

61623-4

61623-4

NO. 61623-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

EARL BOWMAN,

Appellant.

FILED
COURT OF APPEALS DIV. I
STATE OF WASHINGTON
2009 JUN 17 PM 3:31

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE STEVEN GONZALEZ, JUDGE

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

JENNIFER R. PETERSEN
Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000

TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
1. PROCEDURAL FACTS	1
2. SUBSTANTIVE FACTS	2
C. <u>ARGUMENT</u>	5
1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING THE DEFENDANT'S EQUIVOCAL AND UNTIMELY REQUEST TO PROCEED PRO SE	5
a. The Request To Proceed Pro Se Was Equivocal.....	6
b. The Request to Proceed Pro Se Was Untimely.....	11
2. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN FINDING THE DEFENDANT HAD VOLUNTARILY ABSENTED HIMSELF FROM THE PROCEEDINGS.....	14
D. <u>CONCLUSION</u>	18

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Faretta v. California, 422 U.S. 806,
95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975)..... 6

Washington State:

State v. Barker, 75 Wn.App. 236,
881 P.2d 1051 (1994)..... 11, 12

State v. Bebb, 108 Wn.2d 515,
740 P.2d 829 (1987)..... 6, 11

State v. DeWeese, 117 Wn.2d 369,
816 P.2d 1 (1991)..... 7

State v. Fritz, 21 Wn. App. 354,
585 P.2d 173 (1978)..... 6, 11, 12, 14

State v. Garcia, 92 Wn.2d 647,
600 P.2d 1010 (1979)..... 7

State v. Garza, 150 Wn.2d 360,
77 P.3d 347 (2003)..... 14

State v. Luvene, 127 Wn.2d 690,
903 P.2d 960 (1995)..... 6, 7, 10

State v. Stenson, 132 Wn.2d 668,
940 P.2d 1239 (1997)..... 7, 9, 10

State v. Thomson, 123 Wn.2d 877,
872 P.2d 1097 (1994)..... 14, 15

State v. Vermillion, 112 Wn. App. 844,
51 P.3d 188 (2002)..... 6, 7, 13

State v. Woods, 143 Wn.2d 561,
23 P.3d 1046, cert. denied, 122 S. Ct. 374 (2001) 6, 10

Rules and Regulations

Washington State:

CrR 3.4(b) 15

A. ISSUES PRESENTED

Did the trial court properly exercise its discretion in denying appellant's request to proceed pro se when the request was equivocal and made on the day of trial and minutes after the appellant's request for continuance was denied?

Did the trial court properly exercise its discretion in finding the appellant voluntarily absented himself from the proceedings when the appellant failed to appear for the return of the jury's verdict?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant was charged on May 18, 2007 with one count of Violation of the Uniform Controlled Substances Act, Delivery of Cocaine, and one count of Assault in the Fourth Degree. CP 1-2. On February 5, 2008, the morning the case was assigned to a trial court, the defendant requested a continuance of the trial date. CP 51. The Honorable Judge Cheryl Carey denied the continuance and noted the request was the sixth request for a continuance of the trial date. CP 51. The defendant was tried by jury, the Honorable Steven Gonzalez presiding.¹ The defendant was found

¹ The verbatim report of proceedings is cited as: 1RP - 2/5/08 (pretrial); 2RP - 2/6/08 (trial); 3RP - 2/6/08 (voir dire and opening); 4RP - 2/7/08 (trial); 5 RP - 2/8/08 (verdict); 6RP 4/18/08 (sentencing).

guilty as charged. 5RP 4-5. The defendant was sentenced on April 18, 2008 and was granted a Drug Offender Sentencing Alternative of 20 months confinement and 20 months of community custody. 6RP 12.

2. **SUBSTANTIVE FACTS**

On March 1, 2007 Seattle Police Department officers Christine Nichols and Susanna Guyer were conducting an undercover "buy bust" operation. 2RP 37. Officer Guyer and Officer Nichols were in an unmarked vehicle. 2RP 40. Officer Guyer was driving and Officer Nichols was the front seat passenger. 2RP 40.

Officer Guyer and Officer Nichols saw the defendant and another black male known as "Tex" in a gas station parking lot at 7301 Rainier Avenue South. 2RP 41. The officers drove into the parking lot and the defendant and "Tex" walked over to the vehicle. 2RP 41. Officer Guyer rolled down the window and said, "Can you help me out?" 2RP 41. "Tex" asked her what she needed and she asked if she could get some "cream." 2RP 42. "Tex" said he could help her out. 2RP 42.

The defendant told Officer Guyer that he did not want to do the deal out in the open and both "Tex" and the defendant tried to

get inside the officers' vehicle. 2RP 43. The vehicle doors were locked and Officer Nichols and Officer Guyer told "Tex" and the defendant they could not get inside the vehicle. 2RP 43. Officer Nichols and Officer Guyer decided to leave the parking lot. 2RP 43.

As the officers were waiting to leave the parking lot, the defendant flagged them down. 2RP 43. The defendant told the officers that his nephew was down the street and that he would be able to help them out. 2RP 44. The defendant told Officer Guyer to pull into an apartment complex parking lot down the street and wait for him. 2RP 44.

Officer Guyer and Officer Nichols drove around the block and as they circled they saw the defendant walking back to the gas station. 2RP 45. The defendant flagged the officers down again, raised his hand and said, "I got it right here." 2RP 45. The defendant motioned the officers into an apartment complex parking lot. 2RP 45.

The officers drove into the apartment complex parking lot and the defendant approached Officer Nichols on the passenger side of the vehicle. 2RP 46. The defendant held something in his right hand and put his left hand in the frame of the passenger

window. 2RP 46. The defendant opened his left hand and dropped a rock of crack cocaine into Officer Nichols hand. 2RP 47 - 48. Officer Nichols gave the defendant two twenty dollar bills. 2RP 47 - 48.

After the transaction was completed, the defendant pressed the knuckles of his left hand against Officer's Nichols neck and said, "I'm going to fucking kill you, trust me, next time, you fucking cop." 2RP 48. Officer Guyer, who was seated in the driver's seat, could not see the defendant's hand. 2RP 71. Officer Guyer heard the defendant's threat and could see that he was holding his hand to Officer Nichols' neck. 2RP 71. Officer Guyer believed the defendant was holding a knife or other weapon to Officer Nichols' neck. 2RP 71. Officer Nichols bent forward to unholster her weapon, but as she leaned forward she could see the defendant did not have a weapon. 2RP 72. As Officer Nichols quickly rolled up the window, Officer Nichols quickly put the vehicle in reverse and drove away. 2RP 72.

Arrest team officers moved in and placed the defendant under arrest. 2RP 91. Officers recovered from the defendant the pre-recorded buy money used by Officer Nichols to purchase the crack cocaine. 2RP 91-92.

The defendant did not testify at trial. Additional facts are included in the section to which they apply.

C. **ARGUMENT**

1. **THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING THE DEFENDANT'S EQUIVOCAL AND UNTIMELY REQUEST TO PROCEED PRO SE.**

The defendant contends that he unequivocally and timely expressed his desire to proceed pro se and that the trial court improperly denied his request. This claim is without merit. This court reviews a trial court's denial of a request to proceed pro se under an abuse of discretion standard in light of the entire record. Here, the defendant's trial date was continued six times. On the morning of trial the defendant requested yet another continuance and the request was denied. Minutes later, the defendant made a request to represent himself, in his words because the continuance was denied. The defendant then clarified that his position was not necessarily that he wanted to represent himself, but that he was dissatisfied with his counsel. In light of the entire record, this court cannot say the trial court abused its discretion in rejecting the defendant's request to proceed pro se because the request was equivocal and it was untimely.

a. The Request To Proceed Pro Se Was Equivocal.

Criminal defendants have a constitutional right to waive the assistance of counsel and represent themselves. Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); State v. Bebb, 108 Wn.2d 515, 524, 740 P.2d 829 (1987). The right exists despite the fact that its exercise will almost surely result in detriment to both the defendant and the administration of justice. State v. Fritz, 21 Wn. App. 354, 359, 585 P.2d 173 (1978).

The right to self-representation, however, is neither absolute nor self-executing. State v. Woods, 143 Wn.2d 561, 585-86, 23 P.3d 1046, cert. denied, 122 S. Ct. 374 (2001); State v. Vermillion, 112 Wn. App. 844, 851, 51 P.3d 188 (2002). A request to proceed pro se must be timely made and unequivocal. Woods, 143 Wn.2d at 586; Vermillion, 112 Wn. App. at 851. A request must be unequivocal in the context of the record as a whole. Woods, 143 Wn.2d at 586. And even an unequivocal request may be waived by subsequent words or conduct. State v. Luvone, 127 Wn.2d 690, 699, 903 P.2d 960 (1995). While the words a defendant uses may suggest that an unequivocal request for self-representation is being made, a review of the record as a whole may reveal that the

request is an equivocal request and an "expression of frustration."
Luvene, 127 Wn.2d at 698-99.

Statements of desire not to be represented by a court-appointed attorney do not express an intent to represent oneself without counsel. State v. Garcia, 92 Wn.2d 647, 655, 600 P.2d 1010 (1979). A request to proceed pro se as an alternative to substitution of counsel may be an indication that the request is not unequivocal. State v. Stenson, 132 Wn.2d 668, 740-41, 940 P.2d 1239 (1997). Statements of this type do not constitute the necessary unequivocal request for self-representation. Garcia, 92 Wn.2d at 655. A trial court must indulge every reasonable presumption against finding that a defendant has waived the right to counsel. Vermillion, 112 Wn. App. at 851. The purpose of this presumption is, in part, to protect trial courts from manipulative vacillations by defendants. State v. DeWeese, 117 Wn.2d 369, 376, 816 P.2d 1 (1991). This court reviews a trial court's denial of a request for self-representation for abuse of discretion. Vermillion, 112 Wn. App. at 855.

The defendant was charged on May 18, 2007. CP 1-6. On February 5, 2008, the morning the case was assigned to a trial court, the defendant requested a continuance of the trial date. CP

51. The Honorable Judge Cheryl Carey denied the continuance and noted the request was the sixth request for a continuance of the trial date. CP 51. The case was assigned to the Honorable Judge Steven Gonzalez for trial. 1RP 5.

The defendant then made a request before Judge Gonzalez to go pro se because, "I'm dissatisfied with my counsel." 1RP 11. The defendant explained that he had tried to convince his attorney to "give me a continuance," but the continuance was denied. 1RP 7. The defendant claimed he was not "having a fair trial" and was "denied due process" because he was not allowed to call two witnesses. 1RP 7.

The court conducted a colloquy with the defendant about the charges, the penalties, the trial process, and the defendant's background, experience and familiarity with the law. 1RP 8-11. Following the colloquy, the defendant expressed his frustration with his counsel's refusal or inability to call witnesses the defendant believed were necessary. 1RP 11. The defendant told the court, "What I'm saying is I need to go pro se because I feel that I'm not getting the right representation. Because I need him on my side to coach me, too, but at the same time I need to get me what I know what's going to help me in court to find me not guilty." 1RP 11.

The court tried to clarify what the defendant wanted, asking, "So your position isn't necessarily you want to represent yourself. It's that you're dissatisfied with --" 1RP 11. The defendant interrupted the court saying "I'm dissatisfied with my counsel." 1RP 11. The defendant's attorney informed the court that the defendant's "dissatisfaction" had only recently come to his attention and that he believed the "genesis of Mr. Bowman's dissatisfaction" was his inability to obtain another continuance in order to investigate a medical defense and call additional witnesses. 1RP 11-13. The court found the request was based on dissatisfaction with counsel and denied it as untimely and "more properly described as a request for new counsel." 1RP 14.

Here, the defendant never made an unequivocal request to proceed pro se. A review of the record shows the defendant was dissatisfied with his counsel, he disagreed with his counsel as to trial strategy, and he was upset at his counsel's inability to obtain another continuance. The defendant's request was premised solely on his frustration at not getting what he wanted.

This is hardly an unequivocal request to proceed pro se. See Stenson at 737-39 (defendant's request to proceed pro se, made after the court rejected his request for a new attorney and his

request for a continuance, held to be equivocal); Luvene, at 699 (defendant's request to proceed pro se, made after the court granted his counsel's request for a continuance, held to be equivocal and an expression of frustration); Woods, at 574, 586-87 (defendant's request to proceed pro se, made after counsel's request for a continuance, found to be an expression of frustration and not an unequivocal request to proceed pro se).

As the Supreme Court stated in Stenson, "the probability that a defendant will appeal either decision of the trial judge underscores the importance of requiring a defendant who wishes to waive his right to counsel to do so explicitly and unequivocally." Stenson, at 741. Where a request is conditional, it may well be equivocal. Id. at 741.

Here, had the court granted the defendant's request to proceed pro se, he would now be arguing that his request was equivocal, conditional, and merely a verbalization of his frustrations with appointed counsel. Indeed, the defendant made clear that his request to proceed pro se was merely a product of his frustrations when he stated, "...that's the only reason I'm going pro se, because I feel I'm not getting what I deserve, true justice." 1RP 11. The

defendant then inquired of the court, "...If I go pro se, will I still have counsel next to me to help me?" 1RP 14.

The presumption is against finding an unequivocal request to proceed pro se. The standard on appeal is an abuse of discretion, that no reasonable judge would have found as the trial court did. The defendant has not met that standard here.

b. The Request to Proceed Pro Se Was Untimely.

A request to proceed pro se must be timely made. Fritz, 21 Wn.App. at 360. If the request is not timely made, the right is relinquished and the matter of the defendant's representation is left to the discretion of the trial judge. Bebb, 108 Wn.2d at 524. To be timely, a defendant's request to proceed pro se should be made a reasonable time before trial. Fritz, 21 Wn.App. at 361. "The trial court's discretion lies along a continuum that corresponds with the timeliness of the request to proceed pro se." Fritz, 21 Wn.App. at 360. Fritz sets three stages along the continuum:

If the demand for self-representation is made (1) well before the trial or hearing and unaccompanied by a motion for a continuance, the right of self representation exists as a matter of law; (2) as the trial or hearing is about to commence, or shortly before, the existence of the right depends on the facts of the particular case with a measure of discretion reposing in the trial court in the matter, and (3) during

the trial or hearing, the right to proceed pro se rests largely in the informed discretion of the trial court.

Barker, 75 Wn.App. 236, 241, 881 P.2d 1051 (1994) (citing Fritz, 21 Wn.App. at 361). The request to proceed pro se "cannot be used as a means of unjustifiably delaying a scheduled trial or hearing or to obstruct the orderly administration of justice." Fritz, 21 Wn.App. at 361.

... For example, a defendant should not be permitted to wait until the day preceding trial before he moves to represent himself and requests a continuance in order to prepare for trial without some showing of reasonable cause for the lateness of the request. In such a case the motion for self-representation is addressed to the sound discretion of the trial court which should consider relevant factors such as whether or not defense counsel has himself indicated that he is not ready for trial and needs further time for preparation....

Fritz, 21 Wn.App. at 362 (quoting People v. Windham, 560 P.2d 1187, at 1191 n. 5.).

The defendant's request was made on the morning of trial as pre-trial motions had commenced. 1RP 4-7. Thus, his request to represent himself falls in the middle of the continuum and a measure of discretion rests with the trial court. See Fritz, 21 Wn.App. at 365 (trial court had discretion to deny defendant's motion to represent himself made on the day set for trial).

On the morning the case was assigned to a trial court, the defendant requested a continuance of the trial date. CP 51. The continuance was denied and the court noted the request was the sixth request for a continuance of the trial date. CP 51.

Later that morning and for the first time, the defendant made a motion to represent himself. 1RP 7. The defendant told the court, "Pro se, yeah, because I feel like I tried to get him to give me a continuance, but the continuance was denied." 1RP 7. The defendant did not express any desire to proceed pro se until after the motion for a continuance was denied. The defendant's last minute request to proceed pro se, made after the denial of his request for a continuance, was simply another means of delaying the trial.

The defendant analogizes to Vermillion to support his argument that his request to proceed pro se was timely. Vermillion is distinguishable. In Vermillion, the defendant first made a request to proceed pro se one week prior to jury selection. He made a second motion to proceed pro se and ultimately made five separate requests. Vermillion, 112 Wn.App. at 852. The defendant did not request a continuance. The court held that the defendant's request was timely. Id. at 856.

Here, the defendant requested to proceed pro se the day trial commenced. Unlike the defendant in Vermillion, the defendant here requested and was denied a continuance. He made a motion to proceed pro se because the continuance was denied. 1RP 7. The defendant's request was untimely. See Fritz, 21 Wn.App. at 365 (defendant's request to proceed pro se made on the morning of third date set for trial was untimely). As the court stated in Fritz, "...[A] defendant should not be allowed to misuse the Faretta mandate as a means to unjustifiably delay a scheduled trial or to obstruct the orderly administration of justice." Fritz, 21 Wn.App. at 362.

The standard on appeal is an abuse of discretion, that no reasonable judge would have found as the trial court did. The defendant has not met that standard here.

2. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN FINDING THE DEFENDANT HAD VOLUNTARILY ABSENTED HIMSELF FROM THE PROCEEDINGS.

Under the Washington and United States Constitutions, a defendant has a fundamental right to be present at trial. State v. Garza, 150 Wn.2d 360, 366, 77 P.3d 347 (2003); State v. Thomson, 123 Wn.2d 877, 880, 872 P.2d 1097 (1994). However, a

defendant may waive this right if the waiver is voluntary and knowing. Thomson, 123 Wn.2d at 881. Once trial has begun in the defendant's presence, a subsequent voluntary absence operates as an implied waiver, and the trial court may exercise its discretion to continue with trial without further consideration. Id.

The state and federal rules of criminal procedure provide for continuing with trial despite a defendant's voluntary absence as long as the defendant was present when the trial began. CrR 3.4(b) provides:

. . . the defendant's voluntary absence after the trial has commenced in his presence shall not prevent continuing the trial to and including the return of the verdict.

The determination of whether a defendant's absence is voluntary depends upon the totality of the circumstances. Thomson, 123 Wn.2d at 881. In determining whether a defendant's absence is voluntary the court applies a three step test:

- (1) [make] sufficient inquiry into the circumstances of a defendant's disappearance to justify a finding whether the absence was voluntary,
- (2) [make] a preliminary finding of voluntariness (when justified), and
- (3) [afford] the defendant an adequate opportunity to explain his absence when he is returned to custody and before sentence is imposed.

Thomson, 123 Wn.2d at 881.

In this case, the defendant was present for the trial through closing arguments. The jury received the case the afternoon of Thursday, February 7th. 4RP 94-95. After closing arguments, the defendant was informed by the court that he needed to be within 15 minutes of the courthouse for the jury's verdict. 5RP 2. The defendant's attorney informed the court that he told his client to be within 15 minutes of the courthouse at all times when the jury was deliberating. 5RP 2-3.

The defendant also "popped his head in the door" on Thursday, February 7th, while the jury was deliberating, and asked the bailiff whether he needed to be present the following day. The bailiff apparently told the defendant he had to be within 15 minutes of the courthouse on Friday, February 8th, while the jury was deliberating. 5RP 3.

The jury notified the court they had reached a verdict shortly after 9am on Friday, February 8th. 5RP 2. The defendant was not present. 5RP 2. The court waited for the defendant until shortly after 10am at which time the court inquired as to the circumstances of the defendant's disappearance. 5RP 2-4. The defendant's

attorney informed the court that he had spoken to the defendant and told him there was a verdict. 5RP 3. The defendant indicated he would be there within 20 minutes. 5RP 3. The defendant did not appear until Monday, February 11th. Supp. CP __ (sub no. 69, Order Remanding Defendant). The court found he had voluntarily absented himself from the proceedings. 5RP 2-4.

The defendant waived his right to be present for the return of the jury's verdict when he failed to return after he was told there was a verdict. While the appellant claims that "all indications showed Bowman was on his way to court," this is simply not supported by the record. A review of the record makes clear the defendant did not return to court until Monday, February 11th when he was remanded. Supp. CP __ (sub no. 69, Order Remanding Defendant).

Appellant also contends that he was not provided an opportunity to explain his absence. This contention is also unsupported by the record. Indeed, a review of the record makes clear the defendant addressed the court at length at the April 18, 2008 sentencing hearing. 6RP 2-10. The defendant provided the court with two handwritten letters and made a motion for a new trial.

6RP 2-10. The court provided the defendant with an opportunity to address his absence and the defendant chose not to.

The court sufficiently inquired into the circumstances of the defendant's absence and made a finding of voluntariness. The defendant was given an adequate opportunity to explain his absence at the sentencing hearing and he chose to provide no explanation. The standard on appeal is an abuse of discretion, that no reasonable judge would have found as the trial court did. The defendant has not met that standard here.

D. CONCLUSION

For the reasons cited above, this court should affirm the defendant's conviction and sentence.

DATED this 15th day of June, 2009.

RESPECTFULLY submitted,

DANIEL T. SATTERBERG
Prosecuting Attorney

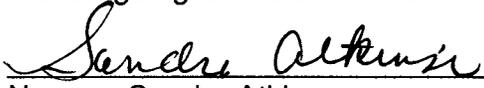
By: _____

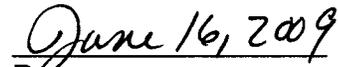
JENNIFER R. PETERSEN, WSBA 35397
Deputy Prosecuting Attorney
Attorneys for the Respondent
WSBA Office #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Eric Broman, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. EARL BOWMAN, Cause No. 61623-4-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.


Name Sandra Atkinson
Done in Seattle, Washington


Date

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2009 JUN 17 PM 3:31