90990-3

No.
Court of Appeals No. 70654-3-I

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MUHAMMED TILLISY,

Petitioner.

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

PETITION FOR REVIEW

GREGORY C. LINK
Attorney for Petitioner

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

A. IDENTITY OF PETITIONER

Pursuant to RAP 13.4, Muhammad Tillisy asks this Court to accept review of the opinion in *State v. Tillisy*, 70654-3-I.

B. OPINION BELOW

Mr. Tillisy had two contemporaneous cases pending against him I superior court. Mr. Tillisy was represented by the same appointed attorney in both cases. After the trial court denied Mr. Tillisy unequivocal request to represent himself, Mr. Tillisy pleaded guilty. The Court of Appeals concluded that by his guilty plea, Mr. Tillisy waived his right to appeal the denial of Sixth Amendment and Article I, section 22 rights to represent himself.[1]

C. ISSUE PRESENTED

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. Where the trial court improperly denies that unequivocal request, does a defendant waive the ability to

[1] A petition for review has been filed in the linked case of *State v. Tillisy*, 69962-8-I.

challenge the resulting denial of his constitutional right to self-representation by subsequently pleading guilty?

D. 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.

E. ARGUMENT

1. Because Mr. Tillisy's guilty plea specifically contemplates a narrow waiver of the right to appeal, the Court of Appeals erred in concluding the plea waived the ability to appeal all issues.

A constitutional right may be waived only where the defendant knowingly, voluntarily, and intentionally relinquishes the right. *Johnson v. Zerbst*, 304 U.S. 456, 464, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938). This Court has said it will "not embrace an inadvertent waiver without notice." *City of Seattle v. Klein*, 161 Wn.2d 554, 560, 166 P.3d 1149, 1152 (2007). This is so because "knowledge is a crucial component of the waiver of appellate rights." *Klein*, 161 Wn.2d at 562. The State carries the burden of demonstrating that a convicted defendant has made a voluntary, knowing, and intelligent waiver of the right to appeal. *State v. Tomal*, 133 Wn.2d 985, 989, 948 P.2d 833 (1997)

Here, the plea form delineates several constitutional rights which Mr. Tillisy waived in entering a guilty plea. CP 106-07. Mr. Tillisy's guilty plea statement provides:

> I UNDERSTAND I HAVE THE FOLLOWING IMPORTANT RIGHT, AND I GIVE THEM UP BY PLEADING GUILTY:
> (a) The right to a speedy and public trial y an impartial jury in the county where the crime was allegedly committed.
> (b) The right to remain silent before and during trial, and the right to refuse to testify against myself.
> (c) The right at trial to hear and question witnesses who testify against me.
> (d) The right at trial to testify and to have witnesses testify for me. These witnesses can be made to appear at no expense to me.
> (e) The right to be presumed innocent unless the State proves the charge beyond a reasonable doubt or I enter a guilty plea.
> (f) The right to appeal a finding of guilt after a trial.

Id. As is clear, Mr. Tillisy waived the right to appeal only to the extent he waived the right to appeal a finding of guilt. Nowhere in that list of rights is the right to self-representation listed. Mr. Tillisy is not appealing a finding of guilt.

The State cannot prove Mr. Tillisy knowingly waived the right to appeal the trial court's denial of his right to represent himself.

Nonetheless, the Court of Appeals concludes this limited express waiver implicitly waived the right to appeal in its entirety.

Opinion at 4-5 At no point does the Court of Appeals address the actual waiver which accompanied Mr. Tillisy's plea. While it may be possible for parties to negotiate a broader appeal waiver Mr. Tillisy did not do so here. The conclusion of the Court of Appeals that a guilty pela waives the right to appeal all errors presumes a broad appellate waiver in contrary to this Court's decisions in *Klein* and *Tomal*. Moreover, a presumptive waiver of important constitutional rights raises substantial constitutional issues. This Court should accept review under RAP 13.4

2. The trial court erred in denying Mr. Tillisy's request to represent himself.

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. *Zerbst*, 304 U.S. at, 464. 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:

> [i]t 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).

Mr. Tillisy made a request to represent himself several weeks before the scheduled start of trial. As *Vermillion* explains, because that

request was made well before trial the right existed as a matter of law. 112 Wn. App. at 855.

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)). Ignoring this Court's decision in *Madsen,* the Court of Appeals concludes that because the request was made in the alternative it was equivocal. Opinion at 6. That conclusion is contrary to *Madsen*, and warrants review under RAP 13.4.

Indeed, the trial court did not believe the request was equivocal. Instead, the court concluded it was not knowingly made. 11/8/12 RP 51. The court reached that conclusion after 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.

The opinion of the Court of Appeals is contrary to this Court's decisions and presents a significant constitutional question. This Court should accept review under RAP 13.4 and reverse Mr. Tillisy's convictions.

F. CONCLUSION

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

Respectfully submitted this 21st day of October, 2014.

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

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. MUHAMMED ZBEIDA TILLISY, Appellant.	)	No. 70654-3-I DIVISION ONE UNPUBLISHED OPINION FILED: September 22, 2014

TRICKEY, J. — Shortly after pleading guilty to two counts of second degree identity theft, Muhammed Tillisy moved to withdraw that plea.[1] The trial court denied his motion, finding that Tillisy entered the plea knowingly, voluntarily, and intelligently. Tillisy now challenges the trial court's denial of his motion to withdraw the guilty plea. He additionally contends that the trial court erred when it denied his request to remove his assigned counsel and proceed pro se. Finding no error, we affirm.

FACTS

The State charged Tillisy, by third amended information, with two counts of second degree identity theft for crimes that took place on or about April 26 and 28, 2012.[2]

On November 8, 2012, at a suppression hearing, Tillisy moved to remove his counsel and proceed pro se with standby counsel.[3] At that time, trial was scheduled for November 16, 2012.[4] The trial court denied Tillisy's motion.[5] It found that Tillisy "has

---

[1] This appeal is linked to State v. Tillisy, No. 69962-8-I.
[2] Clerk's Papers (CP) at 122. The State initially charged Tillisy with one count of second degree identity theft in an information filed on July 13, 2012. CP at 154.
[3] Report of Proceedings (RP) (Nov. 8, 2012) at 3, 13, 14.
[4] RP (Nov. 8, 2012) at 32.
[5] RP (Nov. 8, 2012) at 35, 53; CP at 163-64.

made some assumptions that demonstrate that he does not have a full understanding of what he is requesting."[6]

On April 24, 2013, Tillisy signed a statement of guilty plea as to both counts of second degree identity theft.[7] He also signed a plea agreement and sentencing recommendation.[8]

In a letter to the trial court dated April 29, 2013, Tillisy requested that the court withdraw his guilty plea.[9] On June 26, 2013, Tillisy filed a motion to withdraw his plea of guilty pursuant to CrRLJ 4.2(f).[10] He asserted that when he entered the plea, he was heavily medicated and his medical condition made him uncomfortable and unable to focus.[11] As a result, he argued, his judgment was impaired.[12] The trial court denied the motion.[13]

On July 3, 2013, the trial court entered a judgment and sentence on Tillisy's plea.[14] The court imposed a total sentence of 43 months confinement.[15] Tillisy appeals.

ANALYSIS

Tillisy contends that he is entitled to withdraw his guilty plea. He argues that the plea was not entered into knowingly, intelligently, and voluntarily because he was under the influence of prescribed pain medication at the time he entered the plea. We disagree.

---

[6] CP at 164.
[7] CP at 106-113.
[8] CP at 118.
[9] CP at 104.
[10] CP at 16.
[11] CP at 23.
[12] CP at 26.
[13] RP (June 26, 2013) at 17.
[14] CP at 3.
[15] CP at 6.

We will overturn a trial court's denial of a motion to withdraw a plea for abuse of discretion. State v. Robinson, 172 Wn.2d 783, 790-91, 263 P.3d 1233 (2011).

Due process requires that a defendant enter into a plea agreement knowingly, intelligently, and voluntarily. Boykin v. Alabama, 395 U.S. 238, 242-43, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969); State v. Chervenell, 99 Wn.2d 309, 312, 662 P.2d 836 (1983). "Whether a plea is knowingly, intelligently, and voluntarily made is determined from a totality of the circumstances." State v. Branch, 129 Wn.2d 635, 642, 919 P.2d 1228 (1996). A court must allow a defendant to withdraw a guilty plea as necessary to correct a manifest injustice. CrR 4.2(f). The defendant must show manifest injustice sufficient to warrant withdrawal of a plea agreement before withdrawal is permissible. A manifest injustice exists if (1) the defendant did not ratify the plea, (2) the plea was not voluntary, (3) counsel was ineffective, or (4) the plea agreement was not kept. State v. DeClue, 157 Wn. App. 787, 792, 239 P.3d 377 (2010) (citing State v. Marshall, 144 Wn.2d 266, 281, 27 P.3d 192 (2001)). This injustice must not be obscure; it must be obvious, directly observable, and overt. DeClue, 157 Wn. App. at 792 (quoting State v. Taylor, 83 Wn.2d 594, 596, 521 P.2d 699 (1974)).

Here, no such showing has been made. Tillisy points to no evidence indicating his judgment was impaired at the time of the guilty plea. Even assuming such evidence exists, he neither presented this evidence to the trial court when entering the guilty plea nor when moving to withdraw the plea. This bare assertion is insufficient. See State v. Osborne, 102 Wn.2d 87, 97, 684 P.2d 683 (1984) ("More should be required to overcome this 'highly persuasive' evidence of voluntariness than a mere allegation by the defendant.").

Indeed, the record of the plea colloquy indicates Tillisy understood the plea agreement and was informed and cognizant of its consequences. The trial court asked him questions regarding his understanding of the statement of guilty plea.[16] Tillisy answered that he read and understood the statement as well as the waiver of rights contained in the document, and stated he had no questions.[17] Furthermore, Tillisy's signature and submission of the statement of guilty plea creates a strong presumption that he entered into the plea voluntarily. See State v. Smith, 134 Wn.2d 849, 852, 953 P.2d 810 (1998) ("When a defendant completes a plea statement and admits to reading, understanding, and signing it, this creates a strong presumption that the plea is voluntary."). Tillisy responded intelligently to the thorough questioning by the court.

Moreover, at the hearing on the motion to withdraw the plea, the trial court stated that it had seen no evidence that Tillisy had been in pain on the date the plea was taken.[18] The court also stated that it had observed no confusion on the part of Tillisy from taking his prescribed medications.[19] During a plea colloquy, a court has abundant opportunity to observe a defendant's conduct, appearance, and demeanor. Osborne, 102 Wn.2d at 98. The trial court did not abuse its discretion by denying Tillisy's motion to withdraw the guilty plea.

Tillisy next contends that the trial court abused its discretion when it denied his request to represent himself at trial. However, Tillisy waived his right to appeal this pretrial ruling when he entered into the guilty plea. See State v. Majors, 94 Wn.2d 354, 356, 616 P.2d 1237 (1980) ("Ordinarily, a plea of guilty constitutes a waiver by the defendant of his

[16] RP (April 24, 2013) at 5.
[17] RP (April 24, 2013) at 5-8, 11.
[18] RP (June 26, 2013) at 17.
[19] RP (June 26, 2013) at 18.

right to appeal, regardless of the existence of a plea bargain."); State v. Martin, 149 Wn. App. 689, 693, 205 P.3d 931 (2009) ("A guilty plea waives even constitutional violations occurring before the plea, unless the violation involves the government's power to prosecute."). Nevertheless, this claim fails.

Both the state and federal constitutions guarantee a criminal defendant the right to counsel and the right to self-representation. State v. Madsen, 168 Wn.2d 496, 503, 229 P.3d 714 (2010). But the right to self-representation is neither absolute nor self-executing. State v. Woods, 143 Wn.2d 561, 586, 23 P.3d 1046 (2001). A defendant's request to proceed pro se must be both unequivocally stated and timely made. State v. Stenson, 132 Wn.2d 668, 740, 940 P.2d 1239 (1997). The request must be unequivocal in the context of the record as a whole. State v. Luvene, 127 Wn.2d 690, 698-99, 903 P.2d 960 (1995). Although a court must honor a properly made request for self-representation, a court must also indulge in "'every reasonable presumption'" against a defendant's waiver of the right to counsel. Madsen, 168 Wn.2d at 504 (internal quotation marks omitted) (quoting In re Detention of Turay, 139 Wn.2d 379, 396, 986 P.2d 790 (1999)).

We review the trial court's denial of a request for self-representation for abuse of discretion. Madsen, 168 Wn.2d at 504.

In the context of the record as a whole, we find that Tillisy's request was not unequivocal. Although he requested to proceed pro se, this request was expressed as an alternative to obtaining substitute counsel. In fact, Tillisy acknowledged that he preferred substitute counsel to proceeding pro se.[20] The request was an expression of

[20] RP (Nov. 8, 2012) at 21, 23.

dissatisfaction with his appointed counsel, who was later replaced by private counsel. Tillisy complained about his interactions with his counsel, and he stated that he would seek an ineffective assistance of counsel claim.[21] A request to proceed pro se that indicates dissatisfaction with appointed counsel may indicate the request is equivocal. Stenson, 132 Wn.2d at 740-41; Woods, 143 Wn.2d at 586-87. Accordingly, the trial court properly denied Tillisy's request to waive counsel and proceed pro se.

Affirmed.

Trickey, J

WE CONCUR:

Leach, J.

Becker, J.

[21] RP (Nov. 8, 2012) at 15-17, 21.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 70654-3-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent John Juhl, DPA
[jjuhl@snoco.org]
Snohomish County Prosecutor's Office

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: October 21, 2014