SUPREME COURT NO. 94063-1

NO. 72904-7-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JON DEL DUCA,

Petitioner.

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

The Honorable Mary Roberts, Judge

PETITION FOR REVIEW

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RULES, STATUTES AND OTHER AUTHORITIES

A. IDENTITY OF PETITIONER

Petitioner Jon Del Duca, the appellant below, requests review of the Court of Appeals decision referred to in section B.

B. COURT OF APPEALS DECISION

Del Duca requests review of the Court of Appeals decision in State v. Del Duca, No. 72904-7-I, filed December 19, 2016 and attached to this petition as an appendix.

C. ISSUES PRESENTED FOR REVIEW

1. Is review appropriate under RAP 13.4(b)(1) where the Court of Appeals decision conflicts with this Court's opinion in State v. DeWeese, 117 Wn.2d 369, 816 P.2d 1 (1991), and the record does not reveal a knowing, voluntary, and intelligent waiver of petitioner's right to counsel at trial?

2. Is review also appropriate under RAP 13.4(b)(2) where the Court of Appeals opinion addressing defense motions, which were left unresolved in the trial court, conflicts with prior decisions on this issue?

D. STATEMENT OF THE CASE

1. Trial Proceedings

The lengthy procedural history leading to Del Duca's loss of counsel is discussed in detail in his Court of Appeals opening brief. See Brief of Appellant, at 2-15.

In summary, Del Duca was dissatisfied with two attorneys appointed to represent him in this case. Initial counsel, Brian Beattie, was replaced with new counsel. 6RP 56, 70; CP 11. Thereafter, two other attorneys represented Del Duca, but were replaced for reasons other than Del Duca's dissatisfaction. 7RP 74; CP 206-208. Eventually, attorney John Ewers was appointed. 8RP 3.

Del Duca became disenchanted with Ewers and repeatedly requested new counsel. 8RP 3; 9RP 3; 10RP 3; 11RP 81-90; 12RP 105-131; 13RP 155-165. Every request was denied. 8RP 11-12; 9RP 25; 10RP 3; 11RP 92; 12RP 139, 142; 13RP 157, 166. Judge Mary Roberts, who ruled on these requests, found that Del Duca was not seeking to represent himself. Rather, he was simply "expressing his ongoing unhappiness with this attorney." 13RP 166.

Trial was set to begin on September 26, 2013. 13RP 166. At an omnibus hearing on September 19, 2013, Del Duca complained about a lack of communication and trust with Ewers and maintained

there were still relevant witnesses who needed to be located and interviewed before trial. 14RP 6-7. Del Duca indicated he would not go to trial with Ewers and would now sign paperwork waiving counsel because he had no other choice. 14RP 7-12. Judge Roberts then attempted to engage in a colloquy with Del Duca to determine whether his waiver was knowing, voluntary, and intelligent. 14RP 13. When it became clear Del Duca still sought different representation, Judge Roberts reiterated that Del Duca's choice was between going to trial with Ewers or self-representation. 14RP 17. Del Duca stated that if he were to represent himself, it would be under duress. 14RP 19. He also threatened not to come to court if Ewers remained as counsel. 14RP 20.

At this point, for the first time, Judge Roberts mentioned the possibility of finding that Del Duca had forfeited his right to an attorney based on his inability to work with assigned counsel. 14RP 20-21. Del Duca refused to indicate that he wanted to represent himself and cited his right to counsel. 14RP 23. Judge Roberts then found forfeiture:

> I am finding that Mr. Del Duca has forfeited his right to counsel, and I will allow him to go forward without an attorney even though he has not made a knowing, intelligent, and voluntary waiver of his right to counsel, but that he has forfeited it by his conduct and

> by refusing to work with any attorney who has been appointed by the Court. . . .

14RP 24 (emphasis added). Judge Roberts then filed a consistent written order finding forfeiture. CP 260.

Uncertain of her legal footing, Judge Roberts indicated that if either the prosecutor or Ewers believed something more was required to support forfeiture, they could set the matter for a hearing. 14RP 25-26. She also ordered both counsel present for the next hearing, September 25, in case forfeiture were addressed. 14RP 31.

On September 23, the deputy prosecutor handling the case submitted citations to three cases, including State v. DeWeese, that dealt – instead of forfeiture – with the requirements for a knowing, voluntary, and intelligent waiver of counsel. CP 591.

At the hearing on September 25, Judge Roberts noted that she had provided to the parties a standard "waiver of counsel form" with some additional language added. 15RP 3; CP 588-589. Judge Roberts then asked Del Duca whether "it is still your desire to represent yourself, given that the only other choice at this point is to have Mr. Ewers as your counsel." 15RP 3. After Del Duca responded this was not much of a choice, but "[i]t's[1] a better of two

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[1] The vrp mistakenly indicates, "He's a better of two evils." The recording of the hearing reveals the first word to be "It's."

evils," Judge Roberts asked him to look at the proposed waiver form and indicate whether it was something he was willing to sign. 15RP 3-4.

The waiver form lists the many rights Del Duca would be giving up if he chose to represent himself and what would be expected of him should he choose to go pro se. CP 588-589. The form then says the following: "I have read, or have had read to me, this entire document. I want to give up my right to an attorney. I want to represent myself." CP 589.

After ensuring Del Duca had reviewed the waiver form, Judge Roberts asked him to sign it if he found it acceptable. 15RP 4.

Del Duca indicated he would not sign away his constitutional right to counsel. 15RP 5, 7. Judge Roberts then changed the title of the document from "Waiver of Counsel" to "Order On Defendant's Request to Represent Himself" and added language making it clear that if Del Duca later changed his mind, he might be forced to continue to represent himself. 15RP 8.

After some additional discussion between the two, Judge Roberts said, "And is it your desire to go forth representing yourself? Because if it is, I want to hear that really clearly from you and have you sign the form." 15RP 9 (emphasis added). When Del Duca did

not state his desire to represent himself and did not sign the form, the discussion continued. 15RP 9-11. Judge Roberts once again asked Del Duca if he was willing to sign the form, and Del Duca again said that he would not sign away his rights when what he needed was an attorney's help. 15RP 11.

Judge Roberts then indicated that she would not make Del Duca sign the proposed waiver/order. 15RP 12. Recognizing the form's language (which indicates "I understand this, I understand that") was ill suited for such an order, Judge Roberts promised to change the language, enter a new order indicating "what I think happened," and then send Del Duca a copy so that he could voice his objections. 15RP 12. The order would indicate that Del Duca had knowingly, intelligently, and voluntarily chosen to represent himself given the choice of being represented by Ewers or representing himself and his refusal to work with Ewers. 15RP 12-13. This plan was confirmed later in the hearing when Judge Roberts said, "I'm going to create a new order with regard to, that you're going to represent yourself." 15RP 22.

No such written order was ever entered, however. On the unfiled written waiver form Del Duca refused to sign on September 25, 2013, under "court's findings," a sentence that reads, "I find the

defendant's waiver of counsel to be knowingly, intelligently, and voluntarily made" and "[t]he defendant understands the charges and consequences of his/her waiver" has been intentionally crossed out. CP 587, 589.

On more than one occasion following Judge Roberts promise of a written order revealing "what she thought happened," Del Duca asked Judge Roberts to explain the basis for her ruling. 17RP 230; 18RP 10; 21RP 345, 358; 26RP 424-425, 453; 27RP 53; CP 307, 314. She again indicated she would do so in a written ruling. 17RP 232; 18RP 10; 21RP 345, 358. And although no written ruling was ever entered, Judge Roberts' discussions of her ruling reveals that she ultimately relied on a finding of *forfeiture* rather than voluntary waiver. See 17RP 231-232 ("I have already decided that you have forfeited your right to have counsel" and "I am going to issue a clearer written decision on the forfeiture of your right to have appointed counsel so that you will know exactly what my reasoning is."); 50RP 7 ("the reasons that you – that I found that you forfeited counsel were tied to the fact that you were not accepting of an attorney's determination that issues that you wanted to raise were not the ones that they could ethically raise, because they didn't believe that they were supported by the law.

And so you're going to run into that same problem with any other attorney who's appointed.").

Although the parties had been on the verge of starting trial in September 2013, following the removal of counsel to assist Del Duca, the start of trial was delayed more than a year. 35RP 31. Recognizing he was not qualified to handle his own defense, over the course of that year, Del Duca repeatedly asked for the assistance of counsel or, at the very least, help from standby counsel. Judge Roberts agreed this was a very complicated case. 17RP 237. But every request was denied. See 16RP 176, 185, 187-188, 192; 17RP 230-231, 237-238, 247-248; 18RP 10, 24-25, 32; 19RP 277-280; 20RP 308-309, 311, 314-315, 319; 21RP 335, 341, 344, 346-347, 350, 358; 22RP 49, 66; 23RP 22-23; 24RP 16, 23-25; 25RP 369; 26RP 424-425, 452-453; 27RP 27, 33-35, 53, 55, 60-62, 64-65; 28RP 482; 29RP 502-503, 508, 513-515; 31RP 575-576, 579, 583, 595, 604, 623, 638-640, 652; 32RP 665, 692, 694; 33RP 10, 20-22, 38; 34RP 71, 83; 36RP 13, 46-47, 58-59, 75, 77-78; 37RP 6-7, 19; 40RP 27, 34; 43RP 14-16; 44RP 20; 45RP 15, 27, 42-45; 46RP 10; 47RP 57; CP 284-285, 289-291, 295-299, 325, 330-331, 333, 379-380, 390-391, 409-411, 413, 416-417, 425.

Del Duca had informed Judge Roberts that he had no legal training whatsoever. 6RP 70. He filed motions for summary judgment under CR 56 and for default under CR 55. CP 261-274, 279-280, 284, 287, 292, 300, 320-321, 329-330, 376-379. He also relied on federal procedural rules, the Articles of Confederation, and what he called "legal law." 24RP 12-16; 26RP 421-422; 36RP 51-52; 37RP 16.

Del Duca's pro se defense was insufficient. A jury convicted him of child rape and child molestation, and Judge Roberts sentenced him to serve a total of 162 months in prison. CP 96-97, 133-134.

2. Court of Appeals

In the Court of Appeals, Del Duca argued he had been denied his constitutional right to the assistance of counsel. He challenged Judge Roberts' ruling that he had forfeited his right to counsel, noting that forfeiture requires a showing that a defendant engaged in extremely serious misconduct. Although Del Duca had difficulties getting along with appointed counsel, nothing he had done rose to the level of misconduct. Brief of Appellant, at 19-23. Del Duca also noted that Judge Roberts had never entered a written order finding a

knowing and intelligent waiver of counsel. Nor could she have properly done so. Brief of Appellant, at 23-24.

In response, the State agreed there were no grounds to find that Del Duca had forfeited his right to counsel. Brief of Respondent, at 44 (referencing Judge Roberts' erroneous belief that Del Duca had forfeited right). Instead, the State argued that Judge Roberts' oral finding on September 25, 2013 that Del Duca had knowingly, intelligently, and voluntarily waived his right to counsel was the final and controlling ruling on the issue – despite the absence of any written order to this effect. The State also argued that, under State v. DeWeese, a finding of voluntary waiver was proper. Brief of Respondent, at 36-44.

In reply, Del Duca pointed out that an oral decision from the bench – such as Judge Roberts' oral decision on September 25, 2013 that Del Duca had voluntarily waived his right to counsel – was not binding (and subject to modification or complete abandonment) until reduced to a written order. No such order was ever filed. Moreover, after September 25, every description by Judge Roberts of her decision described forfeiture as the basis, which was consistent with the written order she had filed September 19, 2013. See CP 260 (finding forfeiture).

Furthermore, Del Duca pointed out that, under DeWeese, "[t]he defendant's request to proceed pro se must be stated unequivocally" for there to be a knowing and valid waiver of the right to counsel. Appellant's Reply Brief, at 6 (quoting DeWeese, 117 Wn.2d at 377 (citing State v. Imus, 37 Wn. App. 170, 180, 679 P.2d 376 (1984)). And even the State was conceding that Del Duca never unequivocally requested to proceed pro se. See Brief of Respondent, at 35 (describing Del Duca as a defendant who "refuses to unequivocally waive counsel.").

The Court of Appeals reasoned that Del Duca was reading the express language of DeWeese – requiring a request to proceed pro se be stated unequivocally – too literally. Slip op., at 5. The Court treated Judge Roberts' oral remarks indicating a voluntary waiver of counsel as her decision on the matter.[2] Slip op., at 2-3, 6. The Court then found that this decision could be sustained under a more nuanced and forgiving interpretation of DeWeese. Slip op., at 5-6.

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[2] Interestingly, in describing Judge Roberts' decision, the Court of Appeals used her oral remarks from September 25, 2013 (stating she was finding a voluntary waiver). It also relied on her proposed but unfiled "Waiver of Counsel" form from that same hearing, which she began to modify into an order before abandoning that effort and indicating she would subsequently draft and file a new order. Slip op., at 2-3. The Court of Appeals quotes from the portion of this unfiled form pertaining to forfeiture, but omits any reference to the language (lined through by Judge Roberts as not established) that would have indicated she was finding a knowing, voluntary, and intelligent waiver. Compare CP 589 with Slip op., at 3.

Del Duca now seeks this Court's review.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. REVIEW SHOULD BE ACCEPTED BECAUSE THE COURT OF APPEALS DECISION CONFLICTS WITH THIS COURT'S OPINION IN DeWEESE.

"[A] court must indulge every reasonable presumption against waiver of fundamental rights." Bellevue v. Acrey, 103 Wn.2d 203, 207, 691 P.2d 957 (1984) (citing Glasser v. United States, 315 U.S. 60, 62 S. Ct. 457, 86 L. Ed. 2d 680 (1942)). In Washington, a request to proceed pro se must be stated unequivocally for there to be a valid waiver of the right to counsel. Otherwise, appointed counsel shall continue to represent the defendant. DeWeese, 117 Wn.2d at 377.

The DeWeese Court explained its rationale for this bright-line rule:

> 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. Because of this conflict, a defendant's request for self-representation can be a "heads I win, tails you lose" proposition for a trial court. *People v. Sharp*, 7 Cal.3d 448, 462 n.12, 499 P.2d 489 [498], 103 Cal.Rptr. 233, 242 (1972), cert. denied, 410 U.S. 944 [93 S.Ct. 1380, 35 L.Ed.2d 610] (1973). If the court too readily accedes to the request, an appellate court may reverse, finding an ineffective waiver of the right to counsel. But if the trial court rejects the request, it runs the risk of depriving the defendant of his right to self-representation. *People v. Sharp, supra*. To limit baseless challenges on appeal, courts have required

> that a defendant's request to proceed pro se be stated unequivocally.

DeWeese, 117 Wn.2d at 377 (quoting Imus, 37 Wn. App. at 179-180).

The DeWeese Court continued:

> Thus, a trial court must establish that a defendant, in choosing to proceed pro se, makes a knowing and intelligent waiver of the right to counsel. *State v. Bebb*, 198 Wash.2d 515, 525, 740 P.2d 829 (1987). We hold this requirement extends to a defendant's choice to represent himself rather than remain with current appointed counsel after the court has rejected an unjustified request for substitute counsel. The defendant's request to proceed pro se must be stated unequivocally. . . .

DeWeese, 117 Wn.2d at 377 (underlined emphasis added). The trial court must also ascertain whether the defendant's waiver is knowing and valid under Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). Id. at 377-378.

The bright-line rule in DeWeese avoids the ambiguity that can arise following denial of a motion for new counsel. It exists "[t]o protect defendants from making capricious waivers of counsel, and to protect trial courts from manipulative vacillations by defendants regarding representation . . . ." Id. at 376. If the defendant states a request to proceed pro se unequivocally, and the waiver of counsel is knowingly and intelligently made under Faretta, there is a valid waiver

of counsel. Alternatively, if the defendant refuses to state his request to proceed pro se unequivocally, there is no valid waiver and appointed counsel remains.

In the Court of Appeals, the State argued that the rule in DeWeese is similar to the rule adopted in several other jurisdictions. See Brief of Respondent, at 40 (citing United States v. Garey, 540 F.3d 1253 (11th Cir. 2008); King v. Bobby, 433 F.3d 483, 493 (6th Cir. 2006); United States v. Massey, 419 F.3d 1008, 1010 (9th Cir. 2005); United States v. Oreye, 263 F.3d 669, 670-671 (7th Cir. 2001); McKee v. Harris, 649 F.2d 927, 931 (2d Cir. 1981)). But each of these jurisdictions has *dispensed* with the rule, following denial of new counsel, that the defendant only waives his right to counsel if he expressly states his desire to proceed pro se. The Garey court explained the rationale behind this contrary approach:

> it is not uncommon for defendants to demand what they cannot have: substitute counsel. When confronted with defendants who, by their words and conduct, reject both appointed counsel and self-representation, several of our fellow circuits have concluded that a litigant may waive his right to court-appointed counsel not only by expressly invoking the right to self-representation, but also by engaging in conduct that evinces a knowing desire to reject the counsel to which he is entitled. . . . These courts hold that a defendant who rejects appointed counsel but refuses to cooperate with the court by affirmatively expressing his desire to proceed pro se, effectively chooses self-representation by

> rejecting the only other choice to which he is constitutionally entitled.

Garey, 540 F.3d at 1262-1264.

Thus, unlike Washington – which requires a defendant's request to proceed pro se stated unequivocally – these jurisdictions have rejected this requirement and may find a valid waiver even in the absence of a request to proceed pro se.

The State conceded that Del Duca never made an unequivocal request to proceed pro se. See Brief of Respondent, at 35 (describing Del Duca as a defendant who "refuses to unequivocally waive counsel."). And this is supported by the record.

At the hearing on September 25, 2013, Del Duca did initially say that representing himself was "a better of two evils" and "I'm going to have to defend myself, that's a fact." 15RP 3-4. But the colloquy thereafter made it clear that Del Duca was still seeking counsel and would not unequivocally state a desire to proceed pro se. Judge Roberts told him that if he wanted to represent himself, "I want to hear that really clearly from you and have you sign the form." 15RP 9. Thereafter, Del Duca cited the Sixth Amendment, asked for counsel, and expressly refused to sign the form that indicated, "I want

to give up my right to an attorney. I want to represent myself in this case." CP 589; 15RP 11.

Despite this record, the Court of Appeals held that the DeWeese Court did not literally mean what it said when it held, "[t]he defendant's request to proceed pro se must be stated unequivocally." Slip op., at 5; DeWeese, 117 Wn.2d at 377). Instead, the Court of Appeals employed its own pre-DeWeese approach, which dispenses with the word "stated" and simply requires that "the demand to defend pro se must be unequivocal." Slip op., at 5 (quoting State v. Sinclair, 46 Wn. App. 433, 437, 730 P.2d 742 (1986), review denied, 108 Wn.2d 1006 (1987)).

The Court of Appeals' analysis is consistent with those federal courts, like Garey, that also have dispensed with the requirement that defendants expressly state a request to proceed pro se before a valid waiver of counsel will be found. This approach conflicts with the bright-line rule set out in DeWeese.

The Court of Appeals reasoned that Del Duca's case was similar to DeWeese in the following respect:

> Del Duca's comments that representing himself was "not much of a choice," "a better of two evils," and "I'm going to have to defend myself" are analogous to similar comments made by DeWeese. Our Supreme Court held that DeWeese's comments did not amount

> to equivocation: "Mr. DeWeese's remarks that he had no choice but to represent himself rather than remain with appointed counsel, and his claims on the record that he was forced to represent himself at trial, do not amount to equivocation . . . . These disingenuous complaints in Mr. DeWeese's case mischaracterize the fact that Mr. DeWeese did have a choice, and he chose to reject the assistance of an experienced defense attorney who had been appointed." DeWeese, 117 Wn.2d at 378. For the same reasons, Del Duca's similar comments do not amount to equivocation.

Slip op., at 5-6. The difference, of course, is that -- at some point -- DeWeese stated unequivocally his request to represent himself. Otherwise there could not have been a waiver. And, in light of that stated request, his additional complaints about being forced to do so mattered not. In contrast, Del Duca never stated unequivocally his request to proceed pro so. Nor did he otherwise demand to go pro se. When asked by the court to state his intentions clearly, he continued to ask for counsel and refused to sign the form indicating that he sought self-representation. Under DeWeese, this meant he would continue with appointed counsel despite his dissatisfaction.

If it is a mistake to read the express language of DeWeese literally, or if the rule in DeWeese is wrong, harmful and should be overruled, this Court should be the one to say so. But as it currently stands, the Court of Appeals decision in Del Duca's case conflicts

with DeWeese. Therefore, review is appropriate under RAP 13.4(b)(1).

2. THIS COURT SHOULD ALSO REVIEW THE ISSUE OF DEL DUCA'S POST-TRIAL MOTIONS.

Following the jury's verdicts, Del Duca – still without counsel – filed several challenges to his convictions in a document entitled, "Motion for Mistrial/Dismissal of Charges And Prejudice & Affidavit of Prejudice of Judge." CP 477-499. CrR 7.4 (Arrest of Judgment) and CrR 7.5 (New Trial) permit such post-trial motions. Although these motions are to be filed within 10 days of the verdicts, the trial court may extend that time period. CrR 7.4(b); CrR 7.5(b). Motions for new trial are to be decided prior to entry of judgment and sentence. CrR 7.5(e).

Judge Roberts did not decide the motions prior to entry of the judgment and sentence on December 29, 2014. 50RP 26-31; CP 130. Instead, she proceeded with sentencing and set a subsequent hearing for arguments on the motions. 50RP 3-6, 26, 43-45. At that hearing, which occurred January 9, 2015, both sides argued the post-trial challenges. 51RP 3-46. Judge Roberts then indicated she would enter a written ruling later that day. 51RP 47. There is no indication that she ever entered a ruling.

Leaving Del Duca's final motions unresolved for appeal is not appropriate. Appellate Courts do not find facts or assess credibility. See Boeing v. Heidy, 147 Wn.2d 78, 87, 51 P.3d 793 (2002), disapproved on other grounds in Harry v. Buse Timber & Sales, Inc., 166 Wn.2d 1, 201 P.3d 1011 (2009); State v. Bunch, 2 Wn. App. 189, 191, 467 P.2d 212, review denied, 78 Wn.2d 92 (1970). Nor do they engage in initial decision-making; they are courts of review. Wold v. Wold, 7 Wn. App. 872, 876, 503 P.2d 118 (1972).

The failure to exercise assigned discretion is an abuse of discretion. See State v. Tharp, 96 Wn.2d 591, 598, 637 P.2d 961 (1981) (failure to exercise discretion in admitting evidence under ER 404(b)); State v. Wright, 76 Wn. App. 811, 829, 888 P.2d 1214 (failure to exercise discretion in determining whether offenses involved same criminal conduct for sentencing), review denied, 127 Wn.2d 1010, 902 P.2d 163 (1995), superceded by statute on other grounds by RCW 9.94A.364(6); Tacoma Recycling v. Capitol Material, 34 Wn. App. 392, 396, 661 P.2d 609 (1983) (failure to exercise discretion in denying motion for new trial).

In circumstances where the lower court was required to decide the matter in the first instance, the proper course is to remand for a ruling on the claims. See Wright, 76 Wn. App. at 829; Tacoma

Recycling, 34 Wn. App. at 396. In Del Duca's case, however, the Court of Appeals blamed Del Duca for not taking additional steps in the trial court to obtain rulings on his motions. Slip op., at 8. This is inconsistent with prior cases dealing with unresolved claims in the trial court, none of which require such efforts after a decision has been promised. Therefore, review of this issue is appropriate under RAP 13.4(b)(2).

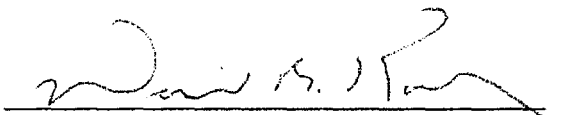
F. CONCLUSION

Because he satisfies the criteria for review under RAP 13.4(b)(1) and (b)(2), Del Duca respectfully asks that this petition be granted.

DATED this 18th day of January, 2017.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JON AMADIO DEL DUCA, Appellant.	)	No. 72904-7-I
	)	DIVISION ONE
	)	UNPUBLISHED OPINION
	)	FILED: December 19, 2016

BECKER, J. — Given the choice between continuing with appointed counsel or representing himself, appellant refused to continue to trial with appointed counsel. In the circumstances of this case, appellant unequivocally demanded to proceed pro se despite his claim that he was under duress when he made this choice. We affirm.

FACTS

In 2012, appellant Jon Del Duca was charged with one count of rape of a child in the first degree and one count of child molestation in the first degree. The State alleged that in 2001 and 2002, Del Duca raped and molested a young girl, about six years old, who lived in his apartment complex.

When these charges were filed, Del Duca was already facing unrelated charges of child molestation in the first degree, filed in 2011, for molesting two children who lived next door to a house where he was doing repair work on a dock. By the time the 2012 charges were filed, Del Duca had already

complained to the court about the first three attorneys appointed to represent him on the 2011 charges. Although the court did not find that his complaints had any merit, the court eventually permitted the attorneys to withdraw. A fourth attorney, who represented Del Duca on the 2011 charges at the time the 2012 charges were filed, was appointed to represent Del Duca on the 2012 charges also.

Del Duca complained to the court about the fourth lawyer, and again the court did not find any merit to Del Duca's complaints but permitted the attorney to withdraw. A fifth and sixth attorney were appointed to represent Del Duca but withdrew shortly after entering appearances.

In January 2013, a seventh attorney was appointed to represent Del Duca on the charges in the present case. From March to September 2013, Del Duca repeatedly sought to discharge this attorney, repeating the same claims the court had already rejected. At a hearing on September 19, the week before trial was scheduled to start, Del Duca refused to go to trial with this attorney. The court found in both an oral ruling and a written order that Del Duca had forfeited his right to counsel. The court also asked both parties to present any additional materials that might bear on its decision.

Four days later, the State referred the court to relevant cases, including State v. DeWeese, 117 Wn.2d 369, 816 P.2d 1 (1991), and State v. Sinclair, 46 Wn. App. 433, 730 P.2d 742 (1986), review denied, 108 Wn.2d 1006 (1987).

At the next hearing on September 25, in light of DeWeese, the court required Del Duca to either continue with current appointed counsel or to represent himself. After a lengthy discussion with Del Duca, the court found in

an oral ruling that Del Duca knowingly, intelligently, and voluntarily chose to represent himself. The court signed a written order stating that Del Duca had forfeited his right to appoint counsel and preferred to represent himself:

> By refusing to accept any attorney appointed by the court defendant has forfeited his right to appointed counsel. . . . The defendant is permitted to exercise his constitutional right to represent himself. I find that the defendant has not provided a legitimate reason to discharge his attorney, Mr. Ewers, and accept that the defendant therefore prefers to represent himself.

Del Duca represented himself at trial in October and November 2014. The jury convicted him as charged on November 5, 2014. He appeals.

RIGHT TO COUNSEL

Del Duca contends that he was denied his constitutional right to assistance of counsel. See U.S. CONST. amend. VI; WASH. CONST. art. 1, § 22 (amend. 10). Whether an indigent defendant's dissatisfaction with his court-appointed counsel is meritorious and justifies the appointment of new counsel is a matter within the discretion of the trial court. DeWeese, 117 Wn.2d at 376. The parties agree that this case is controlled by DeWeese and does not require analysis of the court's reference to forfeiture of the right to counsel.

When an indigent defendant fails to provide the court with legitimate reasons for the assignment of substitute counsel, the court may require the defendant either to continue with current appointed counsel or to represent himself. DeWeese, 117 Wn.2d at 376; Sinclair, 46 Wn. App. at 437. If the defendant chooses not to continue with appointed counsel, requiring such a defendant to proceed pro se does not violate the defendant's constitutional right to be represented by counsel, and may represent a valid waiver of that right.

DeWeese, 117 Wn.2d at 376. "The defendant's request to proceed pro se must be *stated* unequivocally." DeWeese, 117 Wn.2d at 377 (emphasis added). See also Sinclair, 46 Wn. App. at 437 (defendant's demand to defend pro se "must be unequivocal").

At the September 25 hearing, the court presented Del Duca with a waiver of counsel form and asked him whether the form was "acceptable to you, assuming that it is still your desire to represent yourself, given that the only other choice at this point is to have [the appointed attorney] as your counsel." Del Duca responded, "Well, that's not much of a choice. It's[1] a better of two evils, that's the way I see it." Del Duca went on to say, "As I said last week, I'm going to have to defend myself, that's a fact," and "because I stated last week that I'm demanding to be able to defend myself under the offices of the Sixth Amendment of the U.S. Constitution, okay." "I'm still standing on my premise that I'm—I have to defend myself."

> MR. DEL DUCA: Yeah. Because what I need, and what I've needed from the beginning is someone to assist me to address the issues.
> THE COURT: Right. So, I have denied your request to have a different lawyer, and—
> MR. DEL DUCA: And he refuses to.
> THE COURT: —and I understand that that is your belief. Given that, is it your desire to represent yourself?
> MR. DEL DUCA: Under the offices of the Sixth Amendment of the U.S. Constitution, yes.
> THE COURT: Okay.
> MR. DEL DUCA: But now in signing this, it'll be under duress, because—
> THE COURT: Well, I can't have you sign it under duress, Mr. Del Duca.

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[1] The transcript reads, "He's" a better of two evils, but the parties agree that Del Duca actually said "It's."

> MR. DEL DUCA: Yeah, because like I don't believe in signing a waiver of a person's rights—
> THE COURT: Okay. We're not going to have you sign it then.

Del Duca argues that he did not waive his right to counsel because his request to proceed pro se was not *stated* unequivocally as required by DeWeese. This argument takes the word "stated" in DeWeese too literally. In Sinclair, for example, we phrased the requirement as "the demand to defend pro se must be unequivocal." Sinclair, 46 Wn. App. at 437.

Given the choice between continuing on with his appointed counsel and representing himself, Del Duca was unequivocal in his decision to represent himself. Del Duca would have preferred a new attorney who would address the issues he believed all his previous attorneys wrongfully refused to raise, but the trial court was not required to give him that choice. See DeWeese, 117 Wn.2d at 376; Sinclair, 46 Wn. App. at 437-38.

Del Duca's comments that representing himself was "not much of a choice," "a better of two evils," and "I'm going to have to defend myself" are analogous to similar comments made by DeWeese. Our Supreme Court held that DeWeese's comments did not amount to equivocation: "Mr. DeWeese's remarks that he had no choice but to represent himself rather than remain with appointed counsel, and his claims on the record that he was forced to represent himself at trial, do not amount to equivocation . . . . These disingenuous complaints in Mr. DeWeese's case mischaracterize the fact that Mr. DeWeese did have a choice, and he chose to reject the assistance of an experienced

defense attorney who had been appointed." DeWeese, 117 Wn.2d at 378. For the same reasons, Del Duca's similar comments do not amount to equivocation.

Given the choice between continuing to trial with his appointed counsel and representing himself, Del Duca unequivocally chose to represent himself and therefore waived his right to counsel.

Del Duca argues that his right to counsel was also violated when the trial court denied his request to reappoint counsel to represent him on his posttrial motion. Once an unequivocal waiver of counsel has been made, the defendant may not later demand the assistance of counsel as a matter of right since reappointment is wholly within the discretion of the trial court. DeWeese, 117 Wn.2d at 376-77, 379. Once Del Duca unequivocally chose to represent himself, the trial court was not required to reappoint counsel to represent him on his posttrial motion. Because Del Duca had already rejected and refused to work with several qualified attorneys, the trial court did not abuse its discretion in declining to reappoint counsel for his posttrial motion.

REASONABLE DOUBT INSTRUCTION

Del Duca's jury was instructed on reasonable doubt pursuant to WPIC 4.01: "A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence." Del Duca did not object. Del Duca now contends that this instruction is constitutionally defective because it tells jurors they must be able to articulate a reason for their doubt and because it undermines the presumption of innocence and is substantively identical to the fill-in-the-blank arguments that Washington court have invalidated.

We decline to review Del Duca's challenge to the reasonable doubt instruction because he failed to object and giving the instruction was not manifest constitutional error under RAP 2.5(a). State v. Hood, ___ Wn. App. ___, 382 P.3d 710, 714 (2016).

POSTTRIAL MOTION

After the jury returned its verdict, Del Duca, pro se, filed a motion entitled "Motion for Mistrial/Dismissal of Charges and Prejudice & Affidavit of Prejudice of Judge." After sentencing, the trial court held a hearing on Del Duca's motion. At the end of the hearing, the judge did not give an oral ruling. She said she would enter a written order later that day. The record does not contain any written order. Del Duca asks that this court remand for entry of an order on his posttrial motion.

Del Duca has not demonstrated how this issue is properly before us under the Rules of Appellate Procedure. A party may appeal from only certain listed superior court decisions. RAP 2.2(a)(1-13). All of the listed decisions require a "judgment," "decision," or "order." See RAP 2.2(a)(1-13). Del Duca does not have a judgment, decision, or order on his posttrial motion. Because he does not have an order, his appeal of the final judgment does not bring the trial court's failure to enter an order on his posttrial motion up for review. See RAP 2.4(f). Nor has he sought discretionary review under RAP 2.3. He has appealed from the judgment and sentence, treating it as a final judgment reviewable as a matter of right under RAP 2.2(a)(1).

Posttrial motions like the one filed by Del Duca will delay the finality of a judgment until resolved. See RAP 2.2(a)(9-11); RAP 5.2(e). Del Duca's current request to remand for entry of an order on his posttrial motion calls into question, for the first time, the finality of his judgment and sentence. The record does not show that Del Duca took any steps to obtain an order on his posttrial motion. Instead, he raises the issue of the absence of an order for the first time in his brief to this court.

Del Duca argues that "in circumstances where the lower court was required to decide the matter in the first instance, the proper course is to remand for a ruling on the claims." In support of this proposition, he cites State v. Wright, 76 Wn. App. 811, 829, 888 P.2d 1214, review denied, 127 Wn.2d 1010 (1995), and Tacoma Recycling, Inc. v. Capitol Handling Material Co., 34 Wn. App. 392, 396, 661 P.2d 609 (1983). In both Wright and Tacoma Recycling, the trial court entered a decision but did not exercise its discretion because it erroneously believed it could not. Wright, 76 Wn. App. at 827-29; Tacoma Recycling, 34 Wn. App. at 396. This court remanded for the trial court to exercise its discretion. Wright, 76 Wn. App. at 829; Tacoma Recycling, 34 Wn. App. at 396. Here, the trial court did not enter any decision. This is a different issue than the trial court failing to exercise its discretion in Wright and Tacoma Recycling. Del Duca has not cited any authority stating that remand is the proper relief when he appeals from an ostensibly final judgment and at no point took steps to complete the record.

Remanding for the entry of a written order could only lead to another appeal raising the same issues. In this appeal, Del Duca asks us to review the judgment, and that is what we have done. The rules are not designed to allow two appeals. We decline Del Duca's request to remand for entry of an order on his posttrial motion.

STATEMENT OF ADDITIONAL GROUNDS

Del Duca raises numerous issues in a pro se statement of additional grounds. Most of these claims were addressed and rejected by the trial court, including lack of probable cause; lack of due process; motions for default, demurrer and summary judgment; prejudice of the judge; refusal of his appointed attorneys to address the issues he wanted; and speedy trial violations. Del Duca gives us no reason to review the trial court's rulings on these issues.

Del Duca claims that the Department of Corrections violated his rights by denying him access to legal information, refusing to provide medical treatment and adding terms to his sentence that were not ordered by the court. These claims against the Department of Corrections involve matters outside the trial court record and are not reviewable on direct review. See State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

Del Duca claims summarily that evidence was destroyed, that court records were altered, that he was denied hearing transcripts, that the State presented evidence at trial that he had not seen, and that the State refused to provide disclosure ordered by the court. These bare claims fail to adequately

inform the court of the nature and occurrence of the alleged errors. RAP 10.10(c); State v. Alvarado, 164 Wn.2d 556, 569, 192 P.3d 345 (2008).

Affirmed.

Becker, J.

WE CONCUR:

Spearman J.

Cuppleick, J.

NIELSEN, BROMAN & KOCH, PLLC

January 18, 2017 - 10:49 AM

Transmittal Letter

Document Uploaded: 729047-Petition for Review.pdf

Case Name: Jon Del Duca
Court of Appeals Case Number: 72904-7

Party Respresented:

Is this a Personal Restraint Petition? ◯ Yes ◉ No

Trial Court County: King - Superior Court # ____

The document being Filed is:

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- ◯ Statement of Additional Authorities
- ◯ Affidavit of Attorney Fees
- ◯ Cost Bill
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Comments:

copy sent to: Jon Del Duca, 856708 Coyote Ridge Corrections Center P.O. Box 769
Connell, WA 99326

Sender Name: John P Sloane - Email: sloanej@nwattorney.net

A copy of this document has been emailed to the following addresses:

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