

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

STATE OF WASHINGTON,

Respondent,

v.

TANAWAH M. DOWNING,

Appellant.

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

The Honorable Cameron Mitchell

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

REVERSAL IS REQUIRED WHERE THE TRIAL COURT ERRED IN PERMITTING TANAWAH DOWNING TO REPRESENT HIMSELF AND PERMITTING HIM TO PROCEED WITHOUT APPOINTING STANDBY COUNSEL.

Throughout its response the State refers to the “trial court,” but importantly, different judges presided over the pretrial hearings. The relevant hearing occurred on December 13, 2017, before Judge Mitchell who permitted Downing to represent himself without appointing standby counsel. The State claims that “nothing” during the colloquy gave “the trial court pause.” Brief of Respondent at 10. To the contrary, the record reflects that Downing told Judge Mitchell that if the case “moves beyond today, your Honor, then I would -- I would say that perhaps I do need an attorney.” 12/13/17 RP 7-8. Downing’s statement that he would perhaps need an attorney is clearly equivocal and raised a “reasonable presumption” against a waiver of his right to counsel under the circumstances. *State v. Madsen*, 168 Wn.2d 496, 504, 229 P.3d 714 (2010)(quoting *In re Detention of Turray*, 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 (1997)).

Furthermore, the State’s claim that Downing’s “desire for a trial was clear” is unsubstantiated by the record. Brief of Respondent at 9-10. Downing repeatedly asked Judge Mitchell to consider his “motion to

dismiss.” 12/13/17 RP 7-8. Downing explained that he did not believe the case “will be moving beyond this” because his motion presents “very, very valid arguments.” 12/13/17 RP 8. It is evident that Downing expected to have his case dismissed during the pretrial hearing.

Mistakenly relying on *State v. Silva*, 107 Wn. App. 605, 626-27, 27 P.3d 663 (2001), the State argues that the trial court was not required to appoint standby counsel. Brief of Respondent at 11-12. There was no problem with appointing standby counsel here where Downing appreciated having the assistance of standby counsel. When Judge Ekstrom subsequently appointed standby counsel and asked Downing if he understood, he responded, “Absolutely, sir, yeah. And I would have hoped that that would have already happened. You know, it’s almost impossible to fulfill the obligations of the court from within the jail.” 12/27/17 RP 6-7.

Importantly, the State misses the point of the role of standby counsel. Downing repeatedly brought to Judge Mitchell’s attention that he was facing challenges in presenting his motion to dismiss to the court due to his incarceration. 12/13/17 RP 9-12. In *State v. Dougherty*, 33 Wn. App. 466, 470-71, 655 P.2d 1187 (1982), this Court reasoned that an incarcerated defendant has a due process right to meaningful access to the courts and the appointment of standby counsel meets the meaningful access requirement of *Bounds v. Smith*, 430 U.S. 817, 97 S. Ct. 1491, 52 L. Ed. 2d 72 (1977).

Judge Mitchell's failure to appoint standby counsel to advise and assist Downing with properly preparing, filing, and serving his motion to dismiss deprived Downing of his due process right to meaningful access to the courts.

B. CONCLUSION

For the reasons stated here and in appellant's opening brief, this Court should reverse Downing's conviction because the trial court abused its discretion in permitting Downing to represent himself without appointing standby counsel.

DATED this 3rd day of December, 2018.

Respectfully submitted,

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DECLARATION OF SERVICE

On this day, the undersigned sent by email, a copy of the document to which this declaration is attached to the Benton County Prosecutor's Office at prosecuting@co.benton.wa.us per agreement of the parties.

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

DATED this 3rd day of December, 2018.

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