

67541-9

67541-9

NO. 67541-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

NORRIAN PHILLIP PHILLIPS,

Appellant.

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STATE OF WASHINGTON  
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE RONALD KESSLER  
THE HONORABLE THERESA DOYLE  
THE HONORABLE GREGORY P. CANOVA

**BRIEF OF RESPONDENT**

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**A. ISSUE PRESENTED**

A defendant has a constitutional right to counsel at all critical stages of a criminal proceeding, but not to counsel of his or her choice. He must provide a legitimate reason why he would be entitled to reassignment of counsel, and he may not create his own conflict. Requiring a defendant to choose to either waive his right to counsel or continue with present counsel is not constitutionally offensive unless the defendant's objections to existing counsel are such that he has the right to new counsel.

Norrian Phillips has a proven track record of not being able to communicate with or get along with several appointed defense counsel. Following the court's denial of his requests to discharge two of his appointed counsel and obtain counsel from a different defender agency, the defendant twice unequivocally requested to represent himself. Following full colloquies that demonstrated his understanding of the risks of representing himself, the court granted Phillips' requests. Under these circumstances, did Phillips knowingly, intelligently, and voluntarily waive his right to counsel?

**B. STATEMENT OF THE CASE**

In September and October 2010, Norrian Phillips was charged in King County Superior Court under three different cause numbers with a number of different felony offenses and one misdemeanor offense.<sup>1</sup> At a hearing on January 6, 2011, the defendant made a motion to the court to discharge his appointed counsel, Ms. Lei Young of The Defender Association, based on a breakdown in communication. RP 10-13. Following complaints that Ms. Young had made promises to him that she had not followed through with, he stated, “[I] don’t feel comfortable working with this person anymore cause, um, I don’t, I’m not, I don’t plan to say anything else to her. So, we’re not, we’re not going to be communicating with each other.... I can’t work with this, uh, person.” RP 10.

After Ms. Young agreed that she had not been properly responsive to her client, Judge Armstrong granted Phillips’ request and ordered new counsel appointed. RP 13-14.

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<sup>1</sup> The first case filed was Cause No. 10-1-06833-0 SEA on September 10, 2010, in which Phillips was charged with Possession of a Stolen Vehicle and Burglary in the Second Degree. CP 130-31. On October 10, 2010, the State filed 10-1-08981-7 SEA and 10-1-08975-2 SEA, in which Phillips was charged with Theft in the Second Degree and Trafficking in the First Degree (in 10-1-08981-7) and Burglary in the Second Degree and Criminal Trespass in the First Degree (in 10-1-08975-2 SEA). CP 1-2, 54-55.

On March 23, 2011, Phillips was before the court again asking to discharge his newly appointed counsel, Tomackie Kim of the public defender agency SCRAP. RP 18. Ms. Kim had apparently been assigned the case only a week earlier, and had already been in to discuss resolution of the cases with the prosecutor. RP 18. However, Phillips disagreed with her actions thus far, engaging with Judge Kessler as follows:

Phillips: Well, I want to – my lawyer is not handling my case properly. And, um, you know, I want to go on the record, for the record, that I want to actually proceed Pro Se and set my case for trial.

Court: What is the dispute?

Phillips: Well, I just – I don't feel – I'm not even going to talk to her anymore about my case. So, I'm not going to, there's not going to be anymore communication but the dispute is is [*sic*] that she's not actually trying to help me fight my case. She's just came right through the door talking about she's ready to negotiate a plea deal – I'm not trying to plea. I'm, I want to go to trial, so –

Court: And that's fine.

Phillips: And, yeah, I want to be – I'm gonna do it – I'd like to do it myself. So I prefer not to, to deal with this woman anymore, so –

Court: So it is your unequivocal desire to represent yourself?

Phillips: Absolutely.

RP 18-19. Following this exchange, Judge Kessler and Phillips engaged in a long colloquy in which Phillips was informed that he has a constitutional right to a lawyer, and was informed of the charges, of the maximum penalties of the crimes charged, and of the expectation that he would follow the technical procedural rules as if he was an attorney. RP 19-22. Judge Kessler warned Phillips that if the State offered evidence that was objectionable but he failed to properly object, then the evidence might be admitted and there would be no recourse on appeal. RP 22. The court then told Phillips that he would be at a clear disadvantage in terms of legal research and access to resources given that he was in custody. RP 23. The court confirmed that no threats or promises had been made to Phillips. Id.

Finally, Judge Kessler and Phillips had the following exchange:

Court: [W]ell, I'm going to tell you that if I were charged with a crime, I would have a lawyer. And I am a lawyer. And the reason for that is that it's a very bad idea to represent yourself.

Phillips: Well, I mean, if I'm not gonna get the type of represent--, representation that's trying to actually help me win instead of trying to send me to prison, with--, without even looking at my discovery, walking through the door and telling me that you're ready to plea out, plead me out. You don't even know my discovery. You know nothing about my case. What do you think I'm gonna do?

Court: Well, I don't think you're gonna do this because your lawyer is obliged to tell you what possible things could happen including a plea bargain. That's her job.

Phillips: But I'm saying, when you walk through the door and you say 'I'm, I'm going to plea your case, I'm going to negotiation [sic] your case' and you're not trying to look at the discovery and sit down and go over the evidence of the discovery to see what position I'm in and what we have to work with, then, it leaves me no choice. I've already been -- this is my third attorney. So, if I'm not gonna get an attorney that's gonna actually work and help me fight my case then I, I don't have any choice. If I'm gonna --

Court: Well you do --

Phillips: -- be screwed, then I'm gonna screw myself. I'm gonna do it to myself. I'm not going to let somebody else do it. That's what I'm saying. It doesn't make any sense for me to do that. To let somebody else put me in prison for five or six years. No, I can do that myself.

RP 23-25. At this point, the court found a knowing, voluntary, and intelligent waiver of the right to counsel on the three cases, and appointed Ms. Kim as stand-by counsel. RP 25.

This posture did not last long. On April 20, 2011, Phillips requested to “retract my waiver” and have an attorney reappointed. RP 30. Judge Kessler agreed to reappoint Ms. Kim, but warned Phillips that his attorney would need time to prepare for trial, and that “you’re not gonna get to change your mind again.” RP 31.

On May 23, 2011, Phillips was yet again before the court seeking to discharge Ms. Kim as counsel, again due to a claimed breakdown in communication. RP 35-36. Ms. Kim explained that since Phillips was previously pro se, he now considered himself “co-counsel” with her, and refused to accept the proper roles of attorney and defendant in terms of deciding trial tactics. RP 35-36. She then explained that she was transferring to a new unit and Phillips would have a new attorney assigned from her agency within a week and a half, though she suspected that he would have a problem with anyone from SCRAP. Id. Judge Kessler denied the defendant’s motion to discharge, explaining as follows:

Court: Well, I’m not going to give you a new lawyer. I think you’ve had enough lawyers here. You’ve had lawyers, you’ve been

Pro Se. You went off Pro Se. I'm gonna deny your Motion to Discharge.

Phillips: So you're not letting me go Pro Se again, is that what you're saying? So I don't have my right to exercise my constitutional rights?

Court: That is a different question.

Phillips: Okay, so that's what the, that's the issue now. And so, basically you're, my constitutional rights have been tramped upon because you're telling me I can't go Pro Se. I'm not going with SCRAP. That's all there is to it. I'm not coming down here anymore with a SCRAP person representing me. And if you make them my co-counsel that's up to you, but I'm not gonna talk to them though.

RP 40-41. Phillips questioned again why he can't have a lawyer from a different agency,<sup>2</sup> and was told by Judge Kessler that he believed Phillips would have problems with every lawyer in every agency. RP 42-43. The court and Phillips had the following discussion:

Court: You're already getting what you wanted. You're getting another lawyer. But you don't want that lawyer. You don't even know who it is and you don't want it.

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<sup>2</sup> Phillips had apparently been appointed an attorney from Northwest Defender Association (NDA) between Ms. Young and Ms. Kim, but NDA had a conflict of interest and had to withdraw. He wanted another appointment from NDA. RP 38-39.

Phillips: Oh, okay, I'll work with them. I mean, but if it, if its not gonna, if its not gonna go anywhere, if its looking like the same issue, then I'm, you know, we're gonna have this, I'm gonna be back here again and we're going to be doing this all over again.

RP 43.

On June 17, 2011, Phillips was before the court with his new attorney, Emily Deckman of SCRAP. Ms. Deckman asked to withdraw from the case because Phillips had threatened her and she feared him. RP 47-49. Phillips explained that it was clear to him when he met his new attorney that there would be a problem because she was merely repeating the same things that Ms. Kim had told him. RP 49. He stated to the court, "[I] knew this was just gonna be a big waste of time and I seen trying to go through this again. That's why I was trying to get you to give me, give me another agency last time." Id.

Judge Kessler then ruled as follows:

All right. Mr. Phillips has, uh, discharged other lawyers before. Um, it's clear to the Court that Mr. Phillips is simply not going to get along with any lawyer that represents him. Uh, and he doesn't get to create his own conflict. I'm going to deny the Motion to Withdraw....

RP 50. At this point, Phillips informed the court that Ms. Deckman would not represent him at trial and he would just "go pro se." Id.

Judge Kessler then engaged the defendant in the following colloquy:

Court: [S]o you now wish to represent yourself. Is that correct?

Phillips: I'm gonna have to, your Honor.

Court: Okay, you do not have to. You understand that you have the right to a lawyer?

Phillips: No. I'm – you're denying me that.

Court: I am not denying you that. You have a lawyer.

Phillips: That's fine. I'll address that with the Court of Appeals, so –

Court: Well, but you're not answering my question. Do you understand the –

Phillips: -- I'm not gonna answer.

Court: What?

Phillips: I'm not gonna answer them.

Court: You're not gonna answer these questions?

Phillips: No.

Court: Okay, [you're] counsel.<sup>3</sup> Defendant is [sic] not, uh, made an unequivocal demand to represent himself.

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<sup>3</sup> In the transcript, this is noted as "Okay, your Counsel." However, the undersigned attorney was present at the hearing. At this point, it was clear to the parties that Judge Kessler was indicating to Ms. Deckman that she would remain as counsel.

RP 51-52. Ms. Deckman then addressed the court to ask for a continuance of the case for various reasons, to which Phillips objected. RP 52-55. He told the court specifically that he did not want Ms. Deckman as his attorney, and he was ready to go to trial and to defend himself. RP 55. Finding this to be an unequivocal request, the court again engaged Phillips in an extensive colloquy, after which Judge Kessler found that Phillips knowingly, intelligently, and voluntarily waived his right to counsel yet again. RP 55-59.

Phillips remained pro se through his subsequent pleas and sentencing, at which he received standard range sentences.

RP 63-111.

C. **ARGUMENT**

**PHILLIPS' CHOICE TO REPRESENT HIMSELF, RATHER THAN BE REPRESENTED BY COUNSEL HE UNSUCCESSFULLY MOVED TO DISCHARGE, WAS CONSTITUTIONALLY PERMISSIBLE WHERE THERE WAS A PROPER COLLOQUY OF THE RISKS AND WAIVER OF HIS RIGHT TO COUNSEL.**

In this case, Phillips made an unequivocal request to represent himself on two different occasions following vague expressions of dissatisfaction with counsel and explicit statements

that he would refuse to communicate with counsel if he didn't get his way. Following full colloquies, he made a knowing, intelligent, and voluntary waiver of his right to counsel on both occasions. Due to conflicts he intentionally created, he placed himself in the position of choosing between being represented by appointed counsel he disliked or representing himself. Under these circumstances, Phillips' constitutional rights to both counsel and to self-representation were not violated.

The rights of criminal defendants both to counsel and to self-representation are guaranteed by the Sixth and Fourteenth Amendments to the federal constitution and by article I, section 22 of the state constitution. Faretta v. California, 422 U.S. 806, 819, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); State v. Bebb, 108 Wn.2d 515, 524, 740 P.2d 829 (1987). The unjustified denial of the right to self-representation requires reversal. State v. Woods, 143 Wn.2d 561, 586, 23 P.3d 1046 (2001). A defendant who wishes to waive his right to counsel and represent himself must make an affirmative demand, and the assertion of the right must be unequivocal in the context of the record as a whole. State v. Modica, 136 Wn. App. 434, 441, 149 P.3d 446 (2006). Any waiver of the right to counsel must be made knowingly, intelligently, and voluntarily. Modica, 136

Wn. App. at 441. In order to ensure that this standard is met, the trial court must engage the defendant in a colloquy, preferably on the record, that discusses the seriousness of the charge, the possible maximum penalty, and the expectation that the defendant would follow all of the technical procedural rules required in a criminal court proceeding. State v. Lillard, 122 Wn. App. 422, 427-30, 93 P.3d 969 (2004).

Where a defendant's request to proceed pro se is actually an expression of frustration with the trial process, the request may be considered equivocal. State v. Luvone, 127 Wn.2d 690, 698-99, 903 P.2d 960 (1995); Woods, 143 Wn.2d at 587-88. However, when a defendant makes a clear and knowing request to proceed pro se, such a request is not rendered equivocal merely by the fact that the defendant might have a motivation other than a pure desire to represent himself. Modica, 136 Wn. App. at 450 (defendant made a strategic choice to represent himself in order to proceed to trial more quickly than his attorney could prepare); State v. DeWeese, 117 Wn.2d 369, 378-79, 816 P.2d 1 (1991) (defendant's pro se request was unequivocal despite being motivated by frustration with his attorney's performance).

Appointing new counsel to a case at the request of an indigent defendant following an expression of dissatisfaction with court-appointed counsel's performance is a matter within the discretion of the trial court. DeWeese, 117 Wn.2d at 376. If a defendant cannot provide the court with legitimate reasons for assignment of new counsel, the court may require the defendant to make a choice to either continue with current counsel or represent himself. Id. Such a choice is not constitutionally offensive unless the defendant has provided legitimate reasons to discharge the current counsel that justify a substitution. State v. Staten, 60 Wn. App. 163, 169, 802 P.2d 1384 (1991). The rule was concisely stated by the court in State v. Sinclair, 46 Wn. App. 433, 436, 730 P.2d 742 (1986), *review denied*, 108 Wn.2d 1006 (1987): "Even when a defendant does not want to appear pro se, if he fails to provide the court with legitimate reasons why he is entitled to reassignment of counsel, the court can require that he either waive or continue with appointed counsel."

In Sinclair, the defendant's stated reasons to discharge counsel were found to be insufficient where he merely gave the trial judge "a vague account of how counsel had lied and had not shown him the State's fingerprint evidence" and "failed to articulate any

reason he felt justified counsel's replacement, other than his general discomfort with her representation." Sinclair, 46 Wn. App. at 436. The Sinclair court declined to adopt the defendant's argument that his request to appear pro se was equivocal on the basis that he was making it only because the court refused to appoint a new attorney. The court reasoned as follows:

[I]f there can never be a valid waiver when the defendant expressly conditions his request to appear pro se upon the trial court's refusal to appoint new counsel, the court will always be obliged to accede to the defendant's demand under those circumstances, even if there is no legitimate reason to replace appointed counsel. The result here would be that Sinclair would get by default that which he was not entitled to in the first instance – a different attorney.

Sinclair, 46 Wn. App. at 437-38. See also DeWeese, 117 Wn.2d at 372-73, 379 (defendant's choice to proceed pro se following court's denial of his request to substitute counsel for the third time was valid with a proper colloquy, even where the court required the defendant to choose between self-representation and current counsel); Staten, 60 Wn. App. 166-69 (requiring defendant to choose between proceeding pro se or keeping current counsel, where defendant's motion to discharge counsel was not on legitimate grounds, does not make the choice to proceed pro se involuntary).

Phillips' record is very similar to that of Sinclair, DeWeese, and Staten. Initially, Phillips requested to discharge Ms. Young due to his perception that she was not handling his case properly, and stating that he would no longer communicate with her. RP 10. He raised the identical complaint against Ms. Kim. RP 18-19. At that point, he stated unequivocally that he wished to represent himself, and engaged in a lengthy colloquy with Judge Kessler. RP 19-25. His request to proceed pro se was granted. RP 25. He later requested to retract his waiver, recognizing that he needed help. This request was also granted, and Ms. Kim was reappointed to represent him. RP 30-32. When Ms. Kim failed to follow his directions (believing himself to be co-counsel), Phillips again requested a new attorney, specifically one from Northwest Defender Association. RP 35-36, 39. The trial court found no legitimate reason to discharge Ms. Kim, especially since she would soon be replaced by Ms. Deckman, and Phillips would get a new attorney (his stated desire) by default. RP 40. Phillips only reluctantly agreed to work with a new attorney from the same agency, basically foreshadowing problems. RP 43. Following the denial of Ms. Deckman's later motion to withdraw due to threats, Phillips stated unequivocally that he would rather represent himself

rather than be represented by her or anyone from her agency, and eventually answered the necessary questions to the court's satisfaction. RP 49, 55-59. The trial court made clear to the defendant that he had a choice – to be represented by current appointed counsel or to represent himself. RP 51. Phillips chose to represent himself following a proper Faretta waiver. RP 55-59. Given this entire record, Phillips' choice to represent himself was constitutionally permissible.

The appellant relies upon State v. Luvene and State v. Woods to support the contention that Phillips' requests to represent himself were not unequivocal because they arose out of his frustration with counsel. These cases are easily distinguished. In both cases, the court denied the defendants' requests to proceed pro se, finding that their requests were equivocal because they arose out of frustration from requests by their counsel for continuances of the trial date.

In Luvene, the defendant's colloquy with the court clearly reflected ambivalence about representing himself. In one breath Luvene stated that he did not support another continuance and was prepared to defend himself, but in the next he stated that doing so was out of his league. Luvene, 127 Wn.2d at 698. Phillips

expressed no such equivocation or uncertainty with the court, responding, for example, “absolutely” when asked directly if it was his unequivocal desire to represent himself. RP 19.

In Woods, the defendant stated, “I will be prepared to proceed with-with this matter here without counsel come October 21<sup>st</sup>,” only after his counsel requested a lengthy continuance. 143 Wn.2d at 587. The request came as a surprise to his counsel and the court, and clearly arose from frustration due to delay. Id. Unlike our case, at no time did Woods state, “I want to represent myself.” Moreover, Phillips’ unequivocal requests to proceed pro se occurred following his expressions of dissatisfaction of performance by counsel which were not found to support substitution of counsel, not in response to requests of counsel for continuances or trial delays.

#### **D. CONCLUSION**

Norrian Phillips created conflicts with his appointed counsel, and he refused to communicate with them once he disagreed as to strategy or trial tactics. He attempted to discharge or expressed dissatisfaction with every attorney appointed to him. Exercising its sound discretion, the trial court found that no legitimate reasons to

discharge Ms. Kim or Ms. Deckman existed. Phillips' actions and personal feelings eventually put him in the position of making a choice – to accept appointed counsel or to represent himself. He twice unequivocally stated his desire to represent himself, and twice made a knowing, intelligent, and voluntary waiver of his right to counsel. Under these circumstances, Phillips' constitutional rights to counsel and to self-representation were clearly not violated under either the Sixth and Fourteenth Amendments or article I, section 22.

DATED this 18<sup>th</sup> day of April, 2012.

Respectfully submitted,

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