70654-3

70654-3

No. 70654-3-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

MUHAMMED TILLISY,

Appellant.

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

BRIEF OF APPELLANT

GREGORY C. LINK
Attorney for Appellant

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

A. ASSIGNMENTS OF ERROR

1. The trial court improperly refused to permit Muhammad Tillisy to represent himself, in violation of the Sixth Amendment and Article I, §section 22.

2. Because it was not the product of a knowingly and voluntarily waiver, Mr. Tillisy's guilty plea violated the Due Process Clause of the Fourteenth Amendment.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Sixth and Fourteenth Amendments and Article I, section 22 guarantee a criminal defendant the right to represent himself so long as the request is timely, unequivocal, and knowingly and voluntarily made. Well before trial, Mr. Tillisy made a knowing and unequivocal request to represent himself. Did the Court improperly deny Mr. Tillisy his right to represent himself?

2. The Due Process Clause of the Fourteenth Amendment requires a guilty plea be the product of an understanding, knowing and voluntary waiver of the rights at stake. Intoxication may prevent a person from properly understanding and knowingly waiving his rights in a guilty plea. Where the evidence established Mr. Tillisy was under

the influence of narcotic pain medication at the time of his guilty plea, did the trial court err in refusing to permit him to withdraw his plea?

C. STATEMENT OF CASE

The State charged Mr. Tillisy with two counts of second degree identity theft and one count of first degree identity theft. CP 124-26.

Mr. Tillisy was also facing charges under a separate cause number in Snohomish County Superior Court. Mr. Tillisy was represented by the same appointed attorney in both matters. Mr. Tillisy had previously moved to have his appointed attorney replaced in the first case. 7/19/12 Supp. RP 4-5. While the motion was only filed in one of the two pending case, Judge Appel made clear that if he were to make any determination of appointed counsel's ability to represent Mr. Tillisy "it would apply to any case." *Id.* at 14. The court then denied the motion. *Id.* at 22.

Mr. Tillisy renewed his motion, filing under this cause number. 11/8/12 RP 3. Judge Appel again denied the motion. *Id.* at 51-52.

After he was convicted of the charges in the other matter, Mr. Tillisy pleaded guilty in this case to two counts of second degree identity theft. CP 106-21.

Shortly thereafter, Mr. Tillisy moved to withdraw his guilty plea. CP 16-26. In his motion, Mr. Tillisy noted that at the time of his plea he was prescribed and was taking a substantial dose of narcotic pain medication as well as other medications. CP 22-23. As such, he contended he was unable to understand the agreement. The court denied the motion. 6/26/13 RP 12.

D. ARGUMENT

1. The trial court erred in refusing to address Mr. Tillisy's request to proceed pro se.

a. A criminal defendant has the absolute right to represent himself if he makes a timely and unequivocal request.

Article I, section 22 of the Washington Constitution explicitly guarantees a defendant the right to "appear and defend in person, or by counsel." *State v. Madsen*, 168 Wn.2d 496, 503, 229 P.3d 714 (2010). The United States Supreme Court has recognized the Sixth Amendment implicitly provides a right to self-representation. *Faretta v. California,* 422 U.S. 806, 819, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975).

A valid waiver of counsel requires the trial court ensure the accused knowingly, voluntarily, and intentionally relinquishes this fundamental constitutional right. *Johnson v. Zerbst*, 304 U.S. 456, 464, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938). Unlike the right to a fair trial,

the right of self-representation includes the right to forgo trained legal assistance, and even embraces the "personal right to be a fool." *State v. Fritz*, 21 Wn. App. 354, 359, 585 P.2d 173 (1978). It is the defendant who suffers the consequences of a conviction, and:

> It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. . . . his choice must be honored out of the respect for the individual which is the lifeblood of the law.

Faretta, 422 U.S. at 834 n.46 (quoting *Illinois v. Allen*, 397 U.S. 337, 350-51, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1978)).

The trial court's discretion to grant a criminal defendant's request for self-representation "lies at a continuum" based on the timeliness of the request:

> (a) if made well before the trial ... and unaccompanied by a motion for continuance, the right of self-representation exists as a matter of law; (b) if made as the trial ... 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 ... the right to proceed pro se rests largely in the informed discretion of the trial court.

State v. Vermillion, 112 Wn. App. 844, 855, 51 P.3d 188 (2002) (quoting *Fritz,* 21 Wn. App. at 361).

b. Mr. Tillisy made a timely and unequivocal request to represent himself.

Mr. Tillisy made a request to represent himself several weeks before the scheduled start of trial. Mr. Tillisy was represented by the same appointed attorney in both matters. Mr. Tillisy had previously moved to have his appointed attorney replaced in the first case. 7/19/12 Supp. RP 4-5. Mr. Tillisy made that motion contending his attorney had not provided him copies of discovery he had requested and had not spent sufficient time meeting with Mr. Tillisy. *Id.* While the motion was only filed in one of the two pending case, Judge Appel made clear that if he were to make any determination of appointed counsel's ability to represent Mr. Tillisy "it would apply to any case." *Id.* at 14. The court then denied the motion. *Id.* at 22.

Several months later, Mr. Tillisy renewed his previous motion. As before, that motion was made in only one of the two cases. But Mr. Tillisy explained that his attorney, who still represented him on both pending matters, had not met with him for a sufficient amount of time to review discovery in both cases. 11/8/12 RP 17. Mr. Tillisy explained he had only received a portion of the discovery in one of the cases.

Stating his belief that his attorney no longer wanted to work with him, Mr. Tillisy requested the court remove his attorney and

provide him new counsel. *Id.* at 2. Alternatively, Mr. Tillisy requested to proceed pro se. *Id.* at 14, 21. "[A]n unequivocal request to proceed pro se is valid even if combined with an alternative request for new counsel." *Madsen*, 168 Wn.2d at 507 (citing *State v. Stenson*, 132 Wn.2d 668, 741, 940 P.2d 1239 (1997)).

The trial court engaged in a lengthy but largely irrelevant conversation with Mr. Tillisy centering on various technical aspects of trial. For example, the court pressed Mr. Tillisy to explain the exceptions to the hearsay rule. 11/8/12 RP 37-38. The court quizzed Mr. Tillisy on the intricacies of jury selection and instruction. *Id.* at 41-42. The court explained it was doing so because "part of my job is to find out the depth of your ability to represent yourself." *Id.* at 37.

But Mr. Tillisy's responses to such questions do not demonstrate the requisite knowledge, or lack thereof, relevant to his waiver of counsel. Nor was his "ability" to represent himself relevant. As the Supreme Court explained:

> We need make no assessment of how well or poorly Faretta had mastered the intricacies of the hearsay rule and the California code provisions that govern challenges of potential jurors on voir dire. For his technical legal knowledge, as such, was not relevant to an assessment of his knowing exercise of the right to defend himself.

Faretta, 422 U.S. at 836.

Mr. Tillisy plainly stated "I know what I am getting into." 11/8/12 RP at 40. The record illustrates that he did indeed.

Nonetheless, the court concluded that Mr. Tillisy did not truly understand simply because Mr. Tillisy had been pressed into saying that if things got too difficult he would retain counsel. 11/8/12 RP 51. But when told that he would not have the ability to do that, Mr. Tillisy clarified "Obviously, I'm not going to present future motions. My motion at this point is to proceed pro se." *Id.* at 47. And, as it turns out, Mr. Tillisy did in fact subsequently retain private counsel in this case. 1/9/13 RP at 9-10. Mr. Tillisy explained that he understood the consequences of his decision. There was no basis to conclude otherwise.

Mr. Tillisy timely and unequivocally requested to represent himself. The trial court erroneously concluded he lacked the necessary understanding of the consequences of that choice. This Court should reverse Mr. Tillisy's convictions.

2. Mr. Tillisy's plea was not the product of a knowing, intelligent and voluntary waiver of his rights.

The Fourteenth Amendment's Due Process Clause requires that a defendant's guilty plea be knowing, voluntary, and intelligent. *Boykin*

v. Alabama, 395 U.S. 238, 242, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969).

Intoxication is "a factor in deciding whether the defendant understood his rights and made a conscious decision to forego them." *State v. Gardner,* 28 Wn. App. 721, 723, 626 P.2d 56 (1981). Intoxication renders a statement involuntary if the circumstances show it affected the person's ability to comprehend his words or actions. *State v. Cuzzetto,* 76 Wn.2d 378, 383, 386, 457 P.2d 204 (1969)

The trial court said, "I won't state that he was not under or not taking his prescribed medications." 6/26/13 RP 17-18. But the court did find "the indication appears to be that he was taking his prescribed medication." *Id.* at 18. The record establishes his prescription was for 60 mg oxycodone - 30 mg twice daily. CP 22. In addition, Mr. Tillisy was taking an antidepressant, medication for hyperthyroidism, and anxiety/seizure medication. *Id.* Despite the court's hesitation, the record establishes Mr. Tillisy was under the influence of narcotic pain medication and other drugs at the time of his guilty plea.

Mr. Tillisy would not have been competent to testify as a witness in a court. RCW 5.60.050 provides:

The following persons shall not be competent to testify:

> (1) Those who are of unsound mind, or intoxicated at the time of their production for examination . . .

But that is precisely what he did when he entered his plea. Chief among the rights waived by a guilty plea is the right not to incriminate or to give witness against oneself. "A plea of guilty is more than a voluntary confession made in open court. It also serves as a stipulation that no proof by the prosecution need by advanced . . . . It supplies both evidence and verdict, ending controversy." *Boykin*, 395 U.S. at 249 (quoting *Woodard v. State*, 171 So.2d 462, 469 (Ala. Ct. App. 1965)). If as a matter of law Mr. Tillisy was incompetent as a witness, he could not lawfully enter a guilty plea.

Because his guilty plea was not voluntarily and understandingly entered, it violated due process and must be reversed. *Boykin*, 395 U.S. at 244.

E. CONCLUSION

For the reasons set forth above, this Court should reverse Mr. Tillisy's convictions.

Respectfully submitted this 24th day of February, 2014.

GREGORY C. LINK – 25228
Washington Appellate Project – 91072
Attorneys for Appellant

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 70654-3-I
	)	
	)	
MUHAMMED TILLISY,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 4TH DAY OF FEBRUARY, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** 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]	MUHAMMED TILLISY 11100-085 FDC SEATAC PO BOX 13900 SEATTLE, WA 98198	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON, THIS 24TH DAY OF FEBRUARY, 2014.

X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
☎(206) 587-2711