

No. 43827-5-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

GEOFFREY LAWSON,

Appellant.

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

The Honorable Russell W. Hartman

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court violated Mr. Lawson's Sixth Amendment and article I, section 22 rights to self-representation, as well as his Fourteenth Amendment right to due process, when it denied him access to the means necessary to prepare and present his defense.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

The state and federal constitutions protect an accused person's right to meaningful self-representation. The right encompasses meaningful access to the tools necessary to prepare and present an adequate defense, including legal materials. Failure to safeguard the right violates due process of law, requiring reversal and dismissal of the conviction. Where Mr. Lawson made numerous timely requests for adequate access to legal materials and other tools necessary for his defense, the jail repeatedly failed to comply with his attempts to secure those materials, and the prosecution refused to intervene, was Mr. Lawson deprived of his constitutional right to self-representation and to an adequate defense, in violation of due process of law?

C. STATEMENT OF THE CASE

Geoffrey Lawson was charged with one count of voyeurism and one count of attempted voyeurism. CP 1-3. At arraignment, and over Mr. Lawson's initial objections, an attorney was appointed to represent him. 9/14/2011RP 2-5. At the next hearing on October 4, 2011, and following a colloquy, the trial court granted Mr. Lawson's motion to proceed *pro se*. 10/4/2011RP 14. Mr. Lawson refused the trial court's offer of stand-by counsel. 10/4/2011RP 12.

Almost immediately Mr. Lawson ran into problems. On October 28, 2011, a hearing was held to address Mr. Lawson's concerns that his right to represent himself was being infringed by the Kitsap County Jail. 10/28/2011RP 2. Mr. Lawson asserted that his access to legal research was limited to a total of four hours, his source of paper and pen were depleted, and the jail refused to provide new ones. 10/28/2011RP 4. The jail admitted Mr. Lawson was being given the minimum amount of research time, the amount given to an ordinary inmate who was not representing himself. 10/28/2011RP 9-10. Mr. Lawson was also limited to the telephone available to the general population.

10/28/2011RP 11. Despite recognizing Washington courts had held that such limited resources as those provided to Mr. Lawson were not adequate, the trial court nevertheless here found that Mr. Lawson had been offered all that was necessary to prepare his defense. 10/28/2011RP 12-13. The court did acknowledge though, that the four hours of research was likely not adequate. 10/28/2011RP 23.

The trial court in a hearing on November 2, 2011, again addressed the matter. At this hearing, the jail noted it had provided 18.75 hours of computer legal research time to Mr. Lawson in the five days since the last hearing. 11/2/2011RP 8-9. But the jail noted the computer on which jail inmates access legal research does not have a printer, thus Mr. Lawson was unable to print off copies of his research. 11/2/2011RP 10. The trial court found this adequate despite the fact Mr. Lawson faced the task of responding to the State's motion to admit other acts evidence under ER 404(b) and RCW 10.58.090, and despite recognizing the matter was complex:

One of the risks of representing yourself, Mr. Lawson, *this is a complex case.*

...
And frankly, within a 60-day time set, a professionally trained lawyer might be able to get through the discovery packet, analyze the case, and prep properly for trial. You may not be able to do that, but that's your choice. You know, I can only make the resources -- I have to make the choices about what resources we can make available to you, have to select resources that meet the due process requirements and the right to representation requirements that are in the constitution. But those choices don't affect the complexity of the case.

...
And if you're involved in a really serious and difficult case, lots of witnesses, lots of discovery issues, lots of briefing to address the legal nuances of the charge and you're not good at it, *that's your issue.*

11/2/2011RP 27-28 (emphasis added). Mr. Lawson noted that the court was putting him in the untenable position of waiving his right to speedy trial because of the lack of resources the court was willing to provide him. 11/2/2011RP 28-29.

The trial court scheduled the hearing on the State's motion to admit prior acts of Mr. Lawson under ER 404(b) and RCW 10.58.090¹ for November 8, 2011. 11/8/2011RP 2. Mr. Lawson notified the court he was not ready to proceed on the

¹ RCW 10.58.090 was subsequently ruled unconstitutional in *State v. Gresham*, 173 Wn.2d 405, 415-16, 269 P.3d 207 (2012).

motion because of his continuing problem of gaining access to the resources he needed to prepare. 11/8/2011RP 2-3. Mr. Lawson related he did not have adequate paper to file motions in response to the State's motions and did not have adequate time, in light of the inability of the jail to print the product of his research. 11/8/2011RP 5-6. Mr. Lawson again related to the court that the court was forcing him into a Hobson's choice of either going to trial within the time limits of CrR 3.3 or waiving his right to a speedy trial so that he could effectively represent himself. 11/8/2011RP 10-12.³ In response to Mr. Lawson's motion, the court appointed an investigator to assist him. 11/8/2011RP 64. The court refused Mr. Lawson's request for a laptop computer. 11/8/2011RP 83. Ultimately, Mr. Lawson agreed that a continuance of the trial date was necessary because of the lack of resources made available to him. 11/8/2011RP 93-94.

³ At this hearing, the State also upped the ante by filing an amended information, increasing the number of counts Mr. Lawson faced from two to six. 11/8/2011RP 30-34. The State added two counts of second degree burglary, an additional count of voyeurism, and an additional count of attempted voyeurism. CP 20-26.

At a hearing on November 10, 2011, Mr. Lawson moved for the appointment of stand-by counsel given the complexity of the case. 11/10/2011RP 9. The court agreed and appointed stand-by counsel to assist Mr. Lawson. 11/10/2011RP 24.

On January 12, 2012, Mr. Lawson moved to dismiss the matter on the grounds that his work product was available to jail staff, and his access to resources, specifically legal research, was still extremely limited, so much so that he was unable to prepare his defense. 1/12/2012RP 4. Mr. Lawson noted that Coyote Ridge Corrections Center inmates had more access to legal research than he had at the Kitsap County Jail. 1/12/2012RP 14-15. Mr. Lawson had no access to legal information which was available only on the internet, had no access to word processing, and he had no access to legal research in the evening. 1/12/2012RP 15-19. The jail confirmed Mr. Lawson was denied access to any electronic material such as DVDs or CDs, because he did not have a computer, which had been denied by the trial court. 1/12/2012RP 20. The jail also confirmed that some of Mr. Lawson's legal materials were open to the jail staff and not kept separate. 1/12/02012RP 20-22.

Nevertheless, the trial court again found Mr. Lawson was not denied his right to prepare and present a defense despite the jail's admissions of infringements on his right. 1/12/2012RP 37-39.

Due to these infringements, Mr. Lawson submitted he was unable to prepare for the court's hearing on the admissibility of the prior acts evidence under ER 404(b) and RCW 10.58.090. 1/12/2012RP 44.³ The court held the hearing over Mr. Lawson's objection and ruled the evidence of one of the prior acts inadmissible for a failure of the State to show Mr. Lawson was the perpetrator of that event. 1/12/2012RP 60. The court found evidence of two other events admissible as (1) a common scheme or plan; (2) to counter an argument of mistake; and (3) evidence of intent, specifically sexual gratification. 1/12/2012RP 61-65.

The following day, stand-by counsel moved to withdraw, arguing that Mr. Lawson personally wished to interview the witnesses, which the prosecutor would not allow to happen, and

³ The State finally conceded at this hearing that the evidence was not admissible under RCW 10.58.090, "based on the new Washington Supreme Court ruling invalidating 10.58 for prior sex offenses," presumably referring to *Gresham, supra*. 1/12/2012RP 45.

counsel believed that all of the interviews could not be completed by the trial date. 1/13/2012RP 2. The court noted the complexity of the issue of allowing Mr. Lawson to personally interview the witnesses, given a pending court rule regarding direct examination of victims by *pro se* defendants, and the infringement that rule may have on the Sixth Amendment. 1/13/2012RP 6. Following an *in camera* hearing involving the court and Mr. Lawson, the court refused to allow stand-by counsel to withdraw but did continue the trial for several weeks to determine whether the witness interviews could be completed. 1/13/2012RP 10, 17-18.

On January 27, 2012, Mr. Lawson moved for additional resources to prepare for his defense, noting that he did not have access to a printer, or access to either his investigator or stand-by counsel, and was working with only a pen and paper.

1/27/2012RP 4. Mr. Lawson submitted that with these extremely limited resources, he would be unable to be prepared for trial on the scheduled trial date of February 7, 2012.

1/27/2012RP 4-5. The trial court chastised Mr. Lawson for his decision to proceed *pro se* and contended the matter could still

proceed to trial on the scheduled trial date. 1/27/2012RP 6-9.

As a consequence, the trial court denied Mr. Lawson's request for additional resources. 1/27/2012RP 9. Citing the decision in *State v. Silva*, the court also dismissed Mr. Lawson's demand to personally interview the witnesses, requiring that the investigator and stand-by counsel conduct the interviews.

1/27/2012RP 17-21.

Ultimately, on February 1, 2012, Mr. Lawson decided to plead guilty to lesser offenses. 2/1/2012RP 16-17. In return for his concession, the State agreed to allow Mr. Lawson to enter an *Alford*⁴ plea to one felony count of voyeurism and one count of attempted voyeurism, a gross misdemeanor. 2/1/2012RP 17-18. Following a colloquy, the court accepted Mr. Lawson's guilty plea. CP 37-46; 2/1/2012RP 18-29.

⁴ *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

D. ARGUMENT

MR. LAWSON'S CONSTITUTIONAL RIGHT TO SELF-REPRESENTATION WAS VIOLATED, REQUIRING DISMISSAL

1. A defendant has the right to represent himself and have access to the means necessary to prepare and present his defense. A criminal defendant possesses two mutually exclusive rights under the Sixth Amendment: the right to counsel and the right to represent himself. *Gideon v. Wainwright*, 372 U.S. 335, 339-45, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); *Faretta v. California*, 422 U.S. 806, 819, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). Under the Sixth Amendment, depriving a self-represented defendant of "all means of presenting a defense" violates the right of self-representation. *People v. Blair*, 36 Cal.4th 686, 733, 115 P.3d 1145, 31 Cal.Rptr.3d 485 (2005).

While the United States Supreme Court has not ruled what must be provided to one representing oneself, *Kane v. Garcia Espitia*, 546 U.S. 9, 10, 126 S.Ct. 407, 163 L.Ed.2d 10 (2005), "[a]n incarcerated defendant may not meaningfully exercise his right to represent himself without access to law

books, witnesses, or other tools to prepare a defense.” *Milton v. Morris*, 767 F.2d 1443, 1446 (9th Cir.1985).

In contrast, article I, section 22 of the Washington State Constitution explicitly guarantees both the right to counsel and the right to represent oneself *pro se*, and also provides that a pretrial detainee have a greater right of access to the courts than the federal constitution provides. Art. I, § 22; *State v. Silva*, 107 Wn.App. 605, 609, 27 P.3d 663 (2001); *State v. Kolocotronis*, 73 Wn.2d 92, 97, 436 P.2d 774 (1968). The Washington Constitution affords *pro se* defendants a specific corollary right of “reasonable access to state-provided resources” that will enable a defendant to prepare a meaningful *pro se* defense. *Silva*, 107 Wn.App. at 622.

At the very least, “indigent inmates must be provided at state expense with paper and pen to draft legal documents . . .” *Bounds v. Smith*, 430 U.S. 817, 824, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977). Access to legal research is a necessity as well:

It would verge on incompetence for a lawyer to file an initial pleading without researching such issues as jurisdiction, venue, standing, exhaustion of remedies, proper parties plaintiff and defendant, and types of relief available. Most importantly, of

course, a lawyer must know what the law is in order to determine whether a colorable claim exists, and if so, what facts are necessary to state a cause of action.

If a lawyer must perform such preliminary research, it is no less vital for a pro se prisoner. Indeed, despite the "less stringent standards" by which a pro se pleading is judged, *Haines v. Kerner*, 404 U.S. 519, 520, 92 S.Ct. 594, 595, 30 L.Ed.2d 652 (1972), it is often more important that a prisoner complaint set forth a nonfrivolous claim meeting all procedural prerequisites, since the court may pass on the complaint's sufficiency before allowing filing in forma pauperis and may dismiss the case if it is deemed frivolous. See 28 U.S.C. s 1915. Moreover, if the State files a response to a pro se pleading, it will undoubtedly contain seemingly authoritative citations. Without a library, an inmate will be unable to rebut the State's argument. It is not enough to answer that the court will evaluate the facts pleaded in light of the relevant law. Even the most dedicated trial judges are bound to overlook meritorious cases without the benefit of an adversary presentation. *Cf. Gardner v. California*, 393 U.S. 367, at 369-370, 89 S.Ct. 580, 582, 21 L.Ed.2d 601 (1969).

Bounds, 430 U.S. at 825-26 (footnotes omitted).⁵

⁵ Although *Bounds* involved indigent state prison inmates seeking federal discretionary review, it would seem an indigent *pro se* defendant preparing for trial needs even greater access to resources than those individuals in *Bounds*.

2. The trial court unduly restricted Mr. Lawson's access to the resources necessary to prepare his defense. Mr. Lawson was continually denied adequate access to legal materials by the Kitsap County Jail, the prosecuting attorney's office, and the trial court as well as other resources necessary for his defense, such as witness interviews.

In *Milton, supra*, the Ninth Circuit reversed the California convictions of a *habeas* petitioner who was deprived access to research materials, advisory counsel, means to serve subpoenas, and the effective use of a telephone. 767 F.2d at 1444. The trial court had sought to secure Milton access to needed materials to prepare his defense. *Id.* at 1444-45. Notwithstanding the court's efforts, the jail either misinterpreted or ignored court orders, resulting in untimely or deficient compliance with the court's directives. *Id.* On review, the Ninth Circuit held the obstruction of Milton's self-representation right violated due process of law, reasoning,

Despite timely and reasonable requests, Milton was isolated from any means to prepare. The trial court's own orders, which recognized the legitimacy of his need and which would have provided possible avenues of preparation through telephone usage

and a runner, were not heeded. After Milton elected to represent himself, the state not only affirmatively failed to provide defense resources, but also materially impeded use of the minimal tools for defense preparation which the trial court tried to ensure.

Id. at 1445; *see also*, *Taylor v. List*, 880 F.2d 1040, 1047-49 (9th Cir. 1989) (denial of access to library or library materials and library clerks established issue of material fact defeating summary judgment motion in prisoner's rights action).⁶

In *Silva*, this Court held that the defendant, who was timely provided: (1) access to legal materials; (2) pencil and paper; (3) copying services; (4) inmates' telephone; (5) sheriff's office to serve subpoenas; (6) coordination services through standby counsel; (7) blank subpoena forms; (8) postage; (9) access to a notary; and (10) witness interviews, received the resources necessary to provide himself constitutionally adequate representation. 107 Wn.App. at 625-26. Regarding legal materials, this Court noted that as opposed to Mr. Lawson,

⁶ *See also* *People v. Jenkins*, 22 Cal.4th 900, 1040, 95 Cal.Rptr. 2d 377, 997 P.2d 1044 (2000) (California Supreme Court ruling that under the Sixth Amendment, "[i]t is certainly true that a [self-represented] defendant . . . may not be placed in the position of presenting a defense without access to a telephone, law library, runner, investigator, advisory counsel, or any other means of developing a defense.").

“Silva was provided a copy of every case and legal publication he requested by citation.” *Id.* at 624. In addition, this Court further noted that, again as opposed to Mr. Lawson, “the State engaged in a labor-intensive effort to provide Silva access to three of the 14 witnesses Silva desired to interview.” *Id.* at 624-25.

As noted, contrary to *Silva*, Mr. Lawson was denied a copy of the cases he researched, making the task of researching the law and drafting legal pleadings a long and arduous process. “[I]t is unrealistic to expect lay persons to ‘perform legal research effectively by having to designate in advance which pages of a law book are needed, and then designating other pages as a result of reviewing the first designation.’” *People v. James*, 202 Cal.App.4th 323, 335, 136 Cal.Rptr.3d 85 (2011). *Silva* was clear in pointing out that an important reason there was no denial of Mr. Silva’s right to represent himself was the fact he was able to obtain copies of the cases he researched, thus exemplifying that this Court recognized the difficulty in drafting pleadings without copies of the relevant legal materials at hand. *Silva*, 107 Wn.App. at 624.

Silva stands for the proposition that the items listed by this Court provided Mr. Silva with the “reasonable tools necessary . . . to prepare a meaningful defense . . .” *Silva*, 107 Wn.App. at 626. Mr. Lawson did not receive even that minimally necessary service. *Silva* did not profess to hold that these were the only tools required to be provided for every indigent *pro se* defendant to prepare for trial. The decision in *Silva* provided only the floor of what was necessary, not the ceiling. The requirements of indigent *pro se* defendants must be judged on a case-by-case basis.

It is important to take note of the enormous task facing Mr. Lawson while awaiting trial. The State sought to admit prior acts of Mr. Lawson under the newly enacted RCW 10.58.090, which sought to broaden the admissibility of certain prior acts in sex cases. Numerous challenges were made to RCW 10.58.090 before it was ultimately ruled unconstitutional, yet Mr. Lawson did not have access to any of this briefing. Mr. Lawson was required to “reinvent the wheel” in drafting his pleadings attacking RCW 10.58.090. It was only because his trial had been delayed many times over his continued objections

because of a lack of resources that he fortuitously benefited from the *Gresham* decision.

Mr. Lawson was continually denied the minimum necessary tools to prepare his defense: pens and paper, adequate legal research and copies of the product of his research, and access to the witnesses against him. The trial court refused to protect Mr. Lawson's right to proceed *pro se*, and as a result, violated his right self-representation and due process. Mr. Lawson requests this Court reverse his convictions and remand to the trial court.

E. CONCLUSION

For the reasons stated, Mr. Lawson requests this Court reverse his convictions and remand for a new trial.

DATED this 20th day of September 2012.

Respectfully submitted,



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STATE OF WASHINGTON,)	
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GEOFFREY LAWSON,)	
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