

FILED
August 21, 2015
Court of Appeals
Division I
State of Washington

NO. 73034-7-I

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

STATE OF WASHINGTON,

Respondent,

v.

DANIEL BELLEQUE,

Appellant.

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

The Honorable Patrick Oishi, Judge
The Honorable Jim Rogers, Judge
The Honorable Regina Cahan, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Appellant was wrongly deprived of his Wash. Const. Art. 1, § 22¹ right to self-representation.

Issue Pertaining to Assignment of Error

Did the trial court err in denying Appellant's pretrial motion to proceed to pro se on the basis that it was equivocal when Appellant stated unequivocally that he was immediately prepared to proceed to trial and that he wanted to proceed pro se in order to pursue his trial strategy over that of his appointed counsel?

B. STATEMENT OF THE CASE

In June 2014, the King County prosecutor charged appellant Daniel Belleque with second degree burglary and first degree theft, claiming the month before he broke into a medical marijuana dispensary and took over \$12,000 in product and cash. CP 1-7. In mid July 2014, attorney Nikole Hecklinger filed a notice of appearance as Belleque's counsel. Supp CP __ (sub no. 6, Notice of Appearance and Request for Discovery, filed 07/21/14).

On September 29, 2014, a hand-written letter from Belleque to the King County Superior Court "Chief Judge" was filed, in which Belleque

¹ Wash. Const. Art. 1, § 22, provides; "In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel...."

requested new counsel be appointed, claiming Hecklinger "is unwilling to do anything on my behalf, this is a major conflict." CP 9-11. That request was summarily denied by the Honorable Patrick Oishi, Judge, on October 6, 2014, finding "[t]here is absolutely no basis." CP 12; 1RP² 3.

The following day Belleque submitted another letter "begging" the court to provide him with new counsel, noting Hecklinger refused to investigate his alibi defense because she did not believe him. CP 13-15. And on October 22, 2014, Belleque filed another letter³ asking the court to appoint new counsel, again claiming Hecklinger refused to pursue his proposed alibi defense. CP 16-18. It does not appear the court took any action with regard to these pro se filings.

On November 5, 2014, Belleque filed a pro se motion to dismiss the charges with prejudice, claiming his speedy trial rights had been violated. CP 19-22. On November 12, 2014, the court entered an order refusing to rule on any pro se motions. CP 23-30.

On December 1, 2014, before the Honorable Jim Rogers, Judge,

² There are nine volumes of verbatim report of proceedings referenced as follows: 1RP - 10/06/14; 2RP - 12/03/14; 3RP - 12/24/14; 5RP - 12/29/14; 6RP - 12/30/14; 7RP - 12/31/14; 8RP - 01/20/15 (sentencing); and 9RP - 12/01/14 (pro se motion to self-represent) & 01/02/15 (verdict).

³ The letter indicates it was drafted on "9/16/14", but this appears to have been stated in error as it references Judge Oishi's October 6th ruling denying a similar request.

Belleque informed the court he had filed a motion to proceed pro se, although the court had not yet received it, and was hoping the court would grant it immediately and appoint "advising counsel." 9RP 3-4. When the court explained it does not appoint stand-by counsel for pro se litigants, Belleque said he still wanted to proceed with his motion. 9RP 4.

The court noted it planned to continue the hearing and warned Belleque it was unlikely his motion would be granted because the court did not consider it timely. 9RP 5. The court also inquired whether the reason Belleque made the motion was because his previous request for new counsel had been denied, to which Belleque replied it was. 9RP 6. The court then informed Belleque that if that was the case, then it also considered it "an equivocal invocation of the right to represent one's self." 9RP 7.

On December 3, 2014, Judge Rogers formally heard Belleque's request to proceed pro se. 2RP. Belleque told Judge Rogers "I am more than competent enough to defend myself. I've read the discovery. I have information that I need. I could start trial today." 2RP 2. Upon prompting from the court, Hecklinger stated;

I'm not one to try to get out of a case, Your Honor, but I do think there is a very broken attorney client relationship here. He wants -- he has very strong feeling about certain things that, you know -- that I'm not -- that are not my trial strategy.

So [if he] wants to proceed with those -- and I don't know that . . . another attorney would do those is the problem. So the only way for him to get those done is to

proceed pro se. And I think that Breedlove^[4] is instructional on this. I mean, it was allowed to go pro se right before trial.

2RP 3.

The court stated

the issue . . . is whether. . . Mr. Belleque is asserting his right to go pro se in a timely manner. That's really the issue, because in order to allow someone to represent themselves, the first issue is whether it's unequivocal and whether it's timely.

Last time we were -- came to court, I was questioning whether it was unequivocal or not. It sounds fairly straightforward now. I was also questioning whether it was timely. Mr. Belleque says he can go right to trial immediately without any further delay. So let me ask Mr. Belleque a few questions.

2RP 4-5. The court then engaged Belleque in a colloquy regarding whether he understood the rights he was giving up by going pro se, to which Belleque answered in the affirmative. 2RP 5-6. At one point in the colloquy, Belleque stated: "The only reason I feel like I need to do this [is] because I'm not getting the services I feel like I should have gotten. . . . I feel like I haven't gotten the civil rights of what that says right there."⁵ 2RP 6-7.

⁴ Hecklinger was likely referring to State v. Breedlove, 79 Wn. App. 101, 106-111,900 P.2d 586 (1995), in which this Court held it was reversible error to deny a timely and unequivocal pretrial motion to proceed pro se made because of defendant's dissatisfaction with appointed counsel.

⁵ Belleque is likely referring to the "waiver of counsel form" he was provided at a prior hearing. See 2RP 4-5 (court asks Belleque if he has had a chance to look through the "waiver of counsel" form he was provided by the court at a prior hearing).

When the court then stated that if the reason Belleque was seeking to go pro se was because he lost his prior motions to dismiss Hecklinger, that was an equivocal basis and his motion to proceed pro se would be denied, the following colloquy occurred between Belleque and court

[BELLEQUE]: My reason to go pro se, because I have evidence in here that proving -- not necessarily proving that I'm not guilty, but proving that people have lied in this case about me, which under the rules, you can't get a conviction under false testimony. Right? I asked for [Hecklinger] to do her job. Just send my motion -- doesn't matter what her personal opinion is, of what it is. I've asked her to do certain things. She told me no. That, to me, is a violation of my constitutional rights, so I'm invoking my constitutional rights so I can get that done. Does that make sense? It has nothing to do with her. She could have been another lawyer that said to me -- it's my constitutional right to have a fair trial.

THE COURT: Let me just tell you, the jury decides whether or not somebody's telling the truth or not telling the truth, not the judge.

[BELLEQUE]: That's fine. I got the paper. I got the black and white --

THE COURT: That's your cross-examination and examination of witnesses, not through --

[BELLEQUE]: That's right. That's right. That's what I'm hoping for, sir.

THE COURT: I find this is an equivocal indication of a right to go pro se. The motion is denied. All right. We're in recess.

2RP 8-9

Belleque was subsequently represented by Hecklinger at trial, convicted by a jury of second degree burglary and the lesser included offense of third degree theft, and sentenced to 68 months in prison. CP 65-66, 98-

109; 9RP 9-11. Belleque appeals. CP 110-22.

C. ARGUMENT

BELLEQUE WAS DENIED HIS CONSTITUTIONAL RIGHT
TO SELF-REPRESENTATION.

Both the Washington and federal constitutions guarantee a criminal defendant the right to assistance of counsel. Wash. Const. art. I, § 22 (amend.10); U.S. Const., Amend. 6, 14. A defendant, however, also has a right to self-representation under both state and federal law. Wash. Const. art. I, § 22 (amend.10); Faretta v. California, 422 U.S. 806, 835, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). The state constitutional right is absolute and its violation is reversible error. In re Detention of L.S., 138 Wn. App. 882, 890-891, 159 P.3d 435 (2007).

Because there exists an inherent tension between the right to counsel and the right to self-representation, a defendant wishing to proceed pro se must make an unequivocal demand to do so, and the trial court must ensure that the waiver of counsel is “knowing, voluntary, and intelligent.” State v. DeWeese, 117 Wn.2d 369, 376-78, 816 P.2d 1 (1991). Self-representation is a grave undertaking, one not to be encouraged, and courts indulge in every reasonable presumption against waiver. Brewer v. Williams, 430 U.S. 387, 404, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977); DeWeese, 117 Wn.2d at 379; State v. Chavis, 31 Wn. App. 784, 789, 644

P.2d 1202 (1982). However,

This presumption does not give a court carte blanche to deny a motion to proceed pro se. The grounds that allow a court to deny a defendant the right to self-representation are limited to a finding that the defendant's request is equivocal, untimely, involuntary, or made without a general understanding of the consequences. . . .

A court may not deny a motion for self-representation based on grounds that self-representation would be detrimental to the defendant's ability to present his case or concerns that courtroom proceedings will be less efficient and orderly than if the defendant were represented by counsel. . . .

State v. Madsen, 168 Wn.2d 496, 504-05, 229 P.3d 714 (2010) (citations omitted).

The trial court is responsible for assuring decisions regarding self-representation are made with at least a minimal understanding of what pro se representation requires of the defendant. City of Bellevue v. Acrey, 103 Wn.2d 203, 210, 691 P.2d 957 (1984). The favored way of making this determination is by a colloquy on the record that establishes the defendant understands the risks of self-representation, including the nature and classification of charges, the maximum penalty upon conviction, and the existence of technical and procedural rules that would bind the defendant at trial. DeWeese, 117 Wn.2d at 378; Acrey, 103 Wn.2d at 211; State v. Silva, 108 Wn. App. 536, 541, 31 P.3d 729 (2001).

Here, the trial court engaged Belleque in the appropriate colloquy at the December 3, 2014 pretrial hearing. 2RP 4-9. It denied Belleque's demand, however, findings it was "an equivocal indication of a right to go pro se." 2RP 9; CP 37. This was error. The record fails to establish Belleque's demand was "equivocal, untimely, involuntary, or made without a general understanding of the consequences." *Madsen*, 168 Wn.2d at 505. Because the "equivocal" finding is not supported by the record, Belleque's convictions should be reversed and the matter remanded for a new trial at which Belleque is allowed to exercise his constitutional right to self representation.

1. Belleque's demands to proceed pro se was unequivocal.

A reviewing court looks at the record as a whole to determine whether a demand to proceed pro se was unequivocal. *State v. Stenson*, 132 Wn.2d 668, 740-41, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998). In *Stenson*, the defendant moved to proceed pro se only after the trial court denied his motion to substitute counsel. *Stenson*, 132 Wn.2d at 739. And even after his demand, Stenson continued to request the appointment of new counsel and otherwise made it apparent he felt forced into representing himself. 132 Wn.2d at 740, 742. The *Stenson* court held that where the demand is conditioned on denial of a new

attorney, the record must establish the demand is unequivocal, which it was not in Stenson's case. Rather, his request was both conditional and equivocal. 132 Wn.2d at 741-742.

In United States v. Kienenberger, 13 F.3d 1354 (9th Cir. 1994), Kienenberger repeatedly expressed dissatisfaction with appointed counsel, and insisted he be allowed to represent himself, but with counsel to assist with procedural matters. 13 F.3d at 1355-56. At a hearing on appointed counsel's motion to withdraw, Kienenberger reiterated this demand. It was denied. 13 F.3d at 1356.

On appeal, the Ninth Circuit rejected Kienenberger's claim that his demand to proceed pro se was unequivocal:

We have reviewed the record. While Kienenberger, on numerous occasions, requested that he be counsel of record, his requests were always accompanied by his insistence that the court appoint advisory or standby counsel to assist him on procedural matters. Kienenberger never relinquished his right to be represented by counsel at trial. His requests to represent himself were not unequivocal. The district court did not err.

Kienenberger, 13 F.3d at 1356.

Unlike in Kienenberger or Stenson, Belleque's demand to proceed pro se was made without conditions. It was not made as an alternative to appointment of new counsel. It was not conditioned on the appointment of stand-by counsel. It was not conditioned on a continuance so he could

muster his resources. Nor did Belleque give any indication he felt forced to represent himself.

Belleque's demand, made weeks before trial, was not as the trial court concluded, "an equivocal indication of a right to go pro se." 2RP 9. To the contrary, Belleque made clear that he wanted to proceed pro se because he wanted to pursue a different defense strategy than Hecklinger was willing to engage in on his behalf. 2RP 8-9.

2. Belleque's demands to proceed pro se were timely.

A demand to proceed pro se must be made in a timely fashion. In determining whether a demand is timely, the trial court's discretion lies along a continuum corresponding to the time when the demand is made;

The cases which have considered the timeliness of a proper demand for self-representation have generally held: (a) if made well before the trial or hearing and unaccompanied by a motion for continuance, the right of self-representation exists as a matter of law; (b) if made as the trial or hearing is about to commence, or shortly before, the existence of the right depends on the facts of the particular case with a measure of discretion reposing in the trial court in the matter; and (c) if made during the trial or hearing, the right to proceed pro se largely rests in the informed discretion of the trial court.

State v. Fritz, 21 Wn. App. 354, 361, 585 P.2d 173 (1978), review denied, 92 Wn.2d 1002 (1979).

For sure, a demand to proceed pro se is not considered 'timely' if it is made "to delay one's trial or obstruct justice." State v. Paumier, 155

Wn. App. 673, 230 P.3d 212 (2010) (quoting State v. Breedlove, 79 Wn. App. 101, 106, 900 P.2d 586 (1995)), affirmed, 176 Wn.2d 29, 288 P.3d 1126 (2012). There must, however, be substantial evidence in the record to support such a finding, or any other finding relevant to timeliness. Winterstein, 167 Wn.2d at 628.

Belleque's demand to proceed pro se was made weeks before trial was set to begin, and was not accompanied by a request for a continuance, but instead with a declaration that he was prepared to proceed to trial immediately if needed. 2RP 2. As such, Belleque had a right to proceed pro se "as a matter of law." Eritz, 21 Wn. App. at 361. The trial court correctly did not find Belleque's demand was untimely, as there is no basis in the record to support such a finding.

With regard to the trial court's admonishment to Belleque that it had never seen a pro se defendant win a case (see 2RP 7-8), this is not a valid basis to deny a defendant pro se status. See Madsen, 168 Wn.2d at 505 ("A court may not deny a motion for self-representation based on grounds that self-representation would be detrimental to the defendant's ability to present his case . . ."). Belleque might proceed pro se at his peril, but he has the right to do so nonetheless.

When considered as a whole, the record fails to provide a valid basis for denying Belleque's demand to proceed pro se. Belleque made an

unequivocal, knowing, voluntary, intelligent and timely demand to exercise his right to self-representation and it should have been granted. Madsen, 168 Wn.2d at 505-06. Rejection of that demand requires reversal. Madsen, 168 Wn.2d at 510.

D. CONCLUSION

For the reasons stated, this Court should reverse Belleque's judgment and sentence and remand for a new trial.

DATED this 21st day of August 2015.

Respectfully Submitted,

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 73034-7-I
)	
DANIEL BELLEQUE,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 21ST DAY OF AUGUST 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] DANIEL BELLEQUE
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LARCH CORRECTIONS CENTER
15314 NE DOLE VALLEY ROAD
YACOLT, WA 98675-9531

SIGNED IN SEATTLE WASHINGTON, THIS 21ST DAY OF AUGUST 2015.

X *Patrick Mayovsky*