

NO. 64599-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

KOKEE JONES,

Appellant.

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Dated 1/11/11
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CATHERINE SHAFFER

BRIEF OF RESPONDENT

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A. ISSUE

1. Once trial has begun, a criminal defendant's interest in representing himself may be outweighed by society's interest in the orderly administration of justice. Jones made his request to proceed pro se after trial had started, and he conditioned the request on the court allowing Kevin Johnson to assist him. Johnson, who claimed to be a paralegal, lied to the court about his association with the Office of Public Defense and raised concerns about courtroom security. Did the trial court act within its discretion in refusing to allow Jones to represent himself with the assistance of Johnson?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

Kokee Jones was charged by information and amended information with Robbery in the First Degree (Count I), Burglary in the First Degree (Count II), and Assault in the Second Degree (Count III). Counts I and II each included a firearm allegation. The State alleged that, late on the evening of September 18, 2008, Jones and two companions forcibly entered a residence in the Kingsgate area of unincorporated King County, robbed Chad

Alderman at gunpoint, and assaulted Sarah McFarland. CP 1-6, 8-9, 11-12.

A jury convicted Jones as charged. CP 47-48. At sentencing, the trial court exercised its discretion to find that the robbery and the burglary merged. Jones was sentenced to a total term of confinement of 161 months. CP 90-97.

2. SUBSTANTIVE FACTS.

After leaving work on September 18, 2008, 25-year-old Sarah McFarland stopped by the townhouse where her friend Marcus Suniga lived; the two planned to go to a nearby casino to watch football and have a few drinks. 7RP¹ 58, 101-02. Marcus was not home yet, but Bryan Ferguson, who was temporarily staying in the basement of the townhouse, was on the couch in the living room, playing video games with a friend. 7RP 61-62, 102; 8RP 14. Sarah had heard that Ferguson sold "weed" (marijuana). 7RP 102-03.

¹ The verbatim report of proceedings consists of nine volumes, and will be referred to in this brief as follows: 1RP (1-22-09); 2RP (9-10-09); 3RP (9-21-09); 4RP (9-22-09); 5RP (9-23-09); 6RP (10-19-09, 10-26-09, 12-11-09); 7RP (10-20-09); 8RP (10-21-09); 9RP (10-22-09).

When Marcus arrived home, he and Sarah left for the casino. 7RP 103. At some point, their friend Chad Alderman joined them. 7RP 57, 103. When the football game ended (around 9–9:30 p.m.), the three headed back to Marcus's house to drink, socialize and maybe watch a movie. 7RP 57, 103-04.

Around 11:30, a young woman knocked at the door, looking for Bryan. 7RP 63, 106. Chad told her that Bryan wasn't there, and she walked away. Id. About five minutes later, there was another knock at the door. 7RP 65, 106. When Chad answered, a man with a gun shoved him to the floor. 7RP 65-66, 106. More men followed, and they started "running amok" through the house. 7RP 68, 106. Their faces were covered by bandanas, at least one of which was adorned with skulls. 7RP 68, 107; 8RP 6.

The gunman, who was wearing "very distinctive" bright red basketball shoes, appeared to be the leader. 7RP 70-72. He told the three in the living room to keep their heads down and not look at him. 7RP 71; 8RP 6. He kept asking where the money and the "weed" were. 7RP 74; 8RP 6, 10. The other intruders could be heard ransacking the basement and the kitchen. 7RP 69, 75-76; 8RP 7. They also tore up the couches in the living room, flipping them over. 8RP 10. They found the rent money that Bryan had

left, and took it. 7RP 76; 8RP 10. They also took Chad's wallet and his Blackberry. 7RP 78; 8RP 16.

At one point, as Sarah was trying to answer a question put to her by the gunman, someone smacked her in the back of the head with an open palm, hard enough to make her fall forward, and said, "Shut up, bitch." 7RP 77; 8RP 11, 15. Sarah turned to look at her attacker; his bandana had slipped down around his neck, and she saw his face. 8RP 12. She recognized him as the same man who earlier that day had been playing video games on the couch with Bryan. 8RP 13-15. Sarah identified Kokee Jones in court as the man who had smacked her on the head. 8RP 12-13.

The entire incident may have taken only five minutes. 8RP 16-17. The intruders fled in a black Mitsubishi Eclipse. 9RP 6-9. Once they were gone, Sarah called 911. 7RP 79; 8RP 17. Police responding to the scene spied the Mitsubishi Eclipse and gave chase; the Eclipse pulled down a side street, and the occupants took off running. 7RP 14-17. A stolen handgun was left in the car. 7RP 18-19; 8RP 35-36, 39. After a brief search, two suspects, Micaiah Kotthoff and Robert Baker, were apprehended nearby. 7RP 40-52; 9RP 80-82, 87-92. Chad Alderman and Sarah McFarland were brought to the scene for a show-up identification

procedure. 7RP 79-81; 8RP 18-19. Both identified one suspect with certainty, based partly on the distinctive red shoes. 7RP 82; 8RP 19-20. Both were 95% certain that the second suspect was also among the intruders. 7RP 82-83; 8RP 20-21.

Detective Mike Mellis took statements from both Kotthoff and Baker. 9RP 26-28. Based on information from one of them, Mellis went to a house in Bellevue where he believed Kokee Jones was staying. 9RP 32, 37-38. A GPS tracking application on Chad Alderman's stolen Blackberry indicated that the Blackberry was also in that house. 9RP 40-45. Mellis and two fellow detectives entered the house with the consent of the owner, Heather Rehwald, and found Jones sleeping in one of the bedrooms. 9RP 46-47. They took Jones into custody. 9RP 47. Police recovered a black bandana with a skull-and-crossbones design from the bedroom where Jones was sleeping. 9RP 53. The stolen Blackberry was found in a different room of the house. 9RP 50-53.

Jones presented an alibi defense at trial. Heather Rehwald recalled that on September 18, 2008, she went to bed around 10:30 p.m. 9RP 98-99. She woke up at some unknown time and heard her son Josh and Kokee Jones making music on the computer in Josh's room. 9RP 100. Josh Rehwald testified that he

got home from work shortly after 10:00 on that evening, and went into his room to surf the Web and listen to music, which he did for "a good amount of time." 9RP 106-07. Kokee Jones came into the room one or two hours later, and the two spent a few hours making music using a program on Rehwald's computer. 9RP 107. When Jones left the room, Josh went to sleep. Id.

Jones did not testify at his trial.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING JONES'S MOTION TO REPRESENT HIMSELF.

Jones contends that the trial court improperly denied his request to represent himself with the assistance of a person who claimed to be a paralegal. This claim fails. Kevin Johnson, the purported paralegal, lied to the court about his association with the Office of Public Defense, and caused security concerns in the courtroom. Given that Jones's request to proceed pro se was made after trial had begun, the public's interest in the orderly administration of justice outweighed Jones's interest in representing himself with Johnson's assistance.

a. Relevant Facts.

On January 22, 2009, Jones appeared before the Honorable Sharon Armstrong; Jones was represented by appointed counsel Daniel Felker. 1RP 2, 4; Supp. CP ____ (sub # 26). Jones asked the court to appoint a new lawyer to represent him; Jones believed that a different attorney "would be able to work for a better future for me through certain programs rather than a revolving door for prisoners." 1RP 4. Observing that a treatment program with probation was a highly unlikely outcome given the charges that Jones faced, Judge Armstrong denied the motion. Id.; CP 7.

On September 10, 2009, with the trial date fast approaching, a private attorney attempted to substitute in on behalf of Jones. 2RP 4-5. When the attorney told the court that he would need approximately a two-month continuance, Judge Armstrong denied the request. 2RP 5.

On September 21, 2009, Jones appeared before the Honorable Michael Hayden for trial and moved to represent himself with the help of his "uncle," a paralegal.² 3RP 4, 8. The court told

² Jones later explained that "uncle" was simply a term of respect, and that the person he wished to assist him was not a blood relative. 3RP 33.

Jones that, in light of the fact that Jones was in custody, there were security concerns with having a non-lawyer sit at counsel table as his advisor. 3RP 10. The court also informed Jones that he did not have the right to pick his own legal service provider at public expense. 3RP 33. The court told Jones that one alternative would be to proceed pro se with standby counsel. 3RP 13.

The court proceeded to have a pro se colloquy with Jones. 3RP 20-26. Jones asked that Felker remain as his standby counsel. 3RP 26. The court granted Jones pro se status. CP 10, 13.

Kevin Johnson, the proposed legal advisor, represented himself to the court as "a vendor at the office of public defender as a paralegal service provider for criminal defendants who represent themselves." 3RP 28. Johnson asked the court to authorize \$2,500 for investigation. 3RP 31-32. The court postponed ruling on the matter. 3RP 33.

On September 22, 2009, Jones again appeared before Judge Hayden, representing himself with Daniel Felker as his standby counsel. 4RP 4. Kevin Johnson was also present, and courtroom security quickly alerted Judge Hayden to a problem with Johnson: "The gentleman in the front bench, I inquired if he was an

attorney and he wouldn't answer me. And our policy is that we try to keep the front bench clear unless you're an attorney or ---."

4RP 4. The court identified the person on the front bench as Kevin Johnson. 4RP 4-5. The court denied Johnson's request for investigation funds, and again expressed its concern with allowing Johnson to serve as Jones's sole legal advisor: "I cannot control the use of a paralegal other than through a properly admitted lawyer and it's my concern that hiring a paralegal for you would simply encourage the unauthorized practice of law by Mr. Johnson."³ 4RP 5; CP 23.

The prosecutor informed the court that she had spoken with the Office of Public Defense ("OPD") and was informed that OPD did not employ or contract with paralegal vendors. 4RP 6. In addition, the telephone number that Johnson had listed on one of the documents he produced to the court belonged, not to a law firm or paralegal consulting service, but to a small newspaper. Id. Nor could the prosecutor find any listing for "USA Paralegal Services," the name under which Johnson was allegedly doing business.

4RP 5, 6.

³ At the end of the hearing, it came to light that Johnson had apparently tried to circumvent Judge Hayden by presenting his motion for funding to the Criminal Presiding Judge. 4RP 72-73. Judge Hayden again denied the request. 4RP 74.

Jones once again asked if he could get a different assigned attorney. 4RP 7. The court again denied this request, noting that it was too late and there was no apparent conflict. Id. Jones then decided that he no longer wished to represent himself; he withdrew his request to proceed pro se and agreed to be represented by appointed counsel, Daniel Felker. 4RP 7-8.

The trial court proceeded to take evidence under CrR 3.5, with Felker cross-examining the State's witness and arguing on Jones's behalf. 4RP 8-51. The court admitted part of Jones's statements, and excluded a portion. 4RP 52-53; CP 25-27. The court ultimately memorialized its other pretrial rulings, including the ruling denying Jones's request for funds to hire Kevin Johnson. CP 23-24.

The case proceeded to jury selection before the Honorable Catherine Shaffer on October 19, 2009.⁴ 6RP 1, 6. The State provided the court with Judge Hayden's pretrial rulings. 6RP 6; CP 23-27. Felker informed the court that Jones again wanted to represent himself. 6RP 7.

⁴ The parties had reconvened for trial before Judge Hayden on September 23, 2009, but Jones had become violently ill and was taken to the hospital. 5RP 8-9.

Jones informed the court that he now had the funds to hire Kevin Johnson, and he would like to represent himself with Johnson's assistance. 6RP 7-8. Judge Shaffer responded that Judge Hayden had already denied Jones's motion, and she would not revisit that ruling. 6RP 8. Jones confirmed that he did not wish to represent himself without Johnson's assistance. Id. Jones then asked the court if Johnson could assist appointed counsel. 6RP 8-9. The court responded: "That's up to Mr. Felker. He's your attorney." 6RP 9. The court granted Felker's request that Johnson be allowed to sit at counsel table and assist at trial. 6RP 13-14.

b. The Trial Court Properly Exercised Its Discretion.

A criminal defendant has a constitutional right to waive the assistance of counsel and represent himself. State v. Woods, 143 Wn.2d 561, 585, 23 P.3d 1046 (2001). However, a request to proceed pro se must be both unequivocal and timely. Id. at 586. The trial court's disposition of a request to proceed pro se is reviewed for abuse of discretion. State v. Breedlove, 79 Wn. App. 101, 106, 900 P.2d 586 (1995).

Prior to trial, the defendant's interest in representing himself is paramount. State v. Bolar, 118 Wn. App. 490, 516, 78 P.3d 1012 (2003), review denied, 151 Wn.2d 1027 (2004); Breedlove, 79 Wn. App. at 107. But as the trial gets closer, and once it begins, society's interest in the orderly administration of justice becomes weightier. Bolar, at 516; Breedlove, at 107. The trial court must exercise its discretion by balancing these interests accordingly. Breedlove, at 107.

Jones made his first request to proceed pro se on the first day of trial. 3RP 4. On the second day of trial, Jones withdrew the request, and told the court that he wished to be represented by previously appointed counsel, Daniel Felker. 4RP 7-8. When trial resumed after Jones's illness, he again sought to represent himself. 6RP 7. Given the timing, and Jones's previous relinquishment of his right to self-representation, the trial court had broad discretion in deciding the renewed motion to proceed pro se. See State v. Modica, 136 Wn. App. 434, 443, 149 P.3d 446 (2006) (if request for self-representation is made during trial, the right rests largely in the informed discretion of the trial court), aff'd on other grds, 164 Wn.2d 83, 186 P.3d 1062 (2008); cf. State v. DeWeese, 117 Wn.2d 369, 376-77, 816 P.2d 1 (1991) (once defendant unequivocally waives

right to counsel, he may not later demand assistance of counsel as a matter of right, since *reappointment* is wholly within discretion of trial court).

The record is clear that Judge Hayden, in denying Jones's motion to represent himself with the assistance of Kevin Johnson, did not rely solely on the impropriety of expending public funds for a private legal advisor of choice, but weighed the public's interest in the orderly administration of justice as well. Indeed, Judge Hayden first expressed his concern for security in the courtroom, declining to allow Jones, who was in custody for a violent crime, to have a non-lawyer sit with him at counsel table. 3RP 10. This was within the trial court's "broad discretion" to provide for order and security in the courtroom. See Breedlove, 79 Wn. App. at 114.

Judge Hayden was also concerned with Kevin Johnson's status, which was far from clear. Johnson had apparently been acting like an attorney, providing Jones with motions that Johnson himself had prepared. 6RP 12 (prosecutor describes to Judge Shaffer what had occurred at previous hearing). Judge Hayden did not believe that it was appropriate for Johnson, an "unstructured profession[al]," to provide legal assistance to Jones, when Johnson

was not authorized to practice law. 4RP 7. The judge elaborated on his concerns: "I cannot control the use of a paralegal other than through a properly admitted lawyer and it's my concern that hiring a paralegal for you would simply encourage the unauthorized practice of law by Mr. Johnson." 4RP 5.

The trial court's concerns were well-founded. The record shows that Johnson had already lied to the court about his status – OPD had flatly contradicted Johnson's story that he was associated with that office. 3RP 28-29, 30-31; 4RP 5-6; 6RP 11-12. The telephone number that Johnson had provided on court documents apparently belonged to a small newspaper. 4RP 6. The court was under no obligation to allow an unaffiliated person of questionable credentials and dubious honesty to participate in the trial. Judge Hayden did not abuse his wide discretion in denying Jones's motion, brought after trial had begun, to proceed pro se with the assistance of Kevin Johnson.

Nor did Judge Shaffer abuse her discretion when she declined to revisit Judge Hayden's ruling. The only thing that had changed was that Jones had acquired the funds to hire Johnson to

assist him at trial. This fact restored neither Johnson's credentials nor his credibility. Judge Shaffer, like Judge Hayden before her, was under no obligation to let Johnson participate in the trial.

c. The Trial Court Did Not Violate Jones's Constitutional Right Of Association.

Jones further argues that the trial court violated his First Amendment right of association by refusing to allow him to represent himself with the assistance of Kevin Johnson. Jones cites no law that specifically supports his argument. Moreover, the facts do not support this argument. Jones, who was in custody, was free to associate with Johnson to the extent allowed by jail rules and regulations. The trial court's refusal to allow an unsupervised "paralegal" free rein in the courtroom did not infringe on Jones's right of association. Rather, the court was acting within its broad discretion to provide for order and security in the courtroom. See Breedlove, 79 Wn. App. at 114.

D. CONCLUSION

For all of the foregoing reasons, the State asks this Court to affirm Jones's convictions for Burglary in the First Degree, Robbery in the First Degree, and Assault in the Second Degree.

DATED this 19th day of October, 2010.

Respectfully submitted,

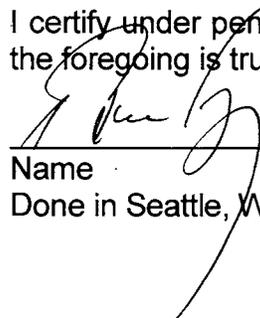
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to **Casey Grannis**, the attorney for the appellant, at **Nielsen, Broman & Koch, PLLC**, 1908 East Madison, Seattle, WA 98122, containing a copy of the **Brief of Respondent**, in **STATE v. KOKEE JONES**, Cause No. **64599-4-I**, in the Court of Appeals for the State of Washington, Division I.

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



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