Case

Mr. Jared Winterer was charged by Information filed August 5, 2016, with 16 counts that each related to conduct directed towards Kittitas Corrections Center officers and/or property⁴. CP 1-6. An arraignment was held on August 8, 2016, at which Mr. Winterer (through an attorney) entered pleas of not guilty to all charges. CP 15-16. A determination of Mr. Winterer's competency, as well as the withdrawal of his counsel, both preceded the jury trial. Mr. Winterer represented himself (with stand-by counsel) following a brief inquiry, which will be addressed in detail below.

An Amended Information was subsequently filed on February 5, 2018, that amended this cause number to include a single count of Stalking contrary to RCW 9A.46.110(5)(b). CP 174. Additionally, the State alleged aggravating circumstances related to Mr. Winterer's "prior un-scored misdemeanor criminal history, multiple current offenses, high

² RP at 177, lns. 12-17.

³ RP at 25, lns. 1-13.

⁴ Count 1: Stalking; Count 2-5: Felony Harassment; Count 6: Harassment, Count 7-9 Felony Harassment, Count 10: Harassment, Counts 11-16: Malicious Mischief in the Second Degree.

offender score, results in some of the current offense going unpunished, and the failure to consider the defendant's prior criminal history which was omitted from the offender score calculation, result in a presumptive sentence that is clearly too lenient⁵." This is the charge upon which Mr. Winterer proceeded to trial.

The jury ultimately found Mr. Winterer guilty of Stalking on February 7, 2018. CP 201. The trial court entered Findings of Fact and Conclusions of Law for an Exceptional Sentence on 2/7/18. CP 202-203. Mr. Winterer was sentenced to 120 months consecutive to all other cause numbers. CP 204-214. Mr. Winterer timely appealed. CP 222-233.

1. Competency Concerns

A motion hearing was held early in the case on September 23, 2016. RP at p. 3. Mr. Winterer almost immediately began to have outbursts in the courtroom. RP at 3-5. The State agreed to the Defense initiated

⁵ RCW 9.94A.535(2)(b)(c) and (d):

(2) Aggravating Circumstances - Considered and Imposed by the Court
The trial court may impose an aggravated exceptional sentence without a finding of fact by a jury under the following circumstances:

...

(b) The defendant's prior unscored misdemeanor or prior unscored foreign criminal history results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter, as expressed in RCW 9.94A.010.

(c) The defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished.

(d) The failure to consider the defendant's prior criminal history which was omitted from the offender score calculation pursuant to RCW 9.94A.525 results in a presumptive sentence that is clearly too lenient.

motion for a determination of competency. RP at 5, lns. 3-7. An Order for Competency Evaluation at Eastern State Hospital was entered. CP 34-39. In digressive correspondence to the trial court, Mr. Winterer expressed a desire for new counsel and disagreement on the issue of competency. CP 41-42; CP 44-45. In an email dated October 18, 2016, Mr. Winterer's attorney relays he was advised by Eastern State Hospital they "require new Orders on Mr. Winterer." CP 52. The trial court entered a subsequent Order for Competency Evaluation at Eastern State Hospital on October 19, 2016. CP 46-51, Mr. Winterer again requested new counsel in correspondence filed on October 20, 2016. CP 53-54. On October 21, 2016, the trial court granted an agreed motion by the State and defense to "re-set status conference dates", the basis for which appears to have been that a 'formatting error' prevented Eastern State Hospital from timely and appropriately evaluating Mr. Winterer. CP 55-57. Mr. Winterer continued to write the trial court seeking help in correspondence filed November 7, 2016, and November 18, 2016, respectively. CP 58-62.

2. Status Hearing on Competency/Pro se Colloquy

Mr. Winterer had sought discharge of his attorney and the appointment of new counsel from very early in the case. Mr. Winterer wrote a letter to the trial court, which was filed on August 9, 2016. CP 20-21. In his letter, Mr. Winterer expressed a desire to fire his attorney on this cause number

(Mr. Etoy Alford Jr.) and appoint another attorney (Mr. Beuschel). CP 21. He wrote the trial court again in a letter filed August 11, 2016. CP 22. Among other things, Mr. Winterer acknowledges that Mr. Alford currently represented him, but that he wished to fire him and have another attorney appointed (he specifically names two attorneys). CP 23. Mr. Winterer also writes in the present tense, "I'm representing myself." CP 23. In a letter dated August 31, 2016, Mr. Winterer wrote that he needed to defend himself, but his attorney wouldn't come to see him. CP 30-31. He requested another attorney by name. CP 31.

At the status hearing on November 28, 2016, Mr. Winterer's attorney (Mr. Alford) made a motion to withdraw. RP at 8. The accompanying written motion to withdraw described the deterioration in communication and sought the appointment of a new attorney to represent Mr. Winterer. CP 64-65. There was no motion to discharge defense counsel in order to proceed *pro se* before the trial court. At the hearing, Mr. Winterer expressed a desire for help similar to the pleas contained in his earlier correspondence:

DEFENDANT: A motion to withdraw. I want new [UNINTELLIGIBLE]. I committed these felonies because I can get medical treatment in jail. [UNINTELLIGIBLE] been doing this, man. I can't get help. I need help, and there's no attorney that will help me and –

RP at 8, lns. 12-22.

The trial court indicated it understood Mr. Winterer wanted a new

attorney, and Mr. Winterer replied, “yeah”. RP at 9 Ins. 9-11. The trial judge stated, “Okay. Everybody agrees then.” RP at 9, ln. 12.

Absent any further prompting by Mr. Winterer, the following exchange then occurred:

THE COURT: Do you want another attorney, or do you want to represent yourself?

DEFENDANT: [UNINTELLIGIBLE] counsel.

THE COURT: I'm sorry?

DEFENDANT: I'm doing this *pro se*, but I need counsel getting the evidence and such.

THE COURT: Okay. It's kind of one or the other, it's not a both.

RP at 9, Ins. 15-22.

The State expressed a concern as to whether Mr. Winterer was actually making a formal request to represent himself and brought up the recent evaluation from Eastern State Hospital. RP at 9, Ins. 23-25; RP at 10, Ins. 1-4.

The trial court reiterated Mr. Winterer's absolute right to represent himself:

THE COURT: You have a right to represent yourself, I'm confirming that, that's what I'm telling you.

DEFENDANT: I know, but I need some counsel to getting evidence and such.

THE COURT: Now, if you want standby counsel –

DEFENDANT: Yeah, exactly.

THE COURT: So you'll be representing yourself, and if there's any – If we have any hearings you'll be the one asking the questions of the witnesses and –

DEFENDANT: Exactly.

THE COURT: -- doing all of the legal writing and all of the legal briefing and—

RP at 10, lns.15-25; RP at 11, ln.1.

After an off-topic tangent by Mr. Winterer, the trial court continued:

THE COURT: Okay. Stand by here. So I want to ask a couple more questions. You do have the absolute right to represent yourself, okay? And that's because, you know, not everybody trusts the government that's, you know, if the government is bringing the charges against you and you have to be like wait a minute, and then the government is going to give me an attorney. That doesn't seem fair, right?

DEFENDANT: I have like [UNINTELLIGIBLE] because I trust the government –

THE COURT: So you have the right to represent yourself. However, you've heard this saying, haven't you –

DEFENDANT: A dentist that treats himself is a fool.

THE COURT: That's close, yeah, a dentist that treats himself is a fool, but also a lawyer who represents himself has a fool for a client. Because it's hard to objective when you're talking about your own problems. It's hard to be objective when you're wondering, you know, how you should deal with something. That's one of the greatest things about having an attorney is not just the fact that they've gone to law school and they understand the Rules of Evidence and the Rules of Criminal Procedure and the process and they've done it many, many times, that's not the only thing that they're good at. They're also good at being able to give you objective advice, you know. It's like, hey, I don't know what you want to do, but this is what you should do. That's good stuff. So –

DEFENDANT: Well, see, the thing is I don't take advice because it isn't in my game plan. I'm going strictly by my game plan.

THE COURT: Yeah, following advice is different than hearing advice. You

don't have to follow the advice. So you want a different attorney, someone other than Mr. Alford?

DEFENDANT: Counsel, standby –

THE COURT: You want standby counsel, you want to represent yourself? You understand that you're doing this is probably not a good idea?

DEFENDANT: Says you, Judge.

THE COURT: That's right.

DEFENDANT: And so is the government. That's totally the government.

THE COURT: Okay.

DEFENDANT: I'm myself, and that's my case and myself –

THE COURT: Do you understand that you'll be held to the same rules as if an attorney -- if you were an attorney?

DEFENDANT: Yeah. And so –

THE COURT: So if you're asking a question and the prosecuting attorney objects and I sustain the objection, you don't get to ask that question. You might not even know why. Do you understand that?

DEFENDANT: Yeah. All right. But, okay, so I need some standby counsel to help explain that to me.

THE COURT: Okay. We'll get you standby counsel, but you want to represent yourself, I understand. Now, we're today -- I'm going to grant the motion, Mr. Alford.

RP at 11, lns. 12-25; RP at 12, lns. 1-25; RP at 13, lns. 1-23.

This exchange actually preceded the Court's entry of an order finding Mr. Winterer competent, which was presumably the primary purpose of the status hearing:

MS. HAMMOND: We need to set a date, Judge. He's been found competent by Eastern State Hospital.

THE COURT: Right. And do we need to enter an order that finds him competent?

MS. HAMMOND: I don't -- yeah, we could do that. I can supply one to the court.

THE COURT: Yeah.

MS. HAMMOND: I didn't bring one today, but I will.

THE COURT: All right. So did you ever see that report?

DEFENDANT: I have a copy of it with my –

THE COURT: Okay. I reviewed it. They think that you're competent, so –

MS. HAMMOND: I have a copy.

THE COURT: -- they're the experts, and if they say that you're competent, you're competent.

RP at 14, lns. 1-17.

The trial court subsequently entered the following order: “Mr. Winterer is competent. After advice of rights, he chooses to represent himself; the prosecuting atty may communicate directly with Mr. Winterer. A stand-by attorney will be provided at Mr. Winterer’s request.” CP 66.

3. Trial

Immediately preceding the trial, the State had moved to amend the Information to include only the single Stalking count along with the aggravator as referenced above. RP at 20, lns. 5-9. The trial court granted this motion to amend over Mr. Winterer’s objection. RP at 20, lns. 5-25. Stand-by counsel, Mr. Kirkham, expressed significant concern Mr. Winterer didn’t understand this Amended Information and, in particular,

the aggravator or its consequence. RP at 22-23. Mr. Winterer actively stated he did not understand. RP at 23, ln. 6. The trial court stated: “And I don’t know how it changes the defense. I don’t think it can change the defense because it doesn’t go to the substantive crime, just for sentencing only. So, I don’t think that there can be an objection.” RP at 23, lns. 16-20.

Additionally, Mr. Winterer did not wear civilian clothing in front of the jury:

THE COURT: So, Mr. Winterer, you're in orange today.

MR. WINTERER: I didn't want to change clothes and –

THE COURT: You didn't want to wear civilian clothing?

MR. WINTERER: No.

THE COURT: You are comfortable wearing orange?

MR. WINTERER: I'm comfortable, and I don't think it matters.

THE COURT: Okay. Well, let's find out from the Corrections staff what efforts were made to –

MALE: We made numerous attempts to get him into some civilian clothes.

RP at 25, lns. 1-13.

Mr. Winterer wore a shock vest throughout proceedings. RP at 177, lns. 12-17.

A CrR 3.5 hearing was held at which Ben Kokjer of the Kittitas County Sheriffs Office testified regarding his interview of Mr. Winterer at

Walla Walla State Penitentiary. RP at 30; 31, lns. 1-7. Mr. Winterer was read his *Miranda* rights, which he indicated he understood. RP at 31, lns. 15-24. A transcript of the Deputy's recorded interview with Mr. Winterer was admitted without objection. RP at 33, ln. 17. Mr. Winterer briefly testified at the hearing. RP at 36.

Mr. Winterer's statements were found to be have been admissible at the conclusion of the CrR 3.5 hearing, and jury selection followed. RP at 45. Both the State and Mr. Winterer then presented opening statements, and the State called its first witness, Ms. Rachael Massey, who was initially sworn in outside the presence of the jury. RP at 55; 56-57. Mr. Winterer assented to a procedure by which the trial judge would ask his (Winterer's) questions of the witness due to Ms. Massey's expressed discomfort at being questioned by Mr. Winterer directly. RP at 59. The jury was then brought in for the State's direct examination of Ms. Massey. RP 61.

Ms. Massey testified she was a civilian employee for the Kittitas County Sheriff's Office at the jail with a specialization in classification. RP at 61, lns. 9-16. She first met Mr. Winterer, a distant cousin to one of her best friends, as a teenager. RP at 61, lns. 9-14; 62 at ln. 7. She identified Mr. Winterer. RP at 63, lns. 4-5. Ms. Massey testified about years of unwanted contact by Mr. Winterer in the community. RP at 64-

68. She testified Mr. Winterer later began contacting her at her work place in the Kittitas County Jail while he was an inmate. RP 66-68. She also testified about the kites he sent to her (or referencing her) while he was an inmate at the jail, and these were admitted into evidence. RP at 71. She obtained an anti-harassment order, which was also admitted into evidence. RP at 73-74. A judge granted the order, and it was served on Mr. Winterer while he was present in the courtroom at that time. RP at 75, Ins. 17-24. Ms. Massey testified Mr. Winterer did not abide by the order at all:

A. More letters, just constant letters and also by third-party contact. Any time he'd see any officer, he would tell them to give me a message. I didn't receive probably 99 percent of them. And then ringing into the control room and asking for me or talking to me, whether I was there or not.

Q. So even though the judge had served him with the order, he didn't follow the terms of the order?

A. Right.

RP at 76, Ins. 1-12.

Ms. Massey testified to her fear of Mr. Winterer, as well as a belief that he had the capacity to harm her and to hurt other people because of her. RP at 95. There was extensive testimony about letters she received while Winterer was both in and out of prison. Numerous letters were admitted into evidence. See CP 52.1. Mr. Winterer questioned the witness. RP at 100.

Additionally, the State called Deputy Kokjer. RP at 114. Deputy Kokjer testified he was made aware through the county sheriff's office, his employer, of a suspected violation of a court order that had occurred against an employee with the Sheriff's Office (Ms. Massey). He was assigned to investigate that. RP at 115, Ins. 11-12. Deputy Kokjer did some research into the order, collected some copies of letters, and went to the Walla Walla Penitentiary and conducted a recorded interview with Mr. Winterer there. RP at 115 at Ins. 13-19. The recorded interview was played in court. RP at 118.

Finally, the State called Detective Sergeant Weed of the Ellensburg Police Department, through which multiple documents pertaining to the investigation of Mr. Winterer were admitted. RP at 153; 156-57; See also CP 52.1. State's Exhibit No. 4, a certified copy of a no-contact order conviction, was also admitted. RP at 158, Ins. 15-22. The State rested. RP at 158.

Mr. Winterer was advised of his right to testify, as well as that he did not necessarily have to. RP at 159-60. Mr. Winterer initially wished to testify, but had significant difficulty doing so without argument and almost immediately decided he no longer wished to. RP at 164-66.

Jury Instructions were generally accepted without meaningful objection. RP 168-178. The trial court sought the assistance of Mr.

Kirkham (stand-by counsel) simply to get through the instructions. RP 168 at lns. 5-11. The State gave its closing. RP at 189. During Mr. Winterer's closing he described himself as a Level 1 sex offender (an issue never discussed elsewhere in the case by anyone). RP 202, lns. 10-14. He also told the jury that he broke the law. RP at 206, ln. 1.

6. *Verdict, Sentencing, and Findings for Exceptional Sentence*

The jury found Mr. Winterer guilty of the crime of Stalking as charged in Count I. RP at 211, lns. 14-17. The jury was polled, and the verdict was unanimous. RP at 211-13.

Mr. Winterer was also sentenced on February 7, 2018. CP 223; RP at 216. Mr. Winterer did not stipulate to his prior convictions. RP 217 at 1-2. The State and trial court reference the review of certified copies of all of Mr. Winterer's prior convictions (though these do not appear as part of the record). RP at 216, lns. 24-25; 217, lns. 1-2. The State's sentencing recommendation was as follows:

MS. HAMMOND: I'm asking for 120 months. I'm asking for the case to run to consecutive to the case that you've already sentenced him on. And I know that your honor is in possession of almost as much information in this case as I am. My concerns are Mr. Winterer's inability or unwillingness to abide by any of the court's instructions for forever. And, you know, he's been evaluated, he's a smart individual, he does appear to be very manipulative. He knows what he's doing and he chooses to do what he wants to do. And I do have compassion for mental health issues. It doesn't always feel like the appropriate response is prison, and I think Mr. Kirkham and I as the case has progressed and I worked with him while he was the attorney and talked about that a lot, but at this point what else are we supposed to do, you know?

So I'm asking the court 10 to impose 120 months. It is an exceptional. I am asking you to find the aggravator, the unscored 12 criminal history. I think his actual score is a 12, 13 but he's racked up quite a felony history in the last few years. And I don't really have any assurances anybody in the community is safe from him. Hopefully, he can get medical treatment and mental health treatment while he's in prison and [INAUDIBLE].

RP at 217, lns. 20-25, 218, lns. 1-10, 219, lns. 9-17.

Mr. Winterer was permitted to speak at sentencing in allocution, during which he described his brain injury in some detail. RP at 221-222.

Interestingly, when his stand-by counsel asked to be heard at sentencing as an officer of the court, Mr. Winterer stated: "You're my counsel, you can be heard. You don't have to ask." RP at 222, lns. 4-11. The trial court had to remind Mr. Winterer that he was, in fact, representing himself. RP at 222, lns. 9-11. Stand-by counsel, Mr. Kirkham, then assisted in making a sentencing presentation:

MR. KIRKHAM: There was testimony and different people who, you know, obviously, for the purposes of some of the charges at the last trial, intent and whether or not he had the ability to control himself was obviously an issue, but what has become pretty apparent to me as well, because of his traumatic brain injury, he thinks differently, he reasons differently. I think the court has seen that. In my investigation and discussions with the State, part of the issue was that when he was sent to prison last time, he did a long enough sentence to be able to take advantage of some of the programs that he otherwise could have (sic). I don't think that it's going to take 120 months to be able to do that. I believe that he had to be sentenced to I think more than 60, at least, that's my recollection. The standard range on this is 72 to 96. I mean, 80 would get him a sufficient amount of time. Bear in mind, the State is attempting to ask the court to consider that the range isn't high enough for his criminal history, but 10 of those were malicious mischief counts that we just got done with trial.

RP at 222-23.

Mr. Winterer received an exceptional sentence of 120 months confinement above the standard range, which was to be run consecutively to all other cause numbers “anywhere, including Kittitas County cause number 16-1-00232-2”. CP 227. At the recommendation of the State, the aggravating factor was found by the trial court. CP 226. The trial court imposed a permanent no-contact order as to Ms. Massey. CP 216. The trial court struck all legal financial obligations. CP 229. The term of community custody was not imposed at Mr. Winterer’s request. CP 227.

The trial court entered written findings and conclusions of law that the exceptional sentence was justified by the following aggravated circumstance: the defendant’s prior un-scored misdemeanor history, and high offender score, and the failure to consider the defendant’s prior criminal history which was omitted from the offender score calculation, result in a presumptive sentence that is clearly too lenient in light of the purposes of 9.94A RCW. CP 202. Mr. Winterer timely appealed. CP 222-233.

III. ARGUMENT

The Trial Court Violated Mr. Winterer’s Sixth Amendment and Article I § 22 Right to Counsel by Accepting an Invalid Waiver of that Right Without Indulging in Every Reasonable Presumption Against Mr. Winterer’s Waiver.

A criminal defendant is constitutionally guaranteed the right to

assistance of counsel. U.S. Const. amends. VI, XIV; *Gideon v. Wainwright*, 372 U.S. 335, 345, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). The State Constitution explicitly and the Federal Constitution implicitly guarantee a criminal defendant the right to self-representation. U.S. Const. amend. VI; Wash. Const., art. I § 22 (“the accused shall have the right to appear and defend in person”); *Faretta v. California*, 422 U.S. 806, 819, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). A criminal defendant’s correlative right to proceed without counsel is afforded when he or she voluntarily and intelligently elects to do so. *Faretta*. 422 U.S. at 836. This right is so fundamental that it is afforded despite its potentially detrimental impact on both the defendant and the administration of justice. *Faretta*, 422 U.S. at 834; *State v. Vermillion*, 112 Wn.App. 844, 51 P.3d 188 (2002).

To show the defendant validly waived his right to counsel, he or she should be made aware of the dangers and disadvantages of self-representation so that the record establishes that “ ‘he knows what he is doing and his choice is made with eyes open.’ ” *Faretta*, 422 U.S. at 835, quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279, 63 S.Ct. 236, 87 L.Ed. 268 (1942).

Both the United States Supreme Court and the Washington State Supreme 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 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)). Here, the trial court demonstrably did not indulge in every reasonable presumption against Mr. Winterer’s waiver of his right to counsel.

i. A Criminal Defendant’s Right to Represent Themselves Is Not Absolute.

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). When a defendant requests *pro se* status, the trial court must determine whether the request is unequivocal and timely. *State v. Stenson*, 132 Wn.2d 668, 737, 940 P.2d 1239 (1997). Absent a finding that the request was equivocal or untimely, the court must then determine if the defendant's request is voluntary, knowing, and intelligent, usually by colloquy. *Faretta*, 422 U.S. at 835, 95 S.Ct. 2525; *State v. Stegall*, 124 Wn.2d 719, 881 P.2d 979 (1994). Even if a request is unequivocal, timely, voluntary, knowing, and intelligent, a court may defer ruling if the court is reasonably unprepared to immediately respond to the request. Again, the court shall indulge in “ ‘every reasonable presumption’ against a defendant's waiver of his or her right to counsel.” *Turay*, 139 Wn.2d at 396, 986 P.2d 790 (quoting *Brewer*, 430 U.S. at 404, 97 S.Ct. 1232).

ii. *Mr. Winterer's Expression of Waiver was Equivocal.*

When a defendant requests *pro se* status, the trial court must determine whether the request is unequivocal and timely⁶. *Stenson*, 132 Wn.2d at 737, 940 P.2d 1239. Equivocal, in this context, appears to refer to whether the request is made conditionally, whether it is clearly manifested, and whether it is made with any hesitation or caveat. Courts must indulge in every reasonable presumption against a defendant's waiver of his or her right. *State v. Madsen*, 168 Wn.2d 496, 504, 229 P.3d 714 (2010).

Stenson, 132 Wn.2d 668, is instructive. There, the defendant immediately moved to proceed *pro se* after the court denied his motion for new counsel. *Stenson*, 132 Wn.2d at 739. He told the court: “ ‘I would formally make a motion then that I be able to allow [sic] to represent myself. I do not want to do this but the court and the counsel that I currently have force me to do this.’ ” *Id.* The trial court found that he did not really want to proceed without counsel and denied his request. *Id.* at 740. On appeal, the Washington Supreme Court held that the request was equivocal, as most of the discussion between *Stenson* and the trial judge concerned *Stenson's* wish for different counsel, and *Stenson* did not refute the trial court's conclusion that he did not want to proceed without

⁶ The trial court's determination here occurred well in advance of Mr. Winterer's trial. See *State v. Fritz*, 21 Wn. App 354, 585 P.2d 173 (1978); *State v. Breedlove*, 79 Wn. App. 101, 107, 900 P.2d 586 (1995).

counsel. *Id.* at 741-42.

Contrarily, in *Madsen*, 168 Wn.2d at 501, the trial court offered to appoint a new attorney after the defendant expressed several reasons why he did not want to be represented by his current counsel. The defendant replied, “ ‘I'd rather represent myself.’” *Id.* at 501. He also explicitly invoked his right: “ ‘I am gonna revert to my constitutional rights, Washington State constitutional rights, Article I, Subsection 22, I have a right to represent myself and that's what I'm going to move forward with doing.’” *Id.* at 501. The court found that it was error to deny Madsen's motion, as he explicitly and repeatedly cited the constitutional provision protecting his right to self-representation and never wavered from that position. *Id.* at 506-07. Unlike Stenson's request, Madsen's request was unequivocal. *Id.* at 507.

Here, unlike in *Madsen*, Mr. Winterer never explicitly invoked his right at all. RP at 9, Ins. 15-22. Rather, much like in *Stenson*, 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.* He asked by name for other attorneys. When he wrote the words ‘*I'm representing myself*’ it was

arguably in the context of explaining that he was effectively representing himself already because his attorney would not come to see him. CP 23.

Mr. Winterer did not even introduce the concept that he wanted to go forward *pro se*, rather the trial court did this for him. RP at 8, lns. 9-22. The State was alert to the trial court's jumping (absent prompting) to the inference that what Mr. Winterer really wanted was to represent himself. *See* RP at 9, lns. 23-25; RP at 10, lns. 1-4. 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. He 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). This underscores the misunderstanding of the role of stand-by counsel as more akin to hybrid-representation and therefore beyond what stand-by counsel would ordinarily do (at least in the absence of a specific court order).⁷ Mr. Winterer's "request" was therefore equivocal.

iii. *Mr. Winterer Was Not Aware of the Consequences of Waiver of His Right to Counsel and Therefore His Waiver Was Not Knowingly, Voluntarily, or Intelligently Made.*

⁷ "We hold that unless otherwise ordered by the trial court, standby counsel is not required to actually perform research and errands on behalf of *pro se* defendants. Rather, their role is as the term standby "counsel" suggests, one of alerting the accused to matters beneficial to him and providing the accused with legal advice or representation upon request." *State v. Silva*, 107 Wn. App. 605, 629-630, 27 P.3d 663 (2001).

The right to counsel may be waived, but a waiver must be knowing, voluntary, and intelligent. *City of Bellevue v. Acrey*, 103 Wn.2d 203, 208–09, 691 P.2d 957 (1984). Washington applies the *Faretta* test for determining a valid waiver of the right to counsel, which requires that the defendant be made aware of the risks and disadvantages of self-representation, with an indication on the record that “ ‘he knows what he is doing and his choice is made with eyes open.’ ” *Acrey*, 103 Wn.2d at 209, 691 P.2d 957 (quoting *Faretta v. California*, 422 U.S. 806, 835, 95 S.Ct. 2525, 2541, 45 L.Ed.2d 562 (1975) (citation omitted)); *Osborne*, 70 Wn.App. at 644, 855 P.2d 302.

Preferably, there should be a colloquy on the record informing the defendant of the nature of the charge, the maximum penalty, and technical rules he must follow in presenting his case. *Acrey*, 103 Wn.2d at 211, 691 P.2d 957. In the absence of a colloquy, the record must otherwise indicate that the defendant was aware of the risks of self-representation. *Acrey*, 103 Wn.2d at 211, 691 P.2d 957.

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. Const. art. 1, § 22 (amend. 10); U.S. Const. amend. 6; *Faretta v. California*, 422 U.S. 806,

95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). In *Faretta*, the Court articulated the test for valid waiver of counsel:

Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, *he should be made aware of the dangers and disadvantages of self-representation*, so that the record will establish that “he knows what he is doing and his choice is made with eyes open.”

Adams v. United States ex rel. McCann, 317 U.S. [269, 279, 63 S.Ct. 236, 241, 87 L.Ed. 268 (1942)]. *Faretta*, at 835, 95 S.Ct. at 2541.

The federal circuit courts interpret *Faretta* in two ways. A number of the circuits require a colloquy on the record between the judge and defendant whereby the judge informs the defendant of the risks of self-representation. The colloquy must show that the trial judge advised defendant in unequivocal terms of the technical problems he may encounter in self-representation, *United States v. Welty*, 674 F.2d 185 (3d Cir.1982), or that the judge has, in some fashion, explained and explored the risks of self-representation with the defendant. *United States v. Donahue*, 560 F.2d 1039 (1st Cir.1977); *United States v. Aponte*, 591 F.2d 1247 (9th Cir.1978); *United States ex rel. Tonaldi v. Elrod*, 716 F.2d 431 (7th Cir.1983); *United States v. Bailey*, 675 F.2d 1292 (D.C.Cir.1982).

Division III has also interpreted *Faretta* to require a colloquy on the record. This court held in *State v. Chavis*, 31 Wn. App. 784, 644 P.2d 1202 (1982), that a valid waiver requires a thorough inquiry into the

defendant's understanding of self-representation. The *Chavis* court specifically rejected as inadequate the form of waiver undertaken by Chavis:

[A] *mere routine inquiry* —the asking of several standard questions followed by the signing of a standard written waiver of counsel—may leave a judge entirely unaware of the facts essential to an informed decision that an accused has executed a valid waiver ...

Chavis, at 789–90 (citing *Von Moltke v. Gillies*, 332 U.S. 708, 68 S.Ct. 316, 92 L.Ed. 309 (1948)). *Accord*, *State v. Dougherty*, 33 Wn.App. 466, 655 P.2d 1187 (1982), *review denied*, 99 Wn.2d 1023 (1983).

Conversely, federal circuit courts decline to require a colloquy on the record to prove that defendant was aware of the risks of self-representation. These courts find a valid waiver if there is evidence on the record that the defendant actually understood the risks, even though the judge did not address the question. *United States v. Kimmel*, 672 F.2d 720 (9th Cir.1982); *Hodge v. United States*, 414 F.2d 1040 (9th Cir.1969); *United States v. Gillings*, 568 F.2d 1307 (9th Cir.1978).

Here, the colloquy that was undertaken was more akin to the ‘mere routine inquiry’ in *Chavis*. Several standard points were raised (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 a 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 by proceeding with stand-by counsel. Critically, this occurred at a status hearing to address a return on competency. RP at 9; CP 66.

Even if there were no colloquy, there are instances in the record that demonstrate Mr. Winterer did not actually understand the risks. Critically, stand-by counsel expressed concern 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. To what degree Mr. Winterer was advised of the standard range and consequence of the aggravator he faced under the Amended Information is unclear. Mr. Winterer believed stand-by counsel's role was to "get evidence" for him, which it was not. RP at 9, lns. 15-22.

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. When Mr. Winterer said to his stand-by counsel at sentencing, "You're my counsel, you can be heard. You don't have to ask" (RP at 222, lns. 4-11), he revealed a fundamental misunderstanding that Mr. Kirkham actually could have spoken, objected, and/or meaningfully participated in the proceedings *at any time* as defense counsel.

IV. CONCLUSION

This Court should reverse Mr. Winterer's conviction and remand to the trial court. Additionally, should this Court reject Mr. Winterer's argument on appeal, he asks for a ruling precluding the State from seeking reimbursement for costs on appeal due to his continued indigency⁸. *State v. Sinclair*, 192 Wn. App. 380, 367 P.3d 612 (2016). Division II has also issued an opinion declining to impose appeal costs. *State v. Grant*, 196 Wn. App. 644, 385 P.3d 184 (2016).

Respectfully submitted this 27th day of July 2018.



Zachary W. Jarvis, WSBA# 36941
Attorney for Appellant

⁸ CP 220-21 (Motion and Order of Indigency).

DECLARATION OF SERVICE

I hereby declare that on July 27, 2018, I filed APPELLANT'S OPENING BRIEF via Electronic Filing for the Court of Appeals for Division III and delivered via E-mail the same to:

Gregory Lee Zempel
Kittitas Co Pros Attorney
205 W 5th Ave Ste 213
Ellensburg, WA 98926-2887
greg.zempel@co.kittitas.wa.us

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

Mr. Jared A. Winterer
DOC No. 350782
Washington State Penitentiary
1313 North 13th Avenue
Walla Walla, WA 99362

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

Dated July 27, 2018.


By _____
Zachary W. Jarvis, WSBA #36941
Attorney for Appellant

HART JARVIS CHANG, PLLC

July 27, 2018 - 12:06 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 35854-2
Appellate Court Case Title: State of Washington v. Jared Anthony Winterer
Superior Court Case Number: 16-1-00196-2

The following documents have been uploaded:

- 358542_Briefs_20180727120456D3696698_0275.pdf
This File Contains:
Briefs - Appellants
The Original File Name was WINTERERAOB.pdf

A copy of the uploaded files will be sent to:

- greg.zempel@co.kittitas.wa.us
- prosecutor@co.kittitas.wa.us

Comments:

Appellant's Opening Brief

Sender Name: Zachary Jarvis - Email: zjarvis@hjmc-law.com
Address:
155 NE 100TH ST STE 210
SEATTLE, WA, 98125-8018
Phone: 206-735-7474

Note: The Filing Id is 20180727120456D3696698