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NO. 58662-9-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

KURT MADSEN,

Appellant.

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COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

APPELLANT'S REPLY BRIEF

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A. ARGUMENT

THE TRIAL COURT VIOLATED MR. MADSEN'S
CONSTITUTIONAL RIGHT TO REPRESENT HIMSELF
WHEN IT DENIED HIS TIMELY, UNEQUIVOCAL
REQUEST TO PROCEED PRO SE.

As Mr. Madsen noted in his opening brief, when a defendant makes a timely, unequivocal request to proceed pro se, the trial court must grant the request as a matter of law unless it enters a finding, after a colloquy, that the request is not knowing, intelligent, and voluntary. Appellant's Br. at 14-16. The trial court here repeatedly refused to grant Mr. Madsen's timely, unequivocal request to proceed pro se. Appellant's Br. at 16-26. The court repeatedly failed to determine whether the request was knowing, intelligent and voluntary. Appellant's Br. at 18-19. Thus, Mr. Madsen's convictions must be reversed and his case remanded for a new trial. Appellant's Br. at 26.

The State does not contest the fact that Mr. Madsen's first two requests were timely, although it incorrectly states that the third request was not timely. Br. of Resp't at 19-22, 25-27. The State does not even contest the fact that Mr. Madsen's first two requests were unequivocal. Br. of Resp't at 19-22. Rather, the State proposes additional barriers to the exercise of the constitutional

right to proceed pro se, and asserts that Mr. Madsen failed to satisfy these new proposed rules. Br. of Resp't at 20. Because Mr. Madsen made a timely and unequivocal request to proceed pro se, his request should have been granted as a matter of law, and reversal is required.

a. Mr. Madsen's request was timely. The State does not deny that Mr. Madsen's January 24, 2006 request to represent himself was timely. Br. of Resp't at 19-22. Nor does the State deny that Mr. Madsen's March 7, 2006 request to proceed pro se was timely. Br. of Resp't at 19-22.

The State incorrectly asserts that Mr. Madsen's May 2006 request to represent himself was untimely. Br. of Resp't at 25-27. As stated in Mr. Madsen's opening brief, the request was timely because it must be viewed in conjunction with the fact that Mr. Madsen had already requested self-representation on two earlier occasions. Appellant's Br. at 23-24 (citing State v. Breedlove, 79 Wn. App. 101, 109, 900 P.2d 586 (1995)).

The State argues that the Breedlove rule does not apply where an earlier request was "deferred" rather than "denied." Br. of Resp't at 26-27. The State is mistaken. "Where a court is put on notice that the defendant wishes to assert his right to self-

representation but it nevertheless delays ruling on the motion, the timeliness of the request must be measured from the date of the initial request.” Breedlove, 79 Wn. App. at 109 (emphasis added). In Breedlove, the court declined to hear the defendant’s motion on the day the defendant first requested to proceed pro se. 79 Wn. App. at 104. The Court of Appeals held that timeliness is judged from the moment the defendant first makes the request, not the moment the court rules on it. Id.; see also State v. Vermillion, 112 Wn. App. 844, 855, 51 P.3d 188 (2002) (ruling was deferred twice, but timeliness measured from first request). Mr. Madsen first asked to be allowed to represent himself on January 24, 2006, over three months before trial started. There is no question that the timeliness requirement is satisfied here.

b. Mr. Madsen’s request was unequivocal. On January 24, 2006, after Mr. Madsen’s retained counsel was allowed to withdraw, Mr. Madsen unequivocally stated that he wanted to proceed pro se rather than being assigned a new attorney:

COURT: Counsel, you’re withdrawing. I assume the next step in the proceeding would be for him to be screened by OPD?

MR. MADSEN: No. I want a pro se order, Your Honor.

COURT: You want to proceed pro se?

MR. MADSEN: Pro se. Yes. Exactly.

1/24/06 RP 4-5. The court asked him why he wanted to represent himself, but did not let him finish explaining why. 1/24/06 RP 5. Nor did the judge find the request to be unknowing, unintelligent, or involuntary. 1/24/06 RP 1-11.

Contrary to the State's assertion, the judge did not base his refusal to grant the motion on the fact that Mr. Madsen had not set the motion on the calendar. Br. of Resp't at 20. Rather, the judge stated, "I'm not going to let you forge ahead on this until you've had an opportunity to talk with counsel from OPD first." 1/24/06 RP 5-6. Because there is no requirement that a defendant consult with a new attorney before proceeding pro se, the court erred in refusing to grant Mr. Madsen's request until Mr. Madsen tried another attorney.

Mr. Madsen's second request to represent himself was also unequivocal. Contrary to the State's assertion that Mr. Madsen "never raised a motion to discharge McCullough or to proceed pro se," Br. of Resp't at 21, Mr. Madsen did just that on March 7, 2006. 3/7/06 RP 2 ("we are here on a Defense motion either to fire Mr.

McCullough or to proceed pro se”), 3 (“this is a Defense motion to proceed pro se or in the alternative to fire me”).

Mr. Madsen unequivocally stated, “According to the Washington Constitution, I have a right to represent myself.” 3/7/06 RP 8. He specifically cited Article 1, § 22 and State v. Silva. 3/7/06 RP 8. When he invoked the Washington Constitution a second time, the judge said, “I’m not here to debate with you. Just shut up and listen to me for a minute.” 3/7/06 RP 9.

The State misrepresents the record by stating that Madsen “would not provide a clear answer” in response to the judge’s “valiant” attempts to ascertain whether Mr. Madsen’s request was truly unequivocal. Br. of Resp’t at 21. Mr. Madsen never wavered from his request to proceed pro se. The judge suggested that maybe Mr. Madsen just wanted a different attorney, as an “in-between” solution, but Mr. Madsen insisted on representing himself. 3/7/06 RP 11. Mr. Madsen told the judge that if the court insisted on implementing an “in-between” solution, then Mr. Madsen would accept stand-by counsel. 3/7/06 RP 11. It was in this context that Mr. Madsen suggested Don Madsen; Mr. Madsen did not, as the State implies, render his request unequivocal by suggesting Don Madsen serve as stand-by counsel in response to the court's

insistence that he consider an in-between solution. 3/7/06 RP 12; see Br. of Resp't at 9-10.

Mr. Madsen never backed down from his resolve to represent himself. Indeed, after the court asked him to consider being appointed new counsel, Mr. Madsen responded, "I'd rather represent myself, Your Honor, honestly." 3/7/06 RP 12. He invoked the Constitution a third time, stating: "I am gonna revert to my constitutional rights, Washington State constitutional rights, Article 1, Subsection 22, I have a right to represent myself and that's what I'm going to move forward with doing." 3/7/06 RP 13. This request, like the January 24 request, was clearly unequivocal and should have been granted as a matter of law.

Finally, Mr. Madsen asked a third time to proceed pro se in May. Although he said he was "almost forced" into representing himself because his lawyer had not fully prepared, such language does not render a request to proceed pro se equivocal. State v. DeWeese, 117 Wn.2d 369, 378, 816 P.2d 1 (1991). In any event, his request should have been granted earlier as described above.

c. The court did not find that Mr. Madsen was incompetent or that his waiver of counsel was not knowing, intelligent, and voluntary. The State argues that the court did not err in refusing to

grant Mr. Madsen's timely, unequivocal requests to proceed pro se because the court "had concerns" about Mr. Madsen's competency and whether his request was knowingly and intelligently made. Br. of Resp't at 20. But "having concerns" is an insufficient basis for refusing to grant the constitutional right to self-representation.

Rather, once a defendant makes a timely, unequivocal request, the court is required to affirmatively investigate whether a defendant's waiver of counsel is knowing, intelligent and voluntary, preferably through a colloquy on the record in which the court explains the nature of the charge, the possible penalties, and the disadvantages of self-representation. State v. Barker, 75 Wn. App. 236, 239, 881 P.2d 1051 (1994); Breedlove, 79 Wn. App. at 111; Vermillion, 112 Wn. App. at 851, 857-58. And if a court believes a defendant is incompetent, it is obligated to order a competency evaluation, not simply refuse to grant a motion to proceed pro se. Godinez v. Moran, 509 U.S. 389, 402 n.13, 113 S.Ct. 2680, 125 L.Ed.2d 321 (1993); In re the Personal Restraint of Fleming, 142 Wn.2d 853, 863, 16 P.3d 610 (2001).

The court here neither engaged in the proper colloquy nor ordered a competency evaluation. The court did not enter a finding that Mr. Madsen was incompetent or that his waiver of counsel was

not knowing, intelligent and voluntary. Accordingly, the court erred in refusing to grant Mr. Madsen's timely, unequivocal requests to proceed pro se, and the convictions must be reversed.

d. The State's proposed additional restrictions on the right to proceed pro se should be rejected. The State does not deny that Mr. Madsen's January and March requests to proceed pro se were timely and unequivocal, but proposes additional requirements – not supported by authority – and then asserts that Mr. Madsen did not meet its newly proposed rules. Br. of Resp't at 20-22. The State's argument is without merit.

The State first suggests that a court may refuse to grant a defendant's request to represent himself if he has not formally set the motion on a calendar, and then asserts that Mr. Madsen failed to do this. The State is wrong on both counts, because there is no such requirement, but in any event, Mr. Madsen did formally note the March 7 motion.

In Barker, the defendant did not set a motion to proceed pro se on the calendar. Rather, he moved for the appointment of new counsel. 75 Wn. App. at 238. At the hearing on that motion, after the court denied it, the defendant asked to proceed pro se. Id. Despite the fact that Mr. Barker never formally noted a motion to

proceed pro se on the calendar, this Court reversed the trial court's denial of the defendant's request to represent himself. Id. at 241. "[B]ecause Barker made his request well before trial began, and did not request a continuance, he should have been granted his motion to represent himself as a matter of law." Id. Similarly here, Mr. Madsen should have been granted his January 24 request to represent himself as a matter of law, and it was perfectly appropriate for him to make this request at a hearing on a motion for withdrawal of counsel.

Vermillion is similarly instructive. The defendant there repeatedly requested to represent himself, but never noted a formal motion to proceed pro se on the calendar. Rather, he made his request at the omnibus hearing, at a pretrial hearing on a motion to exclude witnesses, and at trial just before jury selection. 112 Wn. App. at 852-54. This Court reversed the trial court's denial of the defendant's request because it violated his constitutional right to self-representation. Id. at 848.

Even if there were a requirement to note the motion formally on the calendar, Mr. Madsen did so in March 2006. 3/7/06 RP 2-3. Thus, even if this Court overrules Vermillion and Barker and adopts

the State's proposed requirement, Mr. Madsen's convictions must be reversed and his case remanded for a new trial.

The other requirement the State seeks to add without citation to authority is that the defendant must renew his request at every possible moment between the time the court first refuses to grant it and the time of trial. Br. of Resp't at 20-22. That is not the law. In Barker, the defendant asked to proceed pro se only once, even though he had multiple opportunities afterward to renew his request. 75 Wn. App. at 238. The State argued that he waived his right to proceed pro se by not renewing his request right before trial. Id. at 240. This Court stated, "Given the court's prior, clear refusal to allow Barker to represent himself, we find that it would have been a useless gesture for Barker to have raised the matter at this point." Id. Similarly here, given the court's clear orders (both in January and in March) to try new counsel instead of proceeding pro se, it would have been futile for Mr. Madsen to make any more requests than he already made.

Even if there were some kind of repetition requirement, Mr. Madsen met it. He asked to proceed pro se in January, and the court told him he had to try new counsel first. 1/24/06 RP 5. After giving new counsel a chance, he again asked to proceed pro se in

March. 3/7/06 RP 8-9. He again was told to switch attorneys instead and to give the new attorney an opportunity. 3/7/06 RP 16-17. Again, he followed the court's order and gave the new attorney a chance, and after doing so he again requested to proceed pro se. 5/2/06 RP 80. Because Mr. Madsen made his request on three separate occasions, he satisfied any repetition requirement that may exist. In any event, there is no requirement that a defendant make multiple timely, unequivocal requests to proceed pro se. Once a defendant makes one timely, unequivocal request for self-representation, the court must grant it as a matter of law. Barker, 75 Wn. App. at 241.

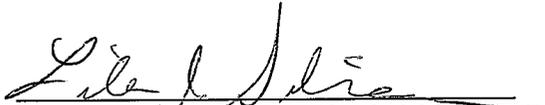
e. Because he was improperly denied his right to represent himself, Mr. Madsen must be granted a new trial. The erroneous denial of a defendant's motion to proceed pro se requires reversal without any showing of prejudice. Breedlove, 79 Wn. App. at 110. Where a conviction is reversed for a violation of the right to self-representation, the case must be remanded for retrial. Vermillion, 112 Wn. App. at 848. Because Mr. Madsen was denied his constitutional right to proceed pro se, his convictions must be reversed and his case remanded for a new trial.

B. CONCLUSION

Because Mr. Madsen's constitution right to represent himself was violated, his convictions must be reversed and his case remanded for a new trial. In the alternative, for the reasons stated in Mr. Madsen's opening brief, his sentence should be vacated and his case remanded for resentencing because the three convictions constituted the same criminal conduct.

DATED this 13th day of August, 2007.

Respectfully submitted,


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Washington Appellate Project
Attorneys for Appellant

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DIVISION ONE**

STATE OF WASHINGTON,)	
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KURT MADSEN,)	
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Appellant.)	

CERTIFICATE OF SERVICE

I, MARIA ARRANZA RILEY, CERTIFY THAT ON THE 13TH DAY OF AUGUST, 2007, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] WILLIAM DOYLE		U.S. MAIL
KING COUNTY PROSECUTING ATTORNEY	(X)	
APPELLATE UNIT	()	HAND DELIVERY
KING COUNTY COURTHOUSE	()	_____
516 THIRD AVENUE, W-554		
SEATTLE, WA 98104		

SIGNED IN SEATTLE, WASHINGTON THIS 13TH DAY OF AUGUST, 2007.

X _____
[Signature]

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