

72607-2

FILED
November 17, 2015
Court of Appeals
Division I
State of Washington

72607-2

NO. 72607-2-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

SIRAJ HAJI-SOMO,

Appellant.

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

APPELLANT'S REPLY BRIEF

TRAVIS STEARNS
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, WA 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF CONTENTSi

TABLE OF AUTHORITIESii

A. ARGUMENT IN REPLY 1

 1. The right to proceed pro se may be deferred, but it must be given
timely consideration. 1

 2. Mr. Haji-Somo was denied an opportunity to adequately present
a defense.....4

B. CONCLUSION..... 7

TABLE OF AUTHORITIES

Cases

<i>Brewer v. Williams</i> , 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977)	2
<i>Chambers v. Mississippi</i> , 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973)	4
<i>Faretta v. California</i> , 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975)	1
<i>In re Det. of Turay</i> , 139 Wn.2d 379, 986 P.2d 790 (1999)	3
<i>McKaskle v. Wiggins</i> , 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984)	4
<i>State v. A.N.J.</i> , 168 Wn.2d 91, 225 P.3d 956 (2010)	6
<i>State v. Barker</i> , 75 Wn. App. 236, 881 P.2d 1051 (1994)	2
<i>State v. Downing</i> , 151 Wn.2d 265, 87 P.3d 1169 (2004)	5
<i>State v. Madsen</i> , 168 Wn.2d 496, 229 P.3d 714, 717 (2010)	1, 2, 3, 4
<i>State v. Stenson</i> , 132 Wn.2d 668, 940 P.2d 1239 (1997)	1
<i>State v. Tatum</i> , 74 Wn.App. 81, 871 P.2d 1123 (1994)	4
<i>State v. Vermillion</i> , 112 Wn. App. 844, 51 P.3d 188 (2002)	1

A. ARGUMENT IN REPLY

1. The right to proceed pro se may be deferred, but it must be given timely consideration.

The right to proceed pro se is so fundamental that it is afforded despite its potentially detrimental impact on both an accused person and the administration of justice. *State v. Madsen*, 168 Wn.2d 496, 503, 229 P.3d 714, 717 (2010) (citing *Faretta v. California*, 422 U.S. 806, 834, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); *State v. Vermillion*, 112 Wn. App. 844, 51 P.3d 188 (2002)). “The unjustified denial of this [pro se] right requires reversal.” *Id.* at 503 (quoting *State v. Stenson*, 132 Wn.2d 668, 737, 940 P.2d 1239 (1997)).

A request to proceed pro se must be considered when it is timely and unequivocal. *Madsen*, 168 Wn.2d at 504 (citing *Stenson*, 132 Wn.2d at 737). There is nothing improper about deferring a decision on whether to proceed pro se, but the court must ultimately afford an accused person the opportunity to demonstrate the waiver is knowing, voluntary, and intelligent. *Madsen*, 168 Wn.2d at 504. There is no requirement an accused person must continue to request new counsel each time a case is heard. *Id.* at 507.

While the law favors proceeding with counsel, courts may not indulge in carte blanche denials of the right to proceed without counsel.

Madsen, 168 Wn.2d at 507 (citing *Brewer v. Williams*, 430 U.S. 387, 404, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977)). Where the request to proceed pro se is made well before trial, the right exists “as a matter of law.” *State v. Barker*, 75 Wn. App. 236, 241, 881 P.2d 1051 (1994). The failure to address the right to self-representation makes the right illusory. *See, Madsen*, 168 Wn.2d at 504.

Mr. Haji-Somo made a timely request to proceed pro se. 5/21/14 RP 6. At this point, the court was obligated to make an inquiry into whether this request was knowing, voluntary and intelligent. The court properly determined it did not have enough information to make this determination and continued to matter. The only information the court appears to have gathered with regard to Mr Haji-Somo’s desire to represent himself came from his newly appointed attorney, who informed the court that Mr. Haji-Somo did not want to be represented by appointed counsel. 5/28/14 RP 5. Counsel informed the court that Mr. Haji-Somo was in the process of hiring an attorney, but no further inquiries seem to have been made with regard to Mr. Haji-Somo’s request.

When the court is confronted with a timely request to proceed pro se, it is incumbent upon the court to make an inquiry into whether

the waiver of counsel is knowing, voluntary and intelligent. While deferring the inquiry to receive more information is proper, the failure to complete the inquiry makes the right itself illusory. The court must conduct a meaningful colloquy before denying the right to proceed without counsel. *In re Det. of Turay*, 139 Wn.2d 379, 396, 986 P.2d 790 (1999). “The court cannot stack the deck against a defendant by not conducting a proper colloquy to determine whether the requirements for waiver are sufficiently met.” *Madsen*, 168 Wn.2d at 506.

Here, the right became meaningless when the court did not complete its inquiry until after Mr. Haji-Somo had to ask again to proceed pro-se. The lateness of this second request does not cure the court’s failure to address the initial timely request. *Madsen*, 168 Wn.2d at 510. Because Mr. Haji-Somo’s request to proceed pro se was timely and the court failed to rule upon it until after trial had commenced, Mr. Haji-Somo is entitled to reversal and remand for a new trial. *Id.*

Finally, the State argues that the failure of the court to conduct a hearing on Mr. Haji-Somo’s right to represent himself was harmless error. State’s Brief at 17. This argument should be rejected. The denial of the right to self-representation is not amenable to a harmless error analysis. “The right is either respected or denied; its deprivation cannot

be harmless.” *McKaskle v. Wiggins*, 465 U.S. 168, 177 n. 8, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984).

2. Mr. Haji-Somo was denied an opportunity to adequately present a defense.

The right to defend against the State’s accusations is fundamental to due process. *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). Continuances may be necessary in order to protect this important right. A reviewing court will examine the prejudice caused to the defendant because of the denial and whether the result would likely have been different had the continuance been granted. *State v. Tatum*, 74 Wn.App. 81, 86, 871 P.2d 1123 (1994) (citing *State v. Eller*, 84 Wn.2d 90, 95–96, 524 P.2d 242 (1974)). The question of whether the denial of a continuance violates the fundamental right to present a defense is conducted on a case-by-case basis. *State v. Downing*, 151 Wn.2d 265, 274, 87 P.3d 1169 (2004).

Defense counsel’s request for a brief continuance was reasonable and necessary to protect Mr. Haji-Somo’s right to defend himself. While the record is not clear as to when defense counsel began to communicate with Mr. Haji-Somo about his defense, it is clear that many of their initial conversation involved this issue of whether she

would continue to represent Mr. Haji-Somo. It should also be emphasized that defense counsel asked for the continuance prior to the jury being sworn in. 8/11/2014 RP 11. She asked the court for “at most a week” to speak to witnesses who would have been able to assist in his defense at trial. *Id.* at 11-12. She declared “that I do believe that these witnesses would be necessary to further that defense, and so they would not be simply frivolous witnesses with information that would not have a significant impact on my client's defense.” *Id.* at 13.

Mr. Haji-Somo’s request for a continuance of no more than a week so that his lawyer could speak to his witnesses and investigate his case was reasonable and necessary to his ability to defend himself. *See, State v. A.N.J.*, 168 Wn.2d 91, 111-12, 225 P.3d 956 (2010) (extent of investigation required vary depending upon the issues and facts of each case). Opening statements had not taken place and no witness had testified. Jurors could easily have been questioned regarding their availability for this short delay. There were no witness availability issues. There was no reason to continue the case for the short continuance defense counsel requested.

Mr. Haji-Somo was prejudiced by the failure of his attorney to complete her investigation. No witnesses were called other than Mr.

Haji-Somo despite the fact he was arrested in an apartment full of other people. 8/12/14 RP 35. Mr. Haji-Somo explained had no memory of the prior evening. 8/14/14 RP 13. Had the investigation been completed, Mr. Haji-Somo's excessive drinking could have been verified. 8/14/14 RP 13. His memory lapse could have been explained. This would have allowed defense counsel to argue from facts verified by witnesses other than her client, which would have strengthened her argument that Mr. Haji-Somo was unable to form the intent to commit the burglary. 8/14/14 RP 58-59.

This State highlighted this lack of corroboration in closing argument. The State relied heavily upon credibility, arguing Mr. Haji-Somo's innocence or guilt came down to "really who's more credible, the defendant or the police and the Hill family." 8/14/14 RP 52. Had defense counsel been granted the brief continuance to complete her investigation, she would have been able to address this argument and the jury would have been able to understand the depth of Mr. Haji-Somo's intoxication. Without the investigation, Mr. Haji-Somo was not able to present a complete defense.

A short continuance to allow defense counsel to prepare a constitutionally adequate defense would have afforded Mr. Haji-Somo

the due process right to present a defense. Because the trial court denied his motion, this Court should remand this matter for a new trial.

B. CONCLUSION

Mr. Haji-Somo requests that this Court reverse his conviction and remand to the trial court for further proceedings.

DATED this 17th day of November 2015.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. Stearns', with a long horizontal flourish extending to the right.

TRAVIS STEARNS (WSBA 29935)
Washington Appellate Project (91052)
Attorneys for Appellant

