No. 46685-6-II

IN THE STATE OF WASHINGTON

COURT OF APPEALS DIVISION II

STATE OF WASHINGTON, Respondent

v.

EXPY SANABRIA, Appellant

APPEAL FROM THE SUPERIOR COURT

OF PIERCE COUNTY

THE HONORABLE JUDGE GAROLD JOHNSON

REPLY BRIEF OF APPELLANT

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I. ISSUES IN REPLY

A. Under the 6th Amendment of the United States Constitution and Article 1 §22 of the Washington State Constitution, where a defendant unequivocally, knowingly, and intelligently moves the court to proceed pro se, in a timely fashion, is it a violation of constitutional rights to deny the motion, requiring reversal of the conviction?

B. Under *Darden*[1], does the criminal defendant's right to confront his accusers trump the State's interest in avoiding disclosure of secret law enforcement techniques and strategies?

C. Was the State obligated to disclose relevant material and information pertaining to the warrantless arrest of Mr. Sanabria?

D. Did the trial court abuse its discretion in finding a witness not material and denying a motion for a continuance when, to the surprise of defense counsel, a lead officer who was instrumental in obtaining probable cause to search and finding incriminating evidence, was suddenly unavailable to testify, despite having received two subpoenas by the State

[1] *State of Washington v. Darden,* 145 Wn.2d 612, 41 P.3d 1189 (2002).

and one from the defense counsel and one from co-defendant's counsel?

II. ARGUMENT

Mr. Sanabria incorporates and relies on the statement of facts presented in appellant's opening brief. He incorporates the arguments from the opening brief and adds the following in reply.

A. The Trial Court Violated Mr. Sanabria's Constitutional Right To Self-Representation.

The State has taken the position that Mr. Sanabria's exercise of his right to represent himself was equivocal because he never made a motion to proceed pro se, did not set the matter for a hearing, and because he did not renew his request at the April 16 and May 1 hearings. (Br. of Resp. at 24). The record does not substantiate this assertion.

1. The Record Shows That Mr. Sanabria Made A Timely Motion To Proceed Pro Se On January 10th and January 24th.

In *Madsen,* the Court held "(1) "…an unequivocal request to proceed pro se is valid even if combined with an alternative request for new counsel" and (2) "There is no requirement that a request to proceed pro se be made at every opportunity. Further, a trial

court's finding of equivocation may not be justified by referencing future events then unknown to the trial court." *State v. Madsen,* 168 Wn.2d 496, 507, 229 P.3d 714 (2010). Under Washington case law the State's assertions are "improper legal reasoning" and "reliance on such is an abuse of discretion." *Id.*

In his January 10 appearance, Mr. Sanabria asked the court to allow him to represent himself with appointed standby counsel. Mr. Sanabria had the right to request standby counsel. *State v. Fritz,* 21 Wn.App.354,363, 585 P.2d 173 (1973) *rev. denied,* 92 Wn.2d 1002 (1979). Like the defendant in *Mehrabian,* Mr. Sanabria stated he wanted standby counsel, just not his current appointed attorney. Under *Madsen* and *Mehrabian,* inclusion of an alternative request is irrelevant to whether the request was unequivocal. *State v. Mehrabian,* 175 Wn.App. 678, 693, 308 P.3d 660 (2013); *Madsen,* 168 Wn.2d at 507.

Like *Madsen*, Mr. Sanabria, also made his request to represent himself early in the prosecution of his case. *Madsen,* 168 Wn.2d at 505. Where a request to proceed pro se is made well before the trial and unaccompanied by a request for a continuance, the right of self-representation exists as a matter of law. *State v. Barker,* 75 Wn.App. 236, 241, 881 P.2d 1051 (1994). The court

was on notice that Mr. Sanabria was exercising his right to represent himself.

The court's colloquy with Madsen was limited to asking why he wanted to represent himself. *Id.* at 505-506. His answer, similar to Mr. Sanabria's was that he thought he could resolve the case better on his own. *Id.* Here, the court did not conduct a colloquy, with the exception of asking Mr. Sanabria if he had gone to law school or understood the rules of evidence.

As here, the court in *Madsen* also failed to inquire further or identify facts suggesting that the request was somehow legally deficient. *Id.* at 506. The reviewing Court stated,

> "[t]he court cannot stack the deck against a defendant by not conducting a proper colloquy to determine whether the requirements for waiver are sufficiently met. As the court failed to ask further questions and there is no evidence to the contrary, the only possible conclusion is that Madsen's request was voluntary, knowing, and intelligent." *Id.*

The court denied Mr. Sanabria's motion without prejudice, giving him time to think about it. The issue for Mr. Sanabria to consider was whether he wanted to go forward with Ms. Melby as counsel, or proceed without standby counsel. The court was clear it was not going to appoint new counsel. (1/10/14 RP 8-11).

The court record also shows that on January 24, 2014, Mr. Sanabria filed a document entitled "Affidavit in Support of Motion To Proceed Pro Se." The filing reads:

> "Comes now: the defendant herein, moves this honorable court to proceed pro se under Faretta vs. The State of California 422 U.S. 806. I am aware of the dangers by representing myself, but I feel this is the only way that I'm going to get any fair justice. So at this time I am now moving this honorable court under U.S. vs. Walker, 142 F.3d 103 (2nd Cir 1998) which states that if a defendant asks to proceed pro se before trial commences, the defendant's sixth amendment right to self-representation is absolute and his request must be granted.

(CP 27).

He included a document for the court to sign entitled "Order Granting Defendant Motion to Proceed Pro Se Pursuant To Faretta v. California, 422 U.S. 806. It reads:

> The above entitled court, having heard a motion to allow the defendant to proceed pro se under case No.: 13-1-04475-9 it is ordered by this court to allow the defendant to proceed pro se pursuant to Faretta v. The State of California, 422 U.S. 806, 45 L.Ed.2d 562, 955 S.Ct. 2525 (1975). Dated this _______ day of ______, 2014. ______________ Judge .

(CP 26).

On the same date he filed a second motion entitled "Motion to Set Docket" for the date of January 28, 2014 between 1:30 and 3:30 pm. The motion specifically states:

> "Defendant pro-se requesting the court for an order to set docket." It is signed "Expy Sanabria, Defendant Pro Se. "

(CP 21).

2. Mr. Sanabria Was Entitled to Represent Himself As A Matter of Law.

Mr. Sanabria is guaranteed the right to self-representation by the Washington State Constitution, Art. 1, § 22.[2] In *Fritz,* the Court laid out the principles relevant to a defendant's request to proceed pro se: (1) there must be a request (2) the request must be knowingly and intelligently made (3) it must be unequivocal and (4) it must be timely. *Fritz,* 21 Wn.App. at 358-64.

Mr. Sanabria made a request in his verbal demand on January 10 and written demand for self-representation on January 24 and requested a hearing for January 28. Second, Mr. Sanabria showed he was making the decision to proceed pro se with "eyes wide open" when he specifically wrote that he understood the

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[2] In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel.

dangers of representing himself. Third, the request was unequivocal and lastly, it was a timely request.

The court never held a hearing or made a ruling on the January 24 demand. Failure to make a ruling was the equivalent of denial of the motion. This was an abuse of discretion. *Madsen,* 168 Wn.2d at 508. The improper rejection of the right to self-representation requires reversal. *Madsen,* 168 Wn.2d at 503-04.

3. Under *Madsen,* Mr. Sanabria's Request Was Unequivocal As There Is No Requirement The Demand Be Made At Every Opportunity.

In its response, the State also focused on the fact that Mr. Sanabria did not raise his pro se request at either the April 16 or May 1 hearing, wrongly concluding that the request was therefore equivocal. (Br of Resp. at 24-25). This argument has already been raised and rejected by the Washington Supreme Court. *Madsen,* 168 Wn.2d at 507.

The State relies on a letter dated April 25, in which Mr. Sanabria asked the court to appoint another attorney for him. (Br. of Resp. at 25). It also relies on the May 1 hearing, where the court heard and denied Mr. Sanabria's motion to be appointed new counsel. (Br. of Resp. 25). As the *Madsen* court held, "There is no

requirement that a request to proceed pro se be made at every opportunity. Further, a trial court's finding of equivocation may not be justified by referencing future events then unknown to the trial court." *Madsen,* 168 Wn.2d at 507.

The record shows that on April 16, the court granted a motion to continue the trial date to May 1. (Supp. CP: Order for Continuance of Trial Date 4/16/2014). Mr. Sanabria was well aware that the trial was to commence on May 1. In context, the court's ignoring of his January 24 request left Mr. Sanabria with little choice but to request new counsel.

Additionally, at the May 1 hearing, rather than proceed with trial, the date was set to May 7. (Supp. CP: Order for Continuance of Trial Date 5/1/2014). Again, Mr. Sanabria's options again were obviously severely limited.

The context of the record shows that Mr. Sanabria wanted to represent himself very early in the prosecution of his case. His demand was made well before trial and was unaccompanied by a motion for a continuance. Mr. Sanabria's request met all the principles outlined in *Fritz* and reiterated in *Breedlove. Fritz,* 21 Wn.App. at 358-364; *State v. Breedlove,* 79 Wn.App. 101, 106-111, 900 P.2d 586 (1995). Mr. Sanabria's expressed desire to exercise

his right to represent himself was not and should not be considered equivocal.

The trial court's denial of the defendant's right to represent himself is reviewed for abuse of discretion. *State v. Hemenway,* 122 Wn.App. 787, 792, 95 P.3d 408 (2004). A trial court abuses its discretion if its decision is manifestly unreasonable or rests on facts unsupported by the record or was reached by applying the wrong legal standard. *Madsen,* 168 Wn.2d at 504. In *Madsen,* the first motion for pro se status met the standards of *Fritz.* The Court held that had the trial court denied the motion on that date, it would have committed reversible error. *Id.* at 505. Here, the court initially denied the motion, and then never addressed it again, amounting to an unjustified denial.

The unjustified denial of the right to proceed pro se requires reversal, whether or not prejudice results. *State v. Floyd,* 178 Wn.App. 402, 408, 316 P.3d 1091 (2013)(citing *State v. Vermillion,* 112 Wn. App. 844, 851, 51 P.3d 188 (2002). Mr. Sanabria's conviction must be reversed.

B. The State Was Obligated To Disclose The Police Reports That Served As The Basis For The Warrantless Arrest Of Mr. Sanabria, Regardless of Whether They Contained Secret Law Enforcement Techniques And Strategies.

Mr. Sanabria was arrested on the basis of the controlled buys allegedly witnessed by Officers Conlon and Martin. (6/23/14 RP 69). Relying on CrR 4.7(c)(1), defense counsel requested copies of the police reports that detailed circumstances leading to his arrest. The State objected, arguing that disclosure of the reports "would lead to strategies, the techniques they use, the locations where they set these buys up. It would give information about the buy." (6/23/14 RP 70-71). The trial court denied access to the reports. (6/23/14 RP 73).

As stated in Mr. Sanabria's opening brief, "It is the long settled policy in this state to construe the rules of criminal discovery liberally in order to serve the purposes underlying CrR 4.7, which are 'to provide adequate information for informed pleas, expedite trial, minimize surprise, afford opportunity for effective cross-examination, and *meet the requirements of due process'*..." *State v. Dunivin,* 65 Wn.App. 728, 733, 829 P.2d 799 (1992). (emphasis added).

Officer Conlon was a member of the Lakewood Police Department and assigned to the Tacoma FBI South Sound Gang Taskforce. He was the officer who "discovered" the car in the driveway of the doublewide and followed it to the controlled buys.

The warrantless arrest was directly related to that event and the search warrant grew out of that event. Without the requested discovery, relevant information related to probable cause for the warrantless arrest was absent. It remains unexplained how Officer Conlon "discovered" the vehicle, when the only solid information law enforcement had was a cell phone number and a partial license plate for a black Acura, which was not registered to Mr. Sanabria.

The advent of the warrantless use of sophisticated technology to accurately pinpoint the location of suspects by the use of their cell phone, has raised the question of the constitutionality of using such without authorization from a court. *Your Secret Stingray's No Secret Anymore: The Vanishing Government Monopoly Over Cell Phone Surveillance And Its Impact On National Security and Consumer Privacy*. *28 Harv. J.L. & Tech.1* Fall 2014. The article cites the use of the technology by law enforcement agencies and the required nondisclosure agreements between the agency and the maker of the Stingray as well as between the FBI and the local agency. The nondisclosure

agreement specifically *prohibits the disclosure of any information* about the use of the company's products.[3]

Without the disclosure of the police reports, whether such technology was used in Mr. Sanabria's case is unknown. The details leading to his warrantless arrest were relevant. Mr. Sanabria would have the right to request suppression of any evidence discovered as a result of a violation of his rights under the 4th Amendment to the U.S. Constitution and Art. 1, § 7 of the Washington State Constitution.

In *Darden,* the Court considered whether a criminal defendant's right to cross-examine adverse witnesses is trumped by the State's interest in avoiding disclosure of a secret law enforcement surveillance location. *Darden,* 145 Wn.2d at 615. The Court held that a defendant's right to challenge the accuracy and veracity of a key witness for the State triumphs over the State's

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[3] "In Tacoma, Washington the local police have used StingRay surveillance devices since 2009 and insist that they only do so with approval from a judge. When asked about the police department's statements in 2014, however, the presiding judge of the local Superior Court told a reporter that the StingRay equipment had not been mentioned in any warrant application that he has seen. He also revealed that other judges in his court were similarly surprised to hear that the Tacoma police were using the technology, stating that '[the judges] had never heard of it.'" 28 Harv. J.L. & Tech 1, Fall 2014.

asserted interest to not reveal the precise location of an observation post. *Id.* at 619. The Court reversed and remanded for a new trial.

Here, if the State had concerns about preservation of law enforcement techniques and strategies, it could have easily asked the court to conduct an in camera hearing. Such a hearing serves "to protect the interests of both the government and the defendant: "the government can be protected from any significant, unnecessary impairment of …secrecy, yet the defendant can be saved from what could be serious police misconduct." *State v. Blackshear,* 44 Wn.App. 587, 591, 723 P.2d 15 (1986)(quoting *United States v. Moore,* 522 F.2d 1068, 1073 (9th Cir. 1975).

Mr. Sanabria was entitled to the police reports regarding the controlled buys as they were relevant to his warrantless arrest. CrR 4.7(c)(1).

C. The Trial Court Erred When It Denied A Continuance So Officer Conlon Could Be Brought To Testify And Found Officer Conlon A Nonmaterial Witness.

The decision to grant or deny a continuance rests in the discretion of the trial court. *State v. Simonson,* 82 Wn.App. 225, 231-32, 917 P.2d 599 (1996). The denial of a continuance may

effectuate a denial of a fair trial and due process of law. *State v. Brett,* 126 Wn.2d 136, 220, 892 P.2d 29 (1995), *cert. denied,* 116 S.Ct. 931, 132 L.Ed.2d 858.

The State has taken the position that because the defense failed to issue a subpoena for Officer Conlon until the trial started, the defense did not exercise due diligence. (Br. of Resp. at 42). Based on the record, this position is incorrect.

The State issued subpoenas to Officer Conlon on February 11, 2014 and again on June 11, 2014. (CP 344;345) Conlon was on the State's latest witness list as late as June 18. (CP 346-47). To suggest that the defense was obligated to issue a subpoena for every subpoenaed prosecution witness is an unprecedented position: it means that in every single case there would need to be a "backup" subpoena issued for each and every witness for both the defense and the State.

Here, the subpoena issued by the State contained the following language: "This subpoena, however, *remains in effect and imposes a continuing duty to appear until you are discharged."* (CP 344;345;272;273). Under CrR 6.12(b), a witness subpoenaed for trial is "dismissed and excused from further attendance as soon as he has given his testimony in chief and has been cross-examined

thereon, unless either party makes requests in open court that the witness remain in attendance." Further, under CrR 4.8(c), failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena is issued. Officer Conlon was under subpoena to appear to be examined and cross-examined on his role in the prosecution of Mr. Sanabria.

The State presented to the trial court that it was surprised and upset that Officer Conlon was not coming in to testify. (6/24/14 RP 341-42). In fact, the State said that it wanted a continuance because it had just learned Conlon was not available. (6/23/14 RP 127). Defense counsel was not notified until June 23 that Conlon was not going to appear. Counsel immediately subpoenaed Conlon, which the Lakewood police department accepted. (CP 273). Counsel also requested a continuance to secure Conlon's presence. (6/24/14 RP 163).

Defense counsel for Ms. Ann called the Lakewood police department on June 23rd and reported to the court that Officer Conlon was *available* to testify on June 25 according the police department. (6/23/14 RP 126-27). The following day, June 24, defense counsel reported to the court that he again spoke with

Lakewood police department and that Conlon was available to testify. (6/24/14 RP 162). At trial, Officer Martin testified that Conlon had actually been at work on the day he was scheduled to testify. (6/25/14 RP 431).

In *State v. Summers,* the State failed to call several witnesses who had been named on its list. *State v. Summers,* 60 Wn.2d 702, 375 P.2d 143 (1962). The Court found no error as the appellant did not claim surprise, ask for a continuance in order to subopena the witnesses, or advise the court by an offer of proof what he intended to prove by them. *Id.* at 706. Where there is a claim of *surprise*, diligence, *materiality*, and no substantial interference with the orderly procedure of the trial, a continuance or recess of the trial may be necessary to preserve a defendant's *constitutional right of compulsory process*. *State v. Edwards,* 68 Wn.2d 246, 412, P.2d 143 (1962). (Emphasis added).

Here, it is clear that all parties, including the State, were surprised that Conlon was simply not going to appear to testify. As soon as defense counsel became aware that Conlon might not appear, Lakewood police department was contacted (to confirm his availability) and a new subpoena was issued to compel his attendance. Counsel asked for a continuance, as Conlon was a

material witness. As presented in appellant's opening brief statement of facts: Officer Conlon was alone when he "discovered" the black Acura at the same time the CI made the telephone call. Officers Conlon and Martin arrested and searched Mr. Sanabria on the basis of the drug buys. Officer Conlon was alone at the time he discovered the contraband in the search of the mobile home. Conlon told Officers Martin and James where he found the items; they did not see Conlon retrieve them. Conlon was a material witness.

The right to offer the testimony of witnesses and to compel their attendance, if necessary, is in plain terms the right to present a defense, which is a fundamental element of due process of law. *In re Johnson v. Cranor,* 43 Wn.2d 200, 260 P.2d 873 (1953), *cert. denied,* 348 U.S. 902, 75 S.Ct. 226, 99 L.Ed. 709 (1954); *State v. Carlisle,* 73 Wn.App. 678, 679, 871 P.2d 172 (1994)(internal citations omitted).

Mr. Sanabria had the right to confront Officer Conlon about exactly where and how he made his discoveries. Mr. Sanabria had the right to test Conlon's perception, memory, credibility, and narrative power. *State v. Paine,* 98 Wn.2d 140, 654 P.2d 77 (1982). The trial court abused its discretion when it denied the

motion for a continuance to secure Conlon's presence, and further abused its discretion when it determined that Conlon was not a material witness.

Mr. Sanabria rests on the remaining arguments presented in appellant's opening brief. Mr. Sanabria also accepts the State's concession that the court erred when it failed to make an individualized inquiry into Mr. Sanabria's current or future ability to pay the imposed discretionary fines.

III. CONCLUSION

Based on the foregoing facts and authorities, Mr. Sanabria respectfully asks this Court to reverse his conviction and remand for a new trial in which he may represent himself or exercise his right to assistance of counsel.

Respectfully submitted this 1st day of September 2015.

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CERTIFICATE OF SERVICE

I, Marie Trombley certify that on September 1, 2015, I delivered by electronic service, by prior agreement between the parties, or sent by USPS first class mail, postage prepaid, a true and correct copy of the reply brief of appellant to the following:

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