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Court of Appeals
Division I
State of Washington
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No. 96663-0

NO. 76806-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

KEITH DAVIS,

Appellant.

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

The Honorable Gregory P. Canova, Judge

BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

I. ALTHOUGH THERE IS NO CONSTITUTIONAL RIGHT TO STANDBY COUNSEL, THE TRIAL COURT MUST STILL EXERCISE MEANINGFUL DISCRETION IN CONSIDERING A DEFENDANT'S REQUEST FOR ONE.

In his opening brief, appellant Keith Davis asserts the trial court failed to properly exercise its discretion when it did not give meaningful and individualized consideration to his request for standby counsel. Brief of Appellant (BOA) at 5-16. In response, the State suggests the trial court was free to give no consideration to the individual merits of Davis' request because criminal defendants have no statutory or constitutional right to standby counsel. Brief of Respondent (BOR) at 13-16. The State is mistaken.

It is well established that appointment of standby counsel – although not statutory or constitutionally required – is within the discretion of the trial court. State v. McDonald, 143 Wn. 2d 506, 511, 22 P.3d 791, 794 (2001); State v. Watkins, 71 Wn. App. 164, 174, 857 P.2d 300, 306 (1993). In other words, the trial court is not required to appoint standby counsel in any particular case, but it is required to give meaningful, individualized consideration to a party's request that standby counsel be appointed.

The State fixates upon the fact that the cases cited by appellant for the proposition that the failure to exercise discretion is an abuse of discretion happen to be sentencing cases that involve statutorily authorized sentencing alternatives. BOR 14-15. From this, it suggests that since there is no statutory or constitutional right to standby counsel, then the trial court is free to ignore the merits of a defendant's request. BOR 15-16. However, the decisions cited by Davis do not necessarily turn on the fact that there was a statutory process in place. Instead, those decisions focus on the fact that it was within the trial court's discretion to make a particular decision, but the trial court failed to exercise this discretion through meaningful, individualized consideration. See, State v. O'Dell, 183 Wn. 2d 680, 697, 358 P.3d 359, 367 (2015); State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005); State v. Garcia–Martinez, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997).

Contrary to the State's suggestion, the concept that a trial court's failure to exercise discretion is an abuse of discretion applies beyond sentencing cases. E.g., State v. Stearman, 187 Wash. App. 257, 270, 348 P.3d 394, 401 (2015) (failure to exercise discretion regarding a motion to change venue); State v. Flieger, 91

Wn. App. 236, 241, 955 P.2d 872, 874 (1998) (failure to exercise independent judgment as to whether a shock box could be used to restrain the defendant). Indeed, it applies whenever the trial court has recognized discretionary decision-making power and a party puts forth an argument that triggers the exercise of that discretion.

Here, it was within the trial court's discretion to appoint standby counsel. Based on the facts and circumstances specific to his case, Davis asked the court to exercise this discretion. Unfortunately, the trial court did not meaningfully consider the substance of his argument, instead applying an apparent county-wide norm against the appointment of standby counsel to defendants such as Davis (or as Judge Lum put it ... "you people"¹). 1RP 11,17-18, 30-31, 44, 72, 186-87. As explained in greater detail in appellant's opening brief, this was an abuse of discretion. BOA at 12-16.

¹ 1RP 17-18.

II. THE TRIAL COURT DID NOT MEANINGFULLY EXERCISE ITS DISCRETION AND CONSIDER THE SUBSTANCE OF DAVIS' REQUEST FOR STANDBY COUNSEL.

The State next claims the record shows the trial court gave appropriate consideration to Davis' request for standby counsel. BOR at 16-18. However, the portion in the record the State relies upon to put forth this argument actually demonstrates just the opposite. It shows that the trial court did not give meaningful, individualized consideration of the facts and circumstances in Davis' case but, instead, relied on some county-wide norm that calls for summarily denying standby counsel to someone like Davis.

The State points to one exchange between Judge Lum and Davis. It singles out a statement by Davis explaining that having standby counsel would be helpful for a variety technical reasons. BOR at 17 (citing RP 16-17). The State then points to Judge Lum's statement: "...it used to be the practice that in many cases, standby counsel was ordered, frankly, for the convenience of the various parties. But you know, about five years ago, that practice stopped." BOR at 17 (citing RP 17-18). From this, the State wrongly concludes that "this comment clearly reflects the court's consideration of the basis of Davis' request."

Contrary to the State's claim, when the record is looked at as a whole, it shows neither Judge Lum nor any other judge actually considered whether – based on the substance of Davis' arguments – there was good cause to appoint standby counsel. Davis repeatedly set forth in detail the substance of his arguments, pointing to the technical hardships and medical limitations he faced in trying to put forth a case while incarcerated. RP 16-17, 20, 25-29, 44, 69-71; CP 37-40, 44-48, 51-58. Yet, all the State can point to is Judge Lum's one generic comment that in the past, the court often appointed counsel for the convenience of the parties but has since stopped. When the record is reviewed as a whole, it reveals that no judge undertook meaningful consideration of Davis' individual substantive arguments. See, BOA at 6-11 (laying out the facts in detail). This constituted an abuse of discretion.

III. DAVIS DID NOT EXPRESSLY WAIVE HIS RIGHT TO BE PRESENT AT TRIAL.

In his opening brief, appellant asserts the trial court erred when it completely removed him from the proceedings for misconduct without first considering whether there were less severe alternatives. BOA at 16-25. In response, the State claims he expressly waived his right to be present by "his own repeated and

explicit statements that he refused to participate.” BOR at 34. However, the record does not support the State’s claim.

A criminal defendant has a constitutional right to be present in the courtroom at all critical stages of the trial. State v. Chapple, 145 Wn. 2d 310, 318, 36 P.3d 1025, 1030 (2001). Yet, the State is correct in saying that the right to be present is not absolute. Chapple, 145 Wn.2d at 318. A criminal defendant may waive the right to be present at trial by voluntarily absenting himself. Id. A waiver of the right to be present may be express or implied. State v. Thurlby, 184 Wn. 2d 618, 624, 359 P.3d 793, 796 (2015). If a trial has begun in the defendant’s presence, a subsequent voluntary absence of the defendant operates as an implied waiver of the right to be present. Id. Additionally, a defendant’s misconduct may act as an implied waiver under particular circumstances. Chapple, 145 Wn.2d at 318-26. However, a reviewing court must indulge every reasonable presumption against waiver of the right to be present. State v. Garza, 150 Wn.2d 350, 367, 77 P.3d 347 (2003).

Here, the State points to Davis’ conduct and statements, claiming they amounted to an express waiver. BOR at 31-36. However, this is supported neither in the record nor the case law. Davis’ conduct was notably similar to the conduct at issue in

Chapple where the defendant was obstreperous and, as part of his misconduct, defiantly uttered he didn't want to participate in the trial. Chapple, 145 Wn.2d at 314-15. Yet, the Supreme Court did not conclude that Chapple had expressly waived his right to counsel. Instead, it looked at the totality of circumstances of the defendant's conduct, as well as the trial court's response, to determine whether there was a valid implied waiver through misconduct. Id. at 318-26.

Perhaps more compelling here, is that the trial court certainly did not consider Davis to have expressly waived his right to be present when ordering his removal. Indeed, the trial court wrote findings and conclusions in which it explicitly found Davis had "absented himself from the trial due to his disruptive behavior." CP 140. The State conveniently ignores the fact that the trial court's written findings do not indicate Davis expressly waived his right to be present and, instead, indicate that Davis was involuntarily removed from the trial due to misconduct. CP 140-43. As such, this Court should reject the State's invitation to recast the record. There was no express waiver here.

IV. UNDER STATE V. CHAPPLE, THE RECORD DOES NOT ESTABLISH A VALID IMPLIED WAIVER OF DAVIS' HIS RIGHT TO PRESENT.

In his opening brief, appellant asserts that that his absence from trial was involuntary where the trial court failed to comply with the requirements set for in Chapple before removing him. RP 20-25. In response, the State claims that Davis' conduct and statements alone were enough to establish a voluntary absence via a valid implied waiver by conduct of his right to be present at trial. BOR at 39-44. However, the State ignores that, when determining whether there has been a valid implied waiver, a reviewing court must: (1) consider the totality of circumstances (which include not only conduct of the defendant but also the response of the court); and (2) indulge every reasonable presumption against waiver of the right to be present. Garza, 150 Wn.2d at 367; Chapple, 145 Wn.2d. 18-26.

The State is correct that a defendant's persistent, disruptive conduct may constitute an implied waiver of the right to be present and thus be considered a voluntary absence. However, before the trial court may properly imply waiver, it must undertake certain precautions. Although the appropriate method for dealing with a disruptive defendant is left to the trial judge's discretion, the

Washington Supreme Court set forth four basic guidelines trial courts are to follow when exercising their discretion. First, the defendant is to be warned that his conduct could lead to removal. Second, the defendant's conduct must be severe enough to justify removal. Third, the trial judge is to consider alternatives to complete removal and use the least severe alternative that will prevent the defendant from disrupting the trial. Finally, the defendant must be allowed to reclaim his right to be present. Chapple, 145 Wn. 2d at 320.

Chapple's guidelines are intended to ensure that trial courts exercise their discretion in a manner that affords defendants a fair trial while maintaining the safety and decorum of the proceedings. Id. In this case, the trial court did not properly exercise its discretion in a manner that struck this balance. Whether it was within the trial court's discretion to remove Davis from the courtroom, it was not within its discretion to completely extinguish his right to be present during a critical phase of the trial where there was a less restrictive alternative. See, BOA at 23-24 (setting forth this point in detail).

In response, the State points to the fact that the day before removal the trial court briefly stated that if Chapple continued to

disrupt, he would be removed to observe the court proceedings elsewhere. BOR at 41-42 (citing RP 380-82). From this, the State argues that the trial court considered alternatives. BOR at 41-43. However, this single statement does not constitute the type of reasonable and thorough consideration of less restrictive alternatives that is expected as part of a Chapple inquiry. There was an option that would enable Davis to remain electronically present at trial even if he were removed from the courtroom, but on the day of his removal, this option was inexplicitly left unexplored.

As explained in appellant's opening brief, the trial court's consideration here pales in comparison to the exemplary considerations made by the trial court in Chapple. BOA at 24. There, the trial court engaged in a thorough exploration of alternatives and provided on-the-record reasoning for why video monitoring would not work. Chapple, 145 Wn.2d at 323-24. The record here is devoid of any such exploration.

The State also contends that, based on Davis' conduct, it is "self-evident" that the trial court had no other reasonable alternative but to remove Davis from the courthouse entirely. BOR 43. However, the State is asking this Court to speculate and make findings of fact the trial court never made.

The State speculates that less restrictive alternatives, such as video monitoring – were not available because Davis would have been unable to gain control and would have still disrupted the trial process. There are two problems with this argument. First, the trial court never found that there were no less restrictive alternatives available. Indeed, the trial court's findings only establish that it found it necessary to remove Davis from the courtroom and nothing more. CP 141-43. Second, the record shows that when Davis was later returned to the courtroom, he participated in his trial without any other significant behavioral issues. CP 143. His behavior indicates that he was capable of calming himself after he was taken out of the courtroom such that he could participate further in his trial. As such, this record does not establish – without rank speculation – that there were no less restrictive alternatives available, making Davis' complete removal from a critical stage of his trial necessary.

In sum, before the trial court may properly exercise its discretion in concluding the defendant is voluntarily absenting himself from trial by his conduct, it must engage in a robust Chapple inquiry -- which includes meaningfully considering whether there are less restrictive alternatives to the defendant's complete

removal from trial. The trial court did not do this. While the State asks this Court to speculate that there were no reasonable alternatives available, the record does not support this, and such speculation runs counter to the notion that this Court must indulge every reasonable presumption against finding an implied waiver of the right to be present at trial. As such, this Court should reject the State's argument and instead conclude that Davis did not voluntarily absent himself from his own trial.

V. DAVIS' SIXTH AMENDMENT RIGHT TO REPRESENTATION WAS VIOLATED WHEN THE TRIAL COURT COMPLETELY REMOVED HIM FROM THE TRIAL DUE TO MISCONDUCT, LEAVING HIM WITH NO REPRESENTATION.

In his opening brief, Davis asserts that he, as a pro se defendant, was wrongly denied his right to representation when the trial court completely removed him from the trial without either obtaining an express waiver of the right to representation (either by himself or an attorney) or appointing counsel. BOA at 25-30. In response, the State claims that this case is controlled by the Washington Supreme Court's decision in State v. DeWeese, 117 Wn.2d 369, 816 P.2d 1 (1991). BOR at 48-50. However, DeWeese did not reach the constitutional question raised here and is factually distinguishable.

As explained further below, DeWeese dealt with two constitutional issues: (1) the right to counsel of choice and (2) the right to be present at trial. 117 Wn.2d 376-79. The Supreme Court never directly addressed whether a pro se defendant forfeits his right to any representation whatsoever by engaging in misconduct at trial. This is because DeWeese had already been found to have fully forfeited his right to counsel due to his pre-trial conduct of firing attorneys for no valid reason and then repeatedly requesting new attorneys. However, no such facts exist here.

In DeWeese, the defendant sought, before trial, to discharge appointed counsel and have the court appoint another lawyer. The trial court denied his request and gave DeWeese the option of either being represented by appointed counsel or representing himself. DeWeese chose to represent himself. At his request, appointed counsel served as standby counsel. Id. at 372-74.

During the trial, DeWeese discharged standby counsel and again asked for representation by a new attorney. The trial court denied his request. DeWeese became truculent during the prosecutor's examination of a witness. The trial court removed DeWeese from the courtroom but – aware that he was representing himself – permitted him to watch the trial on a video monitor so that

he could return to conduct cross-examination. After this, DeWeese expressly refused to participate in the trial unless his demand for an attorney was met. Id. at 373-74, 381.

On appeal, DeWeese argued that the trial court denied him the right to assistance of counsel by refusing to appoint a new attorney and forcing him to choose between proceeding to trial with appointed counsel or representing himself. The Supreme Court rejected DeWeese's argument, reiterating that the trial court had discretion to decide whether a defendant's dissatisfaction with appointed counsel is meritorious and justifies the appointment of new counsel. Id. at 376. It recognized DeWeese had failed to provide a valid reason. It further explained: "What the defendant cannot obtain because of lack of a valid reason, the defendant should not be able to obtain through disruption of trial. Id. at 379. It held that "after a valid denial of a defendant's request for appointment of substitute counsel, the trial court may require the defendant to choose between remaining with current counsel or proceeding pro se." Id.

The Supreme Court also concluded that the trial acted within its discretion when removing DeWeese from the courtroom due to his outbursts. It noted the court had employed the video monitoring

option. It also emphasized DeWeese's refusal to take advantage of his opportunity as a pro se defendant to present his own defense after being invited back. From this, it concluded that DeWeese had expressly and voluntarily absented himself from the proceedings. Id. at 380-81.

There are significant factual differences between Davis' case and that of DeWeese. Unlike Davis, DeWeese never seriously desired to represent himself. DeWeese was required to proceed pro se due to repeated firing of attorneys or forcing withdrawal by creating ethical conflicts. Prior to trial, he had been validly found to have forfeited his right to anything other than pro se representation due to his manipulation of the right to counsel.

By contrast, Davis embraced the idea of representing himself and fought hard to exercise this right. He sought standby counsel only to assist him in areas that his inmate status made it technically difficult to accomplish. He offered valid reasons for wanting standby counsel, but (as explained above) those were not considered on their merit. Unlike DeWeese, Davis was never denied counsel due to manipulation of the right to counsel. He also was never denied standby counsel for failure to show good cause. Instead, Davis chose to proceed pro se, and he was denied

standby counsel merely because of an apparent policy that works to discourage incarcerated defendants from proceeding pro se.

Davis tried to give up his right to proceed pro se after the trial court would not grant another continuance so he could prepare. The State characterizes Davis' requests for continuances as manipulation. BOR 50. However, it is hard to imagine what a pro se defendant gains by seeking a continuance – beyond trial preparation time – when he is sitting in jail awaiting trial. Defendants usually are not looking to extend their time of incarceration while awaiting trial. Instead, this record more aptly demonstrates Davis wanted to represent himself and merely sought the time and support to do so.

Once Davis was forced to trial without being prepared, his misconduct supported his removal from the courtroom temporarily. However, these circumstances were not enough to leave Davis completely unrepresented and unable to view the trial during a critical stage of the trial. See, BOA at 25-30 (citing supporting cases). Even DeWeese was permitted the opportunity of watching from a video monitor so he could effectively conduct cross-examine. Unfortunately, the trial court did not undertake such precautions here. Also, unlike DeWeese, Davis did not refuse to

participate in the trial after he was brought in. He came back in the court and once again stepped into the role of trying to represent himself as best he could under the circumstances.

In sum, as much as the State wants to analogize this case to DeWeese to achieve a particular outcome, the facts and circumstances of the cases are significantly different. Hence, DeWeese is not controlling. As such, for the reasons stated herein and in appellant's opening brief, this Court should find that Davis was denied his Sixth Amendment right to representation.

B. CONCLUSION

This Court should reverse the convictions.

DATED this 9th day of February 2018.

Respectfully submitted,



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February 09, 2018 - 3:11 PM

Transmittal Information

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Appellate Court Case Title: State of Washington, Respondent vs. Keith Adair Davis, Appellant
Superior Court Case Number: 14-1-00794-5

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