Supreme Court No.: 89695-0
Court of Appeals No.: 68926-6-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

THOMAS ARTHUR,

Petitioner.

PETITION FOR REVIEW

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A. INTRODUCTION

"Criminal defendants have an explicit right to self-representation under the Washington Constitution and an implicit right under the Sixth Amendment to the United States Constitution." *State v. Madsen*, 168 Wn.2d 496, 503, 229 P.3d 714 (2010). The value of respecting the right of self-representation "outweighs any resulting difficulty in the administration of justice." *Id.* at 509. Accordingly, mere inconvenience must be an insufficient basis upon which to deny an accused's request to proceed pro se. Yet, here Thomas Arthur's request to act as his own counsel during pretrial motions was denied as "inconvenient" and "untimely."

B. IDENTITY OF PETITIONER AND THE DECISION BELOW

Thomas Arthur requests this Court grant review pursuant to RAP 13.4(b)(1) and (3) of the decision of the Court of Appeals, Division One, in *State v. Arthur*, No. 68926-6-I, filed November 18, 2013. A copy of the opinion is attached as an appendix.

C. ISSUE PRESENTED FOR REVIEW

The federal and state constitutions strongly protect an accused's right to represent him or herself at trial. This Court has held unequivocally that efficiency and the orderly administration of justice are manifestly unreasonable grounds upon which to deny the right to self-representation. Does the Court of Appeals opinion conflict with this Court's jurisprudence and Mr. Arthur's constitutional right to represent himself where it affirms the denial of a motion to proceed pro se based on unsubstantiated concerns for efficiency and the orderly administration of justice?

D. STATEMENT OF THE CASE

As a juvenile, Thomas Arthur pled guilty to a crime based upon an act that the supposed victim, his brother, now concedes did not occur. Exhibit 7; CP 33-34. As part of his disposition, Mr. Arthur was required to register as a sex offender. Exhibit 7, p. 5; *see* RCW 9A.44.130.

In November, 2010, Mr. Arthur changed his registration from homeless to his parent's home—5705 227th Street SW in Mountlake Terrace, Washington. Exhibits 1 & 13; 4/24/12 RP 43-44, 81-83.[1] He

[1] The verbatim reports of proceeding are referred to herein as follows:

remained registered at that address until September 2011. Exhibits 1 & 2; 4/24/12 RP 90-91, 105-07.

Alleging that he ceased to reside at his parent's home between March 17, 2011 and April 27, 2011, the State charged Mr. Arthur with one count of failure to register under RCW 9A.44.132. CP 31.

During pretrial motions, Mr. Arthur waived his right to a jury trial and then asked to represent himself. CP 25; 4/24/12 RP 4-7, 16. Upon returning from a recess, defense counsel stated, "[I]t did come to my attention that Mr. Arthur . . . wished to represent himself at this trial." 4/24/12 RP 16. The court asked Mr. Arthur whether that was true, to which he replied, "Yes, Your Honor." *Id.* Mr. Arthur continued, "I request the Court allow me to set motions in my own defense at this time." *Id.* He elaborated,

> [T]here are at least two more witnesses that should have been on the docket and they're not here, and there is information that was supposed to be subpoenaed that would be – I got the idea when this came up about the stipulation and admissibility of statements of the defendant [moments earlier]. I don't see any

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- "4/24/12 RP" refers to the verbatim report of the CrR 3.5 Hearing and Bench Trial from April 24 and 25, 2012.
- "4/25/12 RP" refers to the verbatim report of the court's oral ruling from April 25, 2012.
- "5/14/12 RP" refers to the verbatim report of the sentencing hearing from May 14, 2012.

> documentation for the Mountlake Terrace Police Department and letters and notes that I came by, requesting them, if they had been trying to get a hold of me. That's in my defense.

4/24/12 RP 17-18.[2] Mr. Arthur informed the court he was ready to represent himself immediately and go to trial as soon as he had the two witnesses and documentation he felt had been missing from defense counsel's case. 4/24/12 RP 18.

The trial denied the motion, finding it "untimely" and "inconvenient." 4/24/12 RP 24-25. Although some pretrial matters had been discussed, the Criminal Rule (CrR) 3.5 hearing regarding the admissibility of Mr. Arthur's statements to law enforcement had not yet been heard. *See generally* 4/24/12 RP 2-11, 22-25. No jury had been impaneled, and Mr. Arthur had agreed to a bench trial. 4/24/12 RP 7. Nonetheless, the court found trial had begun and it would be a burden to allow Mr. Arthur to represent himself. 4/24/12 RP 18-19, 24-25.

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[2] Mr. Arthur also told the trial court:

> Your Honor, I did waive off a jury trial. I believe that will work and I have full faith in you, sir. However, there is [sic] some discrepancies in the case that I thought would be brought up and I'm not seeing anything in light of that right now. I don't want to waste any of the Court's time. I'm very capable of defending myself. With respect to [defense counsel], I just feel within me that there are things in this courtroom right now that are not going the way that I had expected that need to come out. . . .

4/24/12 RP 17.

Accordingly, the court denied Mr. Arthur's request to proceed pro se. 4/24/12 RP 19, 24-25.

At the subsequent bench trial, Mr. Arthur contended he was living at his parent's address during the charging period. *E.g.*, 4/24/12 RP 109-10, 112. His defense was supported by the testimony of his father and his girlfriend, who were called as State's witnesses. *E.g.*, 4/24/12 RP 43-46, 53-54, 56, 94-98. However, the court weighed the credibility of the witnesses and found Mr. Arthur guilty of failure to register. CP 4, 15; 4/25/12 RP 7-16.

The Court of Appeals affirmed, holding the trial court had discretion to deny Mr. Arthur's request to proceed pro se and did not abuse that discretion when the trial court failed to inquire into alternatives to a continuance or whether the scheduled witnesses were willing to appear at a later time.

E. ARGUMENT

The Court of Appeals decision conflicts with this Court's jurisprudence and Mr. Arthur's constitutional rights because it prioritizes efficiency over the right to self-representation.

1. The constitutional right to proceed pro se is strongly protected and may only be denied on limited grounds.

"Criminal defendants have an explicit right to self-representation under the Washington Constitution and an implicit right under the Sixth Amendment to the United States Constitution." *State v. Madsen*, 168 Wn.2d 496, 503, 229 P.3d 714 (2010) (citing *Faretta v. California*, 422 U.S. 806, 819, 95 S. Ct. 2525, 45 L. Ed. 2d 262 (1975)); U.S. Const. amend. VI; Const. art. I, § 22. This right is "so fundamental that it is afforded despite its potentially detrimental impact on both the defendant and the administration of justice." *Madsen*, 168 Wn.2d at 503.

The Washington Constitution provides even greater protection of the right to self-representation than the federal constitution. *State v. Rafay*, 167 Wn.2d 644, 650-51, 222 P.3d 86 (2009). Thus, while courts are "required to indulge in 'every reasonable presumption' against a defendant's waiver of his or her right to counsel," this presumption "does not give a court carte blanche to deny a motion to proceed pro

se." *Madsen*, 168 Wn.2d at 504. "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." *Id.* at 504-05. Concerns for the efficiency of courtroom proceedings cannot drive a trial court's denial of a motion for self-representation. *Id.* at 505. A "criminal defendant's right to pro se status cannot be denied simply because affording the right will be a burden on the efficient administration of justice." *Id.* at 509.

The amount of scrutiny to which a trial court may subject a request to proceed pro se depends upon when the motion is made. "If the demand for self-representation is made . . . well before the trial or hearing and unaccompanied by a motion for a continuance, the right of self representation exists as a matter of law." *Madsen*, 168 Wn.2d at 508 (quoting *State v. Barker*, 75 Wn. App. 236, 241, 881 P.2d 1051 (1994)). If the request is 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." *Id.* Finally, if the demand is made "during the trial or hearing, the right to proceed pro se rests largely in the

informed discretion of the trial court." *Id.* However, burdening the efficient administration of justice is never a sufficient reason to deny an accused's constitutional right to proceed pro se. *Id.* at 509.

The unjustified denial of the right to self-representation is a structural error that requires reversal of the conviction. *Id.*

2. The trial court abused its limited discretion in denying Mr. Arthur's request to proceed pro se because its denial was based on concerns for efficiency and convenience.

The Court of Appeals opinion conflicts with this Court's jurisprudence and with Mr. Arthur's constitutional rights because it sanctions the trial court's denial of a motion to proceed pro se on untenable and manifestly unreasonable grounds. Upon moving to represent himself, Mr. Arthur indicated he was prepared to go to trial but for a couple exhibits and witnesses he wanted to present. 4/24/12 RP 17-18. The trial court conducted no inquiry into the length of continuance Mr. Arthur would require to secure such limited evidence. 4/24/12 RP 17-21. In denying the request, the court focused on the presence of witnesses who were prepared to testify that day. 4/24/12 RP 19-21. In particular, the court focused on Mr. Arthur's father, who had medical issues that made appearing difficult. *Id.* However, the court did not ask Mr. Arthur's father, who was essentially appearing in

support of his son, whether he would be willing and able to return to testify after a brief continuance to allow his son to represent himself. *See id.* The court also did not consider taking that witness's testimony and then continuing the trial to allow Mr. Arthur to collect the additional evidence. Moreover, the court did not inquire into whether a brief continuance would cause any hardship to the State. *See id.* This hardly adds up to the "identifiable" basis required to deny a motion to proceed pro se. *Madsen*, 168 Wn.2d at 505.

In reiterating its denial of Mr. Arthur's motion the court emphasized that it was untimely and inconvenient. 4/24/12 RP 24-25. The trial court's unlawful focus on efficiency is confirmed by its refusal to even conduct an inquiry into the voluntariness of Mr. Arthur's request. 4/24/12 RP 21. In this regard, the court found,

> By the time I go through a colloquy even with the defendant about a motion to represent himself, a large portion of the afternoon, somewhere between 30 and 45 minutes, may well be gone, which may necessitate these witnesses reappearing tomorrow.

Id. The court abused its limited discretion when it prioritized the "administration of justice" over Mr. Arthur's right to represent himself. *See Madsen*, 168 Wn.2d at 509 (holding that the value of respecting right to self-representation "outweighs any resulting difficulty in the

administration of justice"). Yet, in contravention of *Madsen* as well as the constitutional rights enshrined in the Sixth Amendment and article I, section 22, the Court of Appeals affirmed the trial court's denial of Mr. Arthur's motion. This Court should grant review.

F. CONCLUSION

This Court should accept review because the Court of Appeals decision denies Mr. Arthur his state and federal constitutional right to self-representation. The opinion also conflicts with this Court's jurisprudence interpreting those rights, particularly *State v. Madsen*, which proclaims that "Courts must not sacrifice constitutional rights on the altar of efficiency." 168 Wn.2d at 509.

DATED this 17th day of December, 2013.

Respectfully submitted,

Marla L. Zink – WSBA 39042
Washington Appellate Project
Attorney for Petitioner

APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. THOMAS-JAMES DONALD ARTHUR, Appellant.	)	No. 68926-6-I DIVISION ONE UNPUBLISHED OPINION FILED: November 18, 2013

SCHINDLER, J. — Thomas-James Donald Arthur seeks reversal of his conviction of failure to register as a sex offender. Arthur argues the court abused its discretion by denying his request to proceed pro se. We affirm.

FACTS

In 1991, the Snohomish County Superior Court Juvenile Division found Thomas-James Donald Arthur guilty of rape of a child in the first degree. Arthur acknowledged that as a convicted sex offender, he had an obligation to register his residential address with the county sheriff's office.

On November 22, 2010, Arthur changed his registration address from homeless to his parents' address in Mountlake Terrace. Arthur's parents, Charlotte and James

Arthur, own a four bedroom home.[1] There is a wood shed in the backyard. The shed has no electricity, no furniture, and leaked when it rained.

On March 17, 2011, the Mountlake Terrace Police Department came to the Mountlake Terrace home to verify that Arthur lived there. Charlotte and James told police that Arthur no longer lived at their home and had moved in with his girlfriend Susan Barringer.

The State charged Arthur with failure to register as a sex offender under former RCW 9A.44.132 (2010).[2] The State alleged that from March 17 to April 27, 2011, Arthur, "having registered as residing at a fixed residence, . . . cease[d] to reside at that residence and did knowingly fail to provide timely written notice to the county sheriff's office."[3]

The court scheduled trial to begin on October 21, 2011. On October 7, the parties agreed to continue the trial until January 13, 2012. On December 20, 2011, the parties agreed to continue the trial date to March 16, 2012. On February 9, 2012, the parties entered an agreed continuance of the trial date until April 20, 2012.

Arthur's trial began on April 24, 2012. The State's two witnesses, Charlotte and James, were present and waiting to testify. James suffers from gout and was confined to wheelchair.

The court heard several pretrial motions. Arthur agreed to waive his right to a jury trial. The court conducted a colloquy with Arthur on the request to waive his right to

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[1] We refer to Arthur's parents by their first names for clarity and intend no disrespect.

[2] The legislature amended RCW 9A.44.132(1) in 2011, adding failure to register as a sex offender to include previous convictions for felony failure to register as a sex offender "pursuant to the laws of another state." LAWS OF 2011, ch. 337, § 5.

[3] After the State charged Arthur, Arthur registered with the sheriff's office that he was living at Barringer's address in Edmonds.

a jury trial and found Arthur voluntarily, knowingly, and intelligently waived his right to a jury trial.

The State informed the court that Arthur would stipulate that he was required to register and to the admissibility of exhibits related to his 1991 conviction, including a certified copy of the order on disposition. The court accepted the stipulation and admitted the exhibits.

Arthur would not stipulate to the admissibility of the sex offender registration forms he filled out at the Snohomish County Sheriff's Office in November 2010 and September 2011. The court asked whether a CrR 3.5 hearing was necessary. Before the CrR 3.5 hearing, the court ordered a brief recess to allow defense counsel to discuss the CrR 3.5 issue with Arthur. After the recess, defense counsel informed the court that Arthur wished to proceed pro se: "Your Honor, during the brief recess, it did come to my attention that Mr. Arthur would like to address the Court. He indicated to me that he actually wished to represent himself at this trial."

With the court's permission, Arthur read a brief statement. Arthur said, "My attorney is an officer of the court. I have the highest level of respect for him. I request the Court to allow me to set motions in my own defense at this time. That's all I have to say." Arthur told the court that he needed a continuance so he could subpoena additional witnesses and evidence.

> THE DEFENDANT: Your Honor, I did waive off a jury trial. I believe that will work and I have full faith in you, sir. However, there is some discrepancies in the case that I thought would be brought up and I'm not seeing anything in light of that right now. I don't want to waste any of the Court's time. I'm very capable of defending myself. With respect to [defense counsel], I just feel within me that there are things in this courtroom right now that are not going the way that I had expected that need to come out.

THE COURT: You realize we're just at the very beginning stages of the trial?

THE DEFENDANT: Yes, Your Honor, but there are at least two more witnesses that should have been on the docket and they're not here, and there is information that was supposed to be subpoenaed that would be -- I got the idea when this came up about the stipulation of admissibility of statements of the defendant. I don't see any documentation for the Mountlake Terrace Police Department and letters and notes that I came by, requesting them, if they had been trying to get a hold of me. That's in my defense.

THE COURT: All right. Well, I just asked you a minute ago if you're ready to go to trial right here right now.

THE DEFENDANT: With the exception of that answer, no, because --

THE COURT: Well, wait. What do you mean by with the exception of that answer?

THE DEFENDANT: If those two things I just -- if those two items that I just listed were here, I would be ready to go myself to defend my case, yes, Your Honor, but, no, I'm not, because I don't have the two witnesses and the documentation.

THE COURT: So you're not just asking to represent yourself. You're asking for the trial to be delayed?

THE DEFENDANT: With all due respect, yes, sir.

The court denied Arthur's request to proceed pro se as untimely.

[T]he law is that if a request is made well in advance of the trial, it should be granted as a matter of, essentially, of routine for a defendant to represent himself if the Court is, in fact, satisfied that the defendant is appreciative of the risks and the exposure that he faces and what the maximums are. There are rules that need to be followed and whatnot, but we're not well in advance of the trial. We're not even shortly in advance of the trial. We have begun the trial.

And the rule, also, is that once the trial has begun, the Court has significant discretion as to whether or not to allow for a person to say or assert their right to represent themselves at the time. We have started this trial. I've already admitted three or four exhibits. . . .

The State had witnesses -- or had a witness appear yesterday under a personal service subpoena who was ordered to come back today . . . .

. . . .

I was also informed yesterday that the defendant's father, who was a witness who was under personal service subpoena, who has health problems, was not here yesterday but would be returning today. But, again, the man has some health issues . . . .

. . . .

> I haven't heard a word about any motion to continue until such time as both people under subpoena actually were present in the courthouse ready to testify . . . . If the defendant truly wanted to represent himself, he should have made this motion before we had already started the trial and before these witnesses, one of whom is particularly not easy or convenient for him to get here, were present outside in the hallway less than 15 feet from the courtroom door waiting to testify. The motion is denied.
>
> . . . .
>
> [T]he record should reflect the basis for the Court's denial of the motion for the defendant to represent himself is that this is untimely. We're already here. We have actually started the trial. While opening statements hadn't been made yet, the attorneys were in the process of admitting exhibits. I had admitted several exhibits.
>
> . . . .
>
> He has an attorney who's here and ready to represent him. Mr. Thompson is a skilled lawyer and he is prepared to go to trial and that's what we're going to do.

Following the CrR 3.5 hearing, the court concluded that the sex offender registration forms Arthur filled out at the Snohomish County Sheriff's Office were admissible.

The State called five witnesses: three detectives from the Snohomish County Sheriff's office, Arthur's mother Charlotte, and Arthur's father James. James testified that Arthur lived at his home during the spring of 2011. James said that Arthur would sleep in the shed, on the couch, or in the family van. Charlotte testified that Arthur had not lived on the property for five or six years. Charlotte said that it did not look like anyone had been sleeping in the shed in 2011.

Arthur and his girlfriend Susan Barringer testified for the defense. Barringer testified that when she started dating Arthur in March 2011, she picked him up at his parents' house "[p]robably every day, because he didn't drive." Barringer testified that Arthur lived in the wood shed and that she saw Arthur's personal belongings inside the shed. Arthur testified that he stayed in the wood shed in March and April of 2011.

Arthur testified that his father agreed he could stay in the shed. Arthur also testified that he and his father agreed not to tell his mother he was staying on the property.

The court found the defendant committed the crime of failing to register as a sex offender. The court explicitly found Charlotte's testimony credible. The court found that the testimony of Arthur, James, and Barringer was not credible. The court sentenced Arthur to 90 days confinement. The court ordered the sentence could be served as work release.

Arthur appeals.

ANALYSIS

Arthur argues that the court abused its discretion by denying his request to represent himself.

We review the trial court's denial of a request for self representation for abuse of discretion. State v. Madsen, 168 Wn.2d 496, 504, 229 P.3d 714 (2010). A trial court abuses its discretion when its decision is manifestly unreasonable or is based on untenable grounds. State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003).

Criminal defendants have the right to self representation under the Washington Constitution, article I, section 22 (amend. 10), and the United States Constitution, amendments VI and XIV. Madsen, 168 Wn.2d at 503; Faretta v. California, 422 U.S. 806, 819, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). However, the right to self representation is not self-executing. State v. Woods, 143 Wn.2d 561, 586, 23 P.3d 1046 (2001). It is well established that a defendant's request to proceed pro se must be unequivocal and timely. State v. DeWeese, 117 Wn.2d 369, 377, 816 P.2d 1 (1991). Where a defendant's request for self representation is untimely, "the right is relinquished

and the matter of the defendant's representation is left to the discretion of the trial judge." DeWeese, 117 Wn.2d at 377.

The trial court's discretion to grant or deny a motion to proceed depends on when the request is made. If the demand for self representation is made " 'well before the trial or hearing and unaccompanied by a motion for a continuance, the right of self representation exists as a matter of law.' " Madsen, 168 Wn.2d at 508[4] (quoting State v. Barker, 75 Wn. App. 236, 241, 881 P.2d 1051 (1994)). If the request is 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.' " Madsen, 168 Wn.2d at 508 (quoting Barker, 75 Wn. App. at 241). Finally, if the defendant makes his request " 'during the trial or hearing, the right to proceed pro se rests largely in the informed discretion of the trial court.' " Madsen, 168 Wn.2d at 508 (quoting Barker, 75 Wn. App. at 241).

Arthur argues that because he made his request before trial, the court's discretion was limited. The State argues that because Arthur made his request after the trial began, the decision rested within the informed discretion of the trial court.

We need not decide whether trial had begun. Whether the motion to proceed pro se was made immediately before trial or during trial, Arthur does not dispute that the trial court had at least a "measure of discretion" to deny the untimely request for self representation.

Here, trial had already been continued three times. Trial was scheduled to begin and the State's two subpoenaed witnesses, James and Charlotte Arthur, were present and ready to testify. James had difficulty getting to the courthouse because he had gout

[4] (Emphasis omitted.)

and was confined to a wheelchair with "extremely swollen" legs. Charlotte was present at the courthouse for the second day in a row. Only after the court heard preliminary motions, conducted a colloquy on Arthur's jury trial waiver, and admitted several exhibits did Arthur ask to represent himself for the first time. Arthur also asked for a continuance. Arthur's attorney was prepared to represent him. The court did not abuse its discretion by denying Arthur's motion to proceed pro se.

Affirmed.

WE CONCUR:

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 68926-6-I
	)	
	)	
THOMAS ARTHUR,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, NINA ARRANZA RILEY, STATE THAT ON THE 17TH DAY OF DECEMBER, 2013, I CAUSED THE ORIGINAL **PETITION FOR REVIEW** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X]	JOHN JUHL, DPA SNOHOMISH COUNTY PROSECUTOR'S OFFICE 3000 ROCKEFELLER EVERETT, WA 98201	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X]	THOMAS ARTHUR, PETITIONER	( ) ( ) (X)	U.S. MAIL HAND DELIVERY E-MAIL BY AGREEMENT

SIGNED IN SEATTLE, WASHINGTON, THIS 17TH DAY OF DECEMBER, 2013.

X_____

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