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No. 71409-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

YASIN MOHAMED,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

1. The trial court denied Mr. Mohamed his constitutional right to counsel at sentencing.

- a. Mr. Mohamed did not request to act as co-counsel with his attorney.

A defendant is entitled both to the assistance of counsel and the right to reject that assistance and represent himself. U.S. Const. amend. VI, XIV; Const. art. I, § 22; State v. Silva, 108 Wn. App. 536, 539, 31 P.3d 729 (2001). These rights extend to the sentencing phase of trial. State v. Bandura, 85 Wn. App. 87, 97, 931 P.2d 174 (1997).

Mr. Mohamed chose to represent himself at trial and was found guilty by a jury. 8/13/13 RP 4, 12; CP 34. After the verdict was entered against him, the State concedes Mr. Mohamed requested to be represented by counsel at sentencing. Resp. Br. at 22. The court granted Mr. Mohamed's request, and Mr. Mohamed filed several pro se post-verdict motions. 11/8/13 RP 3. In his motions, Mr. Mohamed requested a new trial or dismissal of the charge against him. CP 110-39. The motions did not pertain to Mr. Mohamed's sentencing.

Mr. Mohamed told the court, on three separate occasions, that he wished to represent himself on the post-verdict motions but sought the assistance of counsel at his sentencing. 11/8/13 RP 9; 11/25/13 RP

3; 12/6/13 RP 3. He explained that because he represented himself at trial, he was better positioned than his attorney to bring the post-verdict motions. 11/8/13 RP 9. Each time, the court forced Mr. Mohamed to choose between being heard on his post-verdict motions and receiving the assistance of counsel at sentencing. 11/8/13 RP 19-20; 11/25/13 RP 5; 12/6/13 RP 5.

The State claims the trial court properly denied Mr. Mohamed's request for counsel because Mr. Mohamed sought to act as co-counsel. Resp. Br. at 21. In its response, it alleges Mr. Mohamed "told the court that he wanted to be co-counsel, handling the motions himself, with his attorney handling sentencing matters." Resp. Br. at 23. However, although the trial court improperly characterized Mr. Mohamed's request as him seeking to act as co-counsel, the record does not reflect that Mr. Mohamed actually sought to act as "co-counsel" with his attorney. 11/25/13 RP 3-4.

On November 25, 2013, the attorney briefly appointed to represent Mr. Mohamed explained to the court that Mr. Mohamed:

would like to move the Court to proceed pro se on motions that he has attempted to file with the Court and then have me essentially back on the case once he's done with that.

11/25/13 RP 3. On December 6, 2013, Mr. Mohamed addressed the court directly, explaining that he had worked hard on his post-verdict motions and wished to be heard on them. 12/6/13 RP 4. He articulated to the court that he wanted to continue to represent himself until his sentencing hearing, at which point he wished to exercise his right to counsel, which is exactly what he had first articulated to the court several weeks before. 11/8/13 RP 18; 12/6/13 RP 4. Despite the fact Mr. Mohamed consistently and repeatedly informed the court he wished to proceed pro se until his sentencing hearing, the trial court suggested that he had changed his mind multiple times about whether he wanted counsel, and identified Mr. Mohamed's request as a demand for "co-counsel." 11/25/13 RP 4; 12/6/13 RP 3.

In its response, the State relies on the court's mischaracterization and fails to address how Mr. Mohamed's request actually meets the definition of co-counsel, or "hybrid representation." As stated in the Appellant's Opening Brief, "hybrid representation" occurs when "both the defendant and an attorney actively participate in the presentation and share the duties of managing a defense." State v. Buelna, 83 Wn. App. 658, 661, 992 P.2d 1371 (1996). At no point did Mr. Mohamed ask that both he and his attorney be permitted to actively

participate in the presentation of Mr. Mohamed's defense. Mr. Mohamed had represented himself at trial. He wished to continue representing himself on the motions relevant to that trial. This request not only appeals to common sense but was also financially prudent, given the additional expense of having an attorney review the record and prepare any possible motions.¹

The State claims that by explaining Mr. Mohamed did not wish to act as co-counsel, he "disavows his request below." Resp. Br. at 27. In support for this assertion, the State offers that the appointed attorney indicated he needed to investigate the case and Mr. Mohamed's personal circumstances in order to prepare for sentencing. Resp. Br. at 27; see also 11/8/13 RP 18-19. However, this portion of the record fails to provide support for the State's claim.

As the State acknowledges earlier in its brief, at Mr. Mohamed's hearing on November 8, 2013, Mr. Mohamed explicitly stated that he wished to represent himself on his post-verdict motions but was requesting an attorney for his sentencing. Resp. Br. at 22; 11/8/13 RP 18. The trial court decided not to remove Mr. Mohamed's counsel,

¹ As the State points out in its response, it appears the trial transcript was prepared for appointed counsel at public expense. Resp. Br. at 23 n. 13.

telling Mr. Mohamed that he could consider representing himself again after sentencing. 11/8/13 RP 19. Although Mr. Mohamed ostensibly agreed, he then asked the court how to file his pro se post-verdict motions. 11/8/13 RP 19. During this exchange, Mr. Mohamed's attorney asked for an order directing the Office of Public Defense to pay for the trial transcript. 11/8/13 RP 19. Given that the trial court had just indicated to counsel that he was expected to represent Mr. Mohamed from that point forward, including on any post-verdict motions and at sentencing, it is not surprising that counsel made this request. It offers no support for the State's claim that Mr. Mohamed requested to act as co-counsel.

- b. Mr. Mohamed's waiver of counsel was invalid because he was forced to salvage one constitutional right at the expense of another constitutional right.

Mr. Mohamed repeatedly requested the assistance of counsel at his sentencing hearing and agreed to represent himself only after the trial court required him to choose between being heard on his post-verdict motions and exercising his right to representation. A defendant's request to represent himself must be unequivocal. Silva, 108 Wn. App. at 539. Courts should indulge in every reasonable

presumption against a defendant's waiver of counsel. State v. Madsen, 168 Wn.2d 496, 503, 229 P.3d 714 (2010).

The State argues that "it was solely Mohamed's decision to represent himself, understanding that he would not be permitted to change his mind again." Resp. Br. at 25. As addressed above, the suggestion that Mr. Mohamed repeatedly changed his mind mischaracterizes the record. Further, that Mr. Mohamed was given the opportunity to choose between two alternatives does not indicate that such a choice was constitutionally permissible.

A defendant may not be forced into "choosing between salvaging one constitutional right at the expense of another constitutional right." State v. Woods, 143 Wn.2d 561, 584, 23 P.3d 1046 (2001). The State claims Mr. Mohamed was not forced to choose between constitutional rights, and alleges State v. Brown, 113 Wn.2d 520, 540, 782 P.2d 1013 (1989), presents analogous facts. Resp. Br. at 25. In Brown, the court found that requiring a defendant to testify in order to preserve an alleged error in the admission of prior conviction evidence was permissible. 113 Wn.2d at 540. It determined this requirement was not measurably different from requiring the defendant

to decide whether to testify in the first place if a prior conviction might be admitted. Id.

However, unlike in Brown, which addressed the burdening of one constitutional right, there were multiple rights at issue here. Mr. Mohamed sought to exercise his right, as a pro se defendant, to be heard on his motions for a new trial. In order to do so, the trial court required him to waive his right to counsel at sentencing. His reluctant waiver of counsel at sentencing, despite his repeated requests for counsel, was not unequivocal or knowing, intelligent, and voluntary. See Op. Br. at 7-13. When the court required Mr. Mohamed to proceed pro se at sentencing if he wished to continue to represent himself on the post-verdict motions, the court wrongly denied Mr. Mohamed his right to counsel at sentencing.

2. The trial court abused its discretion when it admitted the recordings of the jail phone calls.


For the reasons set forth in Mr. Mohamed's opening brief, the trial court admitted irrelevant and prejudicial recordings of phone calls, and his conviction should be reversed and his case remanded for a new trial. See Op. Br. at 13-20.

B. CONCLUSION

For the reasons stated above and in his opening brief, Mr. Mohamed was denied his right to counsel at sentencing and is, at a minimum, entitled to a new sentencing hearing. In addition, because the court admitted irrelevant and prejudicial recordings of phone calls, his conviction should be reversed and his case remanded for a new trial.

DATED this 15th day of January, 2015.

Respectfully submitted,



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YASIN MOHAMED,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 15TH DAY OF JANUARY, 2015, I CAUSED THE ORIGINAL **REPLY 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:

<p>[X] DONNA WISE, DPA [paoappellateunitmail@kingcounty.gov] KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT 516 THIRD AVENUE, W-554 SEATTLE, WA 98104</p>	<p>(X) () () ()</p>	<p>U.S. MAIL HAND DELIVERY E-MAIL BY AGREEMENT VIA COA PORTAL</p>
<p>[X] YASIN MOHAMED 3438 29TH AVE SW SEATTLE, WA 98126</p>	<p>(X) () ()</p>	<p>U.S. MAIL HAND DELIVERY _____</p>

SIGNED IN SEATTLE, WASHINGTON THIS 15TH DAY OF JANUARY, 2015.

X _____ 

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