

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 SPOKANE COUNTY

The Honorable Cameron Mitchell

BRIEF OF APPELLANT

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A. INTRODUCTION

The court can be certain that a defendant's request to represent himself and his professed waiver of counsel is knowingly and intelligently made only from a penetrating and comprehensive examination of all the circumstances. Further, a defendant has a due process right to meaningful access to the courts and this right is satisfied by appointment of standby counsel. The trial court here erred in permitting Tanawah Downing to represent himself where it failed to ensure that Downing knowingly, voluntarily, and intelligently waived his right to counsel. Once the court permitted self-representation, it erred in failing to appoint standby counsel thereby depriving Downing of his right to access to the courts. Consequently, Downing's conviction for violation of a protection order must be reversed.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in permitting Downing to represent himself.
2. The trial court erred in failing to appoint standby counsel for Downing.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err in permitting self-representation without thoroughly and earnestly examining whether Downing was knowingly, voluntarily, and intelligently waiving his right to counsel?

2. Did the trial court err in failing to appoint standby counsel at the outset thereby depriving Downing of his right to meaningful access to the courts?

D. STATEMENT OF THE CASE¹

1. Procedure

On November 15, 2017, the Prosecuting Attorney for Benton County, Washington charged appellant, Tanawah M. Downing, with one count of violation of a protective order, alleging that he violated an order prohibiting him from contacting Jennifer Downing, a family or household member, and that he has at least two previous convictions for violating protective orders. CP 1.

Following his arraignment, Downing appeared before Judge Mitchell on December 13, 2017. The State informed the court that Downing has not been able to retain an attorney and asked the court to appoint a public defender and have Downing evaluated to determine his competency. RP 12/13/17 at 3-4. In response, Downing told the court that he would like to represent himself. 12/13/17 RP 4. After a colloquy with Downing, the court allowed Downing to represent himself and declined to order a competency evaluation. 12/13/17 at 5-14

¹ The verbatim report of proceedings are referred to by date and page number.

On December 27, 2017, Downing appeared pro se before Judge Ekstrom, who denied Downing's motion to dismiss and appointed standby counsel. 12/27/17 RP 6-8, 11-18. On January 16, 2018, Judge Runge ordered a competency evaluation and thereafter Judge Ekstrom entered an order finding Downing competent. CP 38-44, 74-75. On February 4, 2017, Judge Ekstrom held a 3.5 hearing and found that Downing's statements to police officers were admissible. 02/07/18 RP 24-48; CP 160-63.

The trial began before Judge Runge on February 12, 2018, and a jury found Downing guilty as charged. 02/13/18 RP 184-86. Judge Runge imposed an exceptional sentence downward of 24 months in confinement with 12 months of community custody and ordered legal financial obligations. 02/13/18 RP 194-99; CP 140-52.

Downing filed a timely notice of appeal. CP 155-56.

2. Facts

a. Pretrial Hearings

At an omnibus hearing before Judge Mitchell, the prosecutor informed the court that Downing has not been able to obtain an attorney and requested that the court appoint a public defender for Downing and order a competency evaluation. She explained that based on her experience in

dealing with Downing for a couple of years, she has concerns about his ability to assist in his own defense. 12/13/17 RP 3. Downing responded by telling the court that he would like to represent himself and argue his “motion to dismiss.” 12/13/17 RP 4. The court replied that it must first address representation and engaged in a colloquy with Downing where he repeated that he wanted to present his motion to dismiss to the court. Downing said if the proceedings moved forward, “I would say that perhaps I do need an attorney.” 12/13/17 RP 8. The court instructed Downing that he must properly file his motion before the court can consider it. 12/13/17 RP 9-11. After informing Downing of the potential consequences, the court allowed Downing to represent himself and declined to order a competency evaluation. 12/13/17 RP 12-13. At the prosecutor’s request, the court continued the omnibus hearing. 12/13/17 RP 13-14.

Subsequently, Downing appeared before Judge Ekstrom to argue his motion. The prosecutor requested that the court appoint standby counsel for Downing. When the court asked Downing if he understood that the State was requesting standby counsel for him, he replied, “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 itself.” 12/27/17 RP 4. After the court appointed standby counsel, it proceeded to hear Downing’s argument on his motion and the State’s response. 12/27/17 RP

8-9, 11-16. In denying Downing's motion, the court asked him if Judge Mitchell told him that it was a bad idea to represent himself. Downing said he does not recall but it was necessary for him to represent himself at that point to move forward. 12/27/17 RP 16-18. At a hearing thereafter, the prosecutor renewed her motion for a competency evaluation, which the court granted after allowing Downing to respond. 01/16/18 RP 3-21.

Following an evaluation by Eastern State Hospital which found Downing competent to stand trial, the court held a 3.5 hearing. 02/07/18 RP 15. Two officers with the Richland Police Department testified that they did not ask Downing any questions before or after he was arrested but he made statements to them. 02/07/18 RP 29-31, 41-43. The court ruled that because Downing's statements were spontaneous and not the result of questioning, his statements were admissible. 02/07/18 RP 46-48.

b. Trial Testimony

Jennifer Downing² is married to Tanawah Downing and they have three children. 02/13/18 RP 120-21. On November 10, 2017, Jennifer was pulled over while driving in the city of Richland with Downing in the car. 02/13/18 RP 121. At the time she knew there was a protection order in

² For clarity, Jennifer Downing will be referred to as Jennifer and Tanawah Downing will be referred to as Downing.

place prohibiting Downing from having contact with her. She did not return to court to have the order modified or removed but she should have “because I didn’t want it.” 02/12/18 RP 121-22, 125.

While on duty on the evening of November 10, 2017, Sergeant Bryce Henry conducted a traffic stop for traffic infractions. 02/12/18 RP 96-97. Henry approached the driver’s side of the vehicle and spoke with the female driver. She provided him with her driver’s license which identified her as Jennifer Downing. When he checked the driver’s status, he learned that she had a protection order against Tanawah Downing. The description on the order matched the appearance of a male sitting in the front passenger seat of the vehicle. Henry checked his database and positively identified the male as Downing. 02/12/18 RP 97-101. Henry instructed Downing who had already stepped out of the vehicle to stand in front of his patrol car. He informed Downing that there was a protection order between him and his wife. Downing said “he was aware of the order but that he and Jennifer were trying to work some things out.” 02/12/18 RP 101-02. Once another officer arrived, Henry arrested Downing and placed him in handcuffs. 02/12/18 RP 102.

Officer Brigit Clary responded to the scene of the traffic stop as a cover officer. She transported Downing to the police station. 02/12/18 RP

104-05. While in the back seat of the patrol car, Downing began crying and explained that “he didn’t understand anything that the judge had told him previously, and he just continued to violate the order over and over.”

02/12/18 RP 106-07. Downing said he told the judge, “I’m guilty of loving my wife and family.” 02/12/18 RP 107.

Benton County District Court records contained a domestic violence no-contact order, naming Downing as the defendant and Jennifer as the protected party. 02/12/18 RP 82-84. Benton County Superior Court files contained judgments and sentences reflecting that Downing had been convicted of three gross misdemeanors and a felony for violations of protection orders. 02/12/18 RP 90-93.

Downing called himself as a witness and attempted to make a statement accusing the prosecutor of breaking the law which drew objections from the prosecutor. 02/13/18 RP 127-30. The court excused the jury and after an extensive discussion the court ruled that as a result of his disruptive behavior Downing could have standby counsel ask him questions or forfeit his right to testify. 02/13/18 RP 131-140. Downing declined to allow standby counsel to conduct a direct examination, did not testify further, and did not call any other witnesses. 02/13/18 RP 141-52.

E. ARGUMENT

1. THE TRIAL COURT ERRED IN PERMITTING DOWNING TO REPRESENT HIMSELF AND SUBSEQUENTLY PERMITTING HIM TO PROCEED WITHOUT APPOINTING STANDBY COUNSEL.

- a. Self-Representation

Criminal defendants have a constitutional right to represent themselves. U.S. CONST. amend VI; WASH. CONST. art. I, section 22; *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). However, the right to self-representation is not absolute. *State v. DeWeese*, 117 Wn.2d 369, 376, 816 P.2d 1 (1991). The defendant's request to represent themselves must be unequivocal because there is a conflict between a defendant's right to self-representation and right to counsel. *DeWeese*, 117 Wn.2d at 376-77. In order to exercise the right to self-representation, the defendant must knowingly, voluntarily, and intelligently waive the right to counsel. *City of Bellevue v. Acrey*, 103 Wn.2d 203, 208-09, 691 P.2d 957 (1984). Courts are required to "indulge in every reasonable presumption" against a defendant's waiver of his right to counsel. *In re Detention of Turay*, 139 Wn.2d 379, 396, 986 P.2d 790 (1999).

Following arraignment, Downing appeared before Judge Mitchell for an omnibus hearing without counsel. The prosecutor informed the court

that Downing stated at his arraignment that he would like to retain an attorney but it was her understanding that he has not been able to do so. 12/13/17 RP 3. The prosecutor asked the court to appoint a public defender and order a competency evaluation. She explained that based on her experience of dealing with Downing for the last couple of years, she had concerns about his ability to assist in his own defense. 12/13/17 RP 3-4. The court asked Downing if he would be able to contact an attorney. Downing replied, "No, no. Actually, I would like to -- I would like to represent myself," and explained that he would like the court to hear his "motion to dismiss." 12/13/17 RP 4.

The court told Downing that it would first address representation and conducted a colloquy with him. During the colloquy, Downing again asked the court to hear his motion:

THE COURT: So am I correct in understanding that you have not subpoenaed witnesses, called witnesses, examined witnesses in the courtroom; is that correct?

THE DEFENDANT: That is correct. And as of this moment, as I said, with -- with this motion to dismiss, I don't believe that -- that we will be moving beyond this. And -- and that's why I would like to present to you --

THE COURT: At this point, we're talking about representation.

THE DEFENDANT: Okay.

THE COURT: And I --

THE DEFENDANT: If it moves beyond today, your Honor, then I would -- I would say that perhaps I do need an attorney. But as of this moment, my request to -- to dismiss the case

which has very, very valid justification, I don't need an attorney to present this.

12/13/17 RP 7-8

Thereafter, the court advised Downing that if he represents himself he will be held to the same standards as an attorney and he will be required to properly file his motion before it is heard. Downing said he understood but asked to the court to be aware of the challenges he faces as a result of his incarceration and for the court to be lenient if possible. 12/13/17 RP 8-12. The court ruled that it would allow Downing to represent himself and that it was not in a position to order a competency evaluation. Upon being reminded by the prosecutor, the court advised Downing of the charge and penalty he faces. Downing said he still wanted to represent himself. 12/13/17 RP 12-13.

The record reflects that Downing's request to represent himself was limited and equivocal. He was clearly focused on presenting his motion to dismiss which he believed would resolve his case. He expressed confidence in the merits of his motion but admitted that in the event the case proceeded, perhaps he would need an attorney. 12/13/18 RP 7-8. In light of Downing's responses, the court failed to fulfill its responsibility imposed by the United States Supreme Court:

The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused

- whose life or liberty is at stake - is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. To discharge this duty properly in light of the strong presumption against waiver of the constitutional right to counsel, a judge must investigate as long and as thoroughly as the circumstances before him demand.

State v. Chavis, 31 Wn. App. 784, 789, 644 P.2d 1202 1982) (citing *In Von Moltke v. Gillies*, 332 U.S. 708, 723-24, 68 S. Ct. 316, 92 L. Ed. 309 (1984)).

The court merely asked standard questions and inexplicably failed to comprehend that Downing believed his case would simply be dismissed based on the justification provided in his motion. It should have been abundantly clear to the court that when Downing said he did not need an attorney specifically for the motion because he could easily present the motion himself, Downing was not waiving his right to counsel. Further, the court made no inquiry at all regarding the prosecutor's concerns about Downing's "theological fixation" on the nature of the charge against him. 12/13/18 RP 3. In its haste, the court did not warn Downing of the charge and penalty he faced until the prosecutor asked the court to do so. 12/13/18 RP 12-13. The court's colloquy was woefully inadequate given that courts are required to "indulge in every reasonable presumption" against a defendant's waiver of his right to counsel. *In re Detention of Turay*, 139 Wn.2d 379, 396, 986 P.2d 790 (1999).

“A judge can make certain that an accused’s professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances.” *Chavis*, 31 Wn. App. at 789. The record substantiates that the court fell far short of conducting a “penetrating and comprehensive examination” and consequently erred in permitting Downing to represent himself where his request did not constitute a knowing, voluntary, and intelligent waiver of his right to counsel.

b. Stand-By Counsel

The Sixth Amendment of the United States Constitution gives a criminal defendant the right to represent himself but the trial court has the authority to appoint standby counsel to explain court rulings and requirements to a defendant and to assure a defendant lacking in legal knowledge does not interfere with the administration of justice. *State v. McDonald*, 143 Wn.2d 506, 511, 22 P.3d 791 (2001)(citing *McKaskie v. Wiggins*, 465 U.S. 168, 177-78, 104 S. Ct. 944, 79 L. Ed. 2d 122 (1984)). Standby counsel’s role is to provide technical information and be available to represent the defendant in the event termination of the defendant’s self-representation becomes necessary. *McDonald*, 143 Wn.2d at 511. Standby counsel will also assist the defendant in acquiring necessary legal materials. *State v. Dougherty*, 33 Wn. App. 466, 471, 655 P.2d 1187 (1982). The trial

court can appoint standby counsel without the consent of the defendant and the mere presence of standby counsel does not infringe upon the defendant's right to self-representation. *State v. Watkins*, 71 Wn. App. 164, 174, 857 P.2d 300 (1993)(citing *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975)).

A defendant has a right of access to the courts under the due process clause. *Dougherty*, 33 Wn. App. at 470 (citing *Ex parte Hull*, 312 U.S. 546, 549, 61 S. Ct. 640, 85 L. Ed.1034 (1941)). “[T]he fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law.” *Bounds v. Smith*, 430 U.S. 817, 822, 97 S. Ct. 1491, 52 L. Ed. 2d 72 (1977). The appointment of standby counsel meets the meaningful access requirement of *Bounds*. *Dougherty*, 33 Wn. App. 471.

During its colloquy with Downing before permitting Downing to represent himself, Judge Mitchell asked him if he understood that he would be held to the same standard as an attorney:

THE COURT: Do you understand that includes the filing and noting of motions and giving proper notice to the opposing side?
THE DEFENDANT: I -- I do understand that. And, as I said, the -- the challenge is that I am here and I'm not -- I'm not out there; so . . .

THE COURT: And that's a challenge you would face in representing yourself.

THE DEFENDANT: I -- I understand that. And so I would ask the Court to be, you know, somewhat cognitive of -- of the challenges that I face as a result of my incarceration.

12/13/17 RP 9.

The court completed its colloquy, granted Downing's request to represent himself, and did not appoint standby counsel. 12/13/17 RP 10-13.

At a subsequent hearing before Judge Ekstrom, the prosecutor asked the court to appoint standby counsel for Downing. 12/27/17 RP 4-5. The court asked Downing if he understood that the State was requesting standby counsel for him. Downing 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 itself." 12/27/17 RP 6-7. The court appointed standby counsel, proceeded to hear argument from Downing and the prosecutor on his motion to dismiss, and denied the motion. 12/27/17 RP 8-18.

The record substantiates that Judge Mitchell erred in failing to appoint standby counsel for Downing. Downing clearly emphasized that he was facing procedural challenges as a result of his incarceration. 12/13/17 RP 9. When Downing repeatedly brought the matter to the court's attention, the court could have easily appointed standby counsel to assist Downing.

All that is necessary for the court to appoint standby counsel is to ask the clerk which attorney is next for appointment. 12/27/17 RP 8. The appointment of standby counsel does not infringe upon the right of self-representation. *State v. Watkins*, 71 Wn. App. 164, 174, 857 P.2d 300 (1993).

It is evident that Downing would have found standby counsel helpful where he lamented that he could have already used the assistance when standby counsel was later appointed. 12/27/17 RP 7. The court's failure to initially appoint standby counsel deprived Downing of his right to "meaningful" access to the courts. *Bounds*, 430 U.S. at 822. Consequently, he argued his motion representing himself without the benefit of standby counsel whose appointment would have fulfilled the meaningful access requirement of *Bounds*. *Dougherty*, 33 Wn. App. 470-71. The court erred in failing to appoint standby counsel at the outset.

c. New Trial

Where a defendant does not knowingly, voluntarily, and intelligently waive his right to counsel and standby counsel was not properly appointed, the remedy is reversal and a new trial. *See Dougherty*, 33 Wn. App. at 471-72; *Chavis*, 31 Wn. App. at 792-93. Accordingly, this Court should reverse Downing's conviction and remand for a new trial.

E. CONCLUSION

For the reasons stated, this Court should reverse Downing's conviction for violation of a protective order and remand to the superior court for a new trial.

DATED this 21st day of September, 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 and by U.S. Mail to Tanawah M. Downing, DOC # 394345, Washington Corrections Center, P.O. Box 2049, Airway Heights, Washington 99001-2049.

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

DATED this 21st day of September, 2018.

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