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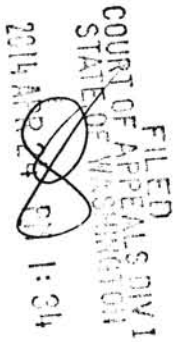
NO. 70654-3-I

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



STATE OF WASHINGTON,

Respondent,

v.

MUHAMMED Z. TILLISY,

Appellant.

BRIEF OF RESPONDENT

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I. ISSUES

1. Did the trial court abuse its discretion in denying defendant's motion to withdraw his guilty plea?

2. Did defendant's entry of a guilty plea waive his right to appeal the trial court's denial of request for self-representation?

3. Did the trial court abuse its discretion in denying defendant's request for self-representation?

II. STATEMENT OF THE CASE

A. CHARGED OFFENSE.

On July 13, 2012, Muhammed Zebeida Tillisy, defendant, was charged with one count 2nd Degree Identity Theft. A second count of 2nd Degree Identity Theft was added on January 4, 2013.[1] CP 134-135, 154-155.

B. MOTION FOR SUBSTITUTION OF COUNSEL.

On November 8, 2012, the matter came before the court on the State's Motion under CrR 3.5 for determination of the admissibility of statements made by defendant. Trial was set for November 16, 2012. At the start of the hearing defendant advised the court that he was asking to have his assigned counsel

[1] On March 22, 2013, a third count of 2nd Degree Identity Theft was added along with the aggravating circumstance of rapid recidivism on all three counts. CP 124-126. The third count was dropped on April 24, 2013. CP 122-123.

removed. Defendant initially asked that his motion be heard ex parte, but then withdrew that request. RP (11/8/12) 2-13, 32.

The court proceeded with defendant's motions to replace his assigned counsel and to proceed pro se with standby counsel. After explaining his reasons for wanting new counsel,[2] defendant clarified that his motion was to replace his assigned counsel and if that was denied, he was requesting to proceed pro se with standby counsel. Defendant acknowledged that he preferred a new attorney to self-representation. The court found that defendant had not established a reason for the court to remove his assigned counsel and substitute another attorney. The court denied the motion. CP ___ (sub# 45, Order); RP (11/8/12) 13-24, 29-35.

C. MOTION TO PROCEED PRO SE WITH STANDBY COUNSEL.

The court then entered a lengthy colloquy with defendant on the disadvantages of self-representation and the consequences of the waiver of counsel to ascertain whether defendant had at least a minimal knowledge of the task involved. Defendant stated that if he got "pushed into a corner during trial" he planned to retain counsel and had been talking with his parents about retaining counsel.

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[2] On July 19, 2012, defendant had previously moved to have his same assigned counsel replaced in a separate matter. That motion was denied. Supp. RP (7/19/12) 4-22.

Defendant stated that he was not ready for trial and would need a continuance to prepare for trial and to bring a motion for ineffective assistance of counsel. The court found that defendant did not have an adequate understanding of the risks involved in self-representation through the trial process to make a knowing, voluntary and intelligent waiver of his right to counsel. The court denied the motion. CP ___ (sub# 45, Order); RP (11/8/12) 35-53.

D. NEW COUNSEL.

Defendant hired private counsel and on January 9, 2013, the court heard defendant's motion for substitution of counsel. The motion was granted. CP ___ (sub# 60, Order on Motion); RP (1/9/13) 2-9.

E. GUILTY PLEA.

On April 24, 2013, defendant pleaded guilty to two counts of 2nd Degree Identity Theft as charged in the third amended information. Defendant was advised of the charges, the maximum penalty and the standard range for each charge, and the rights he was waiving up by entering a guilty plea. Defendant acknowledged that he signed the statement, understood what he was doing and the rights he was waiving by pleading guilty. Defendant was represented by counsel who read the Statement of Defendant on

Plea of Guilty to defendant. The court found defendant guilty of both counts; that there was a sufficient factual and legal basis to support that finding; and that defendant's plea was made freely, knowingly, intelligently and voluntarily. CP 106-121, 122-123; RP (4/24/13) 2-12.

F. WITHDRAWAL OF PRIVATE COUNSEL.

On May 3, 2013, defendant filed a letter indicating that he wanted to withdraw his guilty plea and complaining of some actions by his private counsel. Counsel filed a motion and declaration to withdraw on May 10, 2013. On May 24, 2013, private counsel was allowed to withdraw and defendant was appointed new counsel. CP 99-100, 101-103, 104-105; RP (5/24/13) 2, 19-23.

G. MOTION TO WITHDRAW GUILTY PLEA.

On June 26, 2013, defendant's new appointed counsel filed a Motion to Withdraw Plea of Guilty. The motion was heard that same day. Defendant claimed that he was under the influence of narcotic pain medication and other drugs at the time of his guilty plea and should be allowed to withdraw his guilty plea because it was involuntary. Defendant provided no evidence and nothing in the record[3] supported his claim that he was under the influence of

[3] RP (4/24/13) 2-14.

drugs or intoxicated at the time he entered his guilty plea. CP 16-26; RP (6/26/13) 2-19.

The trial court had the opportunity to observe defendant at both the plea hearing and at the hearing on the motion to withdraw his plea. The court specifically noted that at the time of defendant's guilty plea the court did not see any evidence at all that defendant was in any sort of pain, that defendant appeared distracted, that defendant was confused at any part of the proceeding, nor any indication that defendant did not understand. The court denied defendant's motion to withdraw his guilty plea. RP (6/26/13) 17-19.

H. SENTENCING.

On July 3, 2013, defendant was sentenced in this case. CP 3-13; RP (7/3/13) 15-33. The court granted State motion to dismiss the aggravating circumstance of rapid recidivism. RP (7/3/13) 17, 27. The court sentenced defendant to 43 months on each count, concurrent with each other, but consecutive to his sentence in 12-1-01246-1; twelve months community custody; and payment of legal financial obligation of $600.00. CP 6-8; RP (7/3/13) 28-29.

I. APPEAL.

On August 1, 2013, defendant filed a notice of appeal. CP 2.

III. ARGUMENT

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING DEFENDANT'S MOTION TO WITHDRAW HIS GUILTY PLEA.

Appellate courts review a decision denying the withdrawal of a guilty plea for abuse of discretion. State v. Marshall, 144 Wn.2d 266, 280, 27 P.3d 192 (2001), abrogated on other grounds, State v. Sisouvanh, 175 Wn.2d 607, 622, n.3, 290 P.3d 942 (2012); State v. Olmsted, 70 Wn. App. 116, 118, 400 P.2d 312 (1966). Discretion is abused if the trial court's decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons. Madsen, 168 Wn.2d at 504.

> A decision is based "on untenable grounds" or made "for untenable reasons" if it rests on facts unsupported in the record or was reached by applying the wrong legal standard. A decision is "manifestly unreasonable" if the court, despite applying the correct legal standard to the supported facts, adopts a view "that no reasonable person would take" and arrives at a decision "outside the range of acceptable choices."

State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003) (citations omitted). Discretion is abused only where it can be said no reasonable person would take the view adopted by the trial court. State v. Blight, 89 Wn.2d 38, 41, 569 P.2d 1129 (1977).

Here, because the trial court had not yet sentenced defendant when he moved to withdraw his guilty plea, CrR 4.2(f) applies. State v. Pugh, 153 Wn. App. 569, 577, 222 P.3d 821 (2009). "The court shall allow a defendant to withdraw the defendant's plea of guilty whenever it appears that the withdrawal is necessary to correct a manifest injustice." CrR 4.2(f). Because of the many safeguards that precede a guilty plea, the manifest injustice standard for plea withdrawal is demanding. State v. Taylor, 83 Wn.2d 594, 596-597, 521 P.2d 699 (1974); Pugh, 153 Wn. App. at 577. "Manifest injustice" means "an injustice that is obvious, directly observable, overt, [and] not obscure." Taylor, 83 Wn.2d at 596; Pugh, 153 Wn. App. at 577. The Supreme Court has enumerated four indicia of manifest injustice that allow a defendant to withdraw his guilty plea: (1) the defendant received ineffective assistance of counsel, (2) the defendant did not ratify his plea, (3) the plea was involuntary, and (4) the prosecution did not honor the plea agreement. Taylor, 83 Wn.2d at 597; Pugh, 153 Wn. App. at 577.

Defendant has the burden of showing a manifest injustice. State v. Osborne, 102 Wn.2d 87, 97, 684 P.2d 683 (1984). Manifest injustice can be proved by a showing that the plea is

involuntary. State v. Saas, 118 Wn.2d 37, 42, 820 P.2d 505 (1991). However, when a defendant completes a plea statement and admits to reading, understanding, and signing it, it creates a strong presumption that the plea is voluntary. State v. Smith, 134 Wn.2d 849, 852, 953 P.2d 810 (1998); State v. Perez, 33 Wn. App. 258, 261, 654 P.2d 708 (1982). When a trial court verifies the criteria of voluntariness in a colloquy with the defendant, the presumption of voluntariness is "well-nigh irrefutable." Perez, 33 Wn. App. at 262.

Here, as in the trial court, defendant claims that he was under the influence of narcotic pain medication and other drugs at the time of his guilty plea and argues that he should be allowed to withdraw his guilty plea because it was involuntary. Appellant's Brief 3, 7-9; CP 16-26; RP (6/26/13) 4-12. However, defendant's bare assertion that he was intoxicated at the plea hearing is insufficient. The defendant must present some evidence of involuntariness beyond his self-serving allegations. Osborne, 102 Wn.2d at 97; State v. Hystad, 36 Wn. App. 42, 45, 671 P.2d 793 (1983) (claim that plea was involuntary because of the methadone-created confusion is suspect); State v. Armstead, 13 Wn. App. 59, 63-65, 533 P.2d 147 (1975) (no involuntary guilty plea where

defendant claimed he was "drunk off barbiturates"). Here, defendant provided no evidence of intoxication and nothing in the record from the plea hearing supports the claim that defendant was under the influence of drugs or intoxicated at the time he entered his guilty plea. See RP (4/24/13) 2-14.

The trial court is vested with broad discretion in judging a defendant's mental capacity to make a plea of guilty. Osborne, 102 Wn.2d at 98; State v. Calvert, 79 Wn. App. 569, 575, 903 P.2d 1003 (1995). Its determination is made from such considerations as the defendant's demeanor, conduct, personal history, past history, medical and psychiatric reports and the statements of counsel. Osborne, 102 Wn.2d at 98; Calvert, 79 Wn. App. at 575-576. The standard is "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." Osborne, 102 Wn.2d at 98; Calvert, 79 Wn. App. at 576.

Here, the facts support the trial court's decision to accept defendant's guilty plea. Defense counsel reviewed the plea statement with defendant and defendant stated in open court that he understood the contents of the documents. "Solemn declarations in open court carry a strong presumption of verity. The

subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible." Blackledge v. Allison, 431 U.S. 63, 74, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977). The plea statement which defendant signed informed him of his constitutional rights. CP 106-113; RP (4/24/13) 8. Defendant's actions create a strong presumption that his plea was voluntary. Smith, 134 Wn.2d at 852.

The court engaged in a long colloquy with defendant verifying the plea was voluntary and allowing defendant to put his concerns regarding his jail privileges and access to the law library on the record. The facts that the plea was made after consultation with defense counsel, and reflects a reasonable decision to meliorate defendant's jail privileges and access to the law library, support the finding that defendant was competent to enter a voluntary guilty plea. Osborne, 102 Wn.2d at 98-99; Calvert, 79 Wn. App. at 576-577; Hystad, 36 Wn. App. at 45. In the present case, the presumption of voluntariness is "well-nigh irrefutable." Perez, 33 Wn. App. at 262. The record supports the trial court's finding that defendant made his plea freely, knowingly, intelligently and voluntarily. RP (4/24/13) 5, 12.

More importantly, at the hearing on defendant's motion to withdraw his guilty plea, the court specifically noted that the court had the opportunity to observe defendant during his plea. At the plea hearing the court did not see any evidence at all that: defendant was in any sort of pain; defendant appeared distracted; indicated defendant did not understand; or defendant was confused at any part of the proceeding. RP (6/26/13) 17-19. The mere possibility that intoxication may have rendered defendant incompetent to understand a plea of guilty, without external indications of mental impairment at the time the plea was entered, is insufficient to show manifest injustice. Osborne, 102 Wn.2d at 98 (the critical period for determining competency is the time of the entry of the guilty plea). The trial court did not abuse its discretion in denying defendant's motion to withdraw his guilty plea.

B. DEFENDANT WAIVED HIS RIGHT TO APPEAL THE DENIAL OF HIS REQUEST FOR SELF-REPRESENTATION.

A guilty plea generally waives the right to appeal pretrial motions. Smith, 134 Wn.2d at 852; State v. Olson, 73 Wn. App. 348, 353, 869 P.2d 110 (1994); State v. Wiley, 26 Wn. App. 422, 425, 613 P.2d 549 (1980). The State bears the burden to show a valid waiver of the right to appeal. Smith, 134 Wn.2d at 852. A

statement on plea of guilty that a defendant read, understood, and signed creates a strong presumption that the plea is voluntary. Id. A guilty plea is "more than a confession which admits that the accused did various acts; it is itself a conviction" and "nothing remains but to give judgment and determine punishment." Boykin v. Alabama, 395 U.S. 238, 242, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); Smith, 134 Wn.2d at 852.

Here, defendant admitted understanding and signing his statement on plea of guilty that defense counsel had read to him. His lawyer confirmed all of this and the court confirmed that defendant fully reviewed the plea and related documents with his attorney. The court then properly accepted defendant's guilty plea as being entered knowingly, voluntarily, and intelligently. CP 106-121; RP (4/24/13) 5-12. Defendant has waived his right to appeal the pre-trial denial of his request for self-representation. Smith, 134 Wn.2d at 852–853.

C. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING DEFENDANT'S REQUEST FOR SELF-REPRESENTATION.

Even if this Court were to review the denial of defendant's request for self-representation, it would conclude that the trial court did not abuse its discretion. Criminal defendants have a right to

self-representation under article I, § 22 of the Washington Constitution and the Sixth Amendment to the United States Constitution. State v. Madsen, 168 Wn.2d 496, 503, 229 P.3d 714 (2010); Faretta v. California, 422 U.S. 806, 819, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). "The unjustified denial of this [pro se] right requires reversal." Madsen, 168 Wn.2d at 503; State v. Stenson, 132 Wn.2d 668, 737, 940 P.2d 1239 (1997). However, the right to self-representation is not absolute. In order to exercise the right a request must be unequivocal, knowingly and intelligently made, timely, and not for the purpose of delaying trial or obstructing justice. State v. Bolar, 118 Wn. App. 490, 516, 78 P.3d 1012 (2003); State v. Breedlove, 79 Wn. App. 101, 106, 900 P.2d 586 (1995). If the request is made well before trial, the defendant's interest in self-representation is paramount, but as the trial draws closer, the interest in the orderly administration of justice becomes weightier. Bolar, 118 Wn. App. at 516; Breedlove, 79 Wn. App. at 107. If the motion is not made in a timely fashion, the right is relinquished and the matter of the defendant's representation is left to the discretion of the trial judge. Stenson, 132 Wn.2d at 737; State v. DeWeese, 117 Wn.2d 369, 376–377, 816 P.2d 1 (1991). The same analysis governs a pre-trial motion to proceed pro se

when it is accompanied by a motion for continuance. Breedlove, 79 Wn. App. at 108. The appellate court reviews a trial court's denial of a request for self-representation for abuse of discretion. Madsen, 168 Wn.2d at 504; Breedlove, 79 Wn. App. at 106.

Both the United States and the Washington Supreme Courts have held that courts are required to indulge in every reasonable presumption against a defendant's waiver of his or her right to counsel. Madsen, 168 Wn.2d at 504; Brewer v. Williams, 430 U.S. 387, 404, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977). Once the issue of waiver of right to counsel is raised, the trial court needs to assess, preferably through a colloquy on the record, whether the defendant's decision is made with at least minimal knowledge of what the task entails, and that the defendant understands the risks of self-representation. City of Bellevue v. Acrey, 103 Wn.2d 203, 211, 691 P.2d 957 (1984); State v. Vermillion, 112 Wn. App. 844, 851, 51 P.3d 188, 192 (2002), review denied, 148 Wn.2d 1022 (2003). A sample colloquy designed to assist trial courts and the parties in assessing a request for self-representation was set out in State v. Christensen, 40 Wn. App. 290, 295, n. 2, 698 P.2d 1069 (1985). This colloquy has been approved by this Court as the kind of colloquy trial courts should engage in when faced with a motion

by a defendant for self-representation. State v. Vermillion, 112 Wn. App. at 858, n. 3. In the present case, defendant's request to represent himself was not made timely, unequivocally, knowingly and intelligently.

1. The Demand For Self-Representation Must Be Made Timely.

To be timely, the demand for self-representation should be made a reasonable time before trial. State v. Jordan, 39 Wn. App. 530, 541, 694 P.2d 47 (1985); State v. Fritz, 21 Wn. App. 354, 361, 585 P.2d 173 (1978). The court may deny a request for self-representation that is untimely. Madsen, 168 Wn.2d at 504; State v. Baker, 75 Wn. App. 236, 241, 881 P.2d 1051 (1994).

Cases considering 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 rests largely in the informed discretion of the trial court. Madsen, 168 Wn.2d at 508.

In the present case, defendant made his request for self-representation at the start of the hearing on the State's CrR 3.5 motion, one week before the scheduled start of trial.[4] The motion was made without warning; defendant filed no written motion, or otherwise gave the court or the State any notice that he intended to bring the motion at the hearing. Further, defendant needed a continuance to prepare for self-representation. Finally, defendant was represented by a skilled attorney who was present and prepared for the hearing and for trail. The trial court had full discretion to grant or deny defendant's request. Stenson, 132 Wn.2d at 737; DeWeese, 117 Wn.2d at 376–377; Bolar, 118 Wn. App. at 516; Breedlove, 79 Wn. App. at 107.

2. The Demand for Self-Representation Must Be Made Unequivocally.

The requirement that a request to proceed pro se be stated unequivocally derives from the fact that there is a conflict between a defendant's rights to counsel and to self-representation. State v. Imus, 37 Wn. App. 170, 179, 679 P.2d 376 (1984). Prior to his

[4] Defendant's claim that his request for self-representation came "several weeks before the scheduled start of trial" is not supported by the facts. Appellant's Brief at 5.

request to proceed pro se, defendant had made two requests for new counsel.[5]

a. Substitution of Counsel.

A defendant who seeks to have substitute counsel appointed bears the burden of showing good cause to grant the request. Stenson, 132 Wn.2d at 734. Good cause may be shown if there is a conflict of interest, an irreconcilable conflict or a complete breakdown in communication between the attorney and client. Id. It is not enough that the defendant has generally lost confidence or trust in counsel. Id. "Attorney-client conflicts justify the grant of a substitution motion only when counsel and defendant are so at odds as to prevent presentation of an adequate defense." Id. Here, the trial court spent a considerable amount of time with defendant inquiring into defendant's reasons for wanting new counsel. During the course of that hearing the court gave the defendant great latitude in setting forth his complaints regarding counsel's representation. In making its decision to deny substitution of counsel the trial court considered the extent of the conflict and the timing of the motion. Id.

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[5] Defendant's first request to have his assigned counsel replaced was on June 19, 2012, in a separate matter. Supp. RP (7/19/12) 4-22.

b. Self-Representation.

In the present case, after his motion to replace his assigned counsel was denied, defendant requested to proceed pro se with standby counsel. The trial court entered a lengthy colloquy with defendant on the disadvantages of self-representation and the consequences of the waiver of counsel. Over the course of the colloquy, it was evident that defendant's expression of dissatisfaction with his current counsel was an indirect request for either new counsel or a continuance. Defendant stated that he was not ready for trial and would need a continuance to prepare for trial and to bring a motion for ineffective assistance of counsel. Further, defendant stated that he had been talking with his parents about retaining counsel, and if he got "pushed into a corner during trial" he planned to retain counsel.[6] Defendant acknowledged that he preferred a new attorney to self-representation. Taken in the context of the record as a whole, these statements can be seen only as an expression of frustration by defendant with his attorney and not as an unequivocal assertion of his right to self-representation. State v. Woods, 143 Wn.2d 561, 587, 23 P.3d

[6] Defendant retained counsel and an order granting substitution for his appointed counsel entered on January 9, 2013. CP ___ (sub# 60, Order on Motion); RP (1/9/13) 2-9.

1046 (2001); State v. Luvene, 127 Wn.2d 690, 699, 903 P.2d 960 (1995).

3. The Demand for Self-Representation Must Be Made Knowingly and Intelligently.

Once a defendant unequivocally demands self-representation, the trial court must determine if the defendant has made a knowing, intelligent, and voluntary waiver of the right to assistance of counsel. DeWeese, 117 Wn.2d at 377; State v. James, 138 Wn. App. 628, 635, 158 P.3d 102 (2007). In the present case, the court spent a considerable amount of time in colloquy with defendant on the record, ascertaining whether defendant's decision was being made with at least minimal knowledge of the task involved, and an understanding of the risks of self-representation. Acrey, 103 Wn.2d at 211; Vermillion, 112 Wn. App. at 85. The questions asked were similar to those outlined by the court in its sample colloquy in Christensen, 40 Wn. App. at 295, n. 2. The court found that defendant's assumptions demonstrated he did not have an adequate understanding of the risks of self-representation and that defendant was not making a knowing and intelligent waiver of his right to counsel. The trial court

did not abuse its discretion in denying defendant's request for self-representation.

IV. CONCLUSION

For the reasons stated above, the appeal should be denied.

Respectfully submitted on April 23, 2014.

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