

COA NO. 64599-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

KOKEE JONES,

Appellant.

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STATE OF WASHINGTON
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King County Prosecutor
Appellate Unit

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

The Honorable Catherine Shaffer, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court violated appellant's constitutional right to self-representation.

Issue Pertaining to Assignment of Error

One judge granted appellant's motion to proceed pro se but denied his motion for a state-funded paralegal. Appellant subsequently withdrew his motion to proceed pro se. Appellant later moved to proceed pro se again, this time with the assistance of a privately-retained paralegal. A second judge denied this motion on the ground that the first judge had already denied it.

Did the trial court impermissibly deny or interfere in the exercise of appellant's right to self-representation by (1) basing its ruling on a mistaken belief that a prior judge had already denied the same motion to proceed pro se; (2) basing its ruling on a ground that did not form a proper basis for denial as a matter of law; and (3) unjustifiably conditioning the exercise of appellant's constitutional right to self-representation on the relinquishment of his First Amendment right to association?

B. STATEMENT OF THE CASE

1. Procedural Facts

The State charged Kokee Jones with first degree robbery, first degree burglary and second degree assault, and alleged Jones was armed

with a firearm during commission of the first two counts. CP 11-12. A jury found Jones guilty on all counts and returned special verdicts that he or an accomplice was armed with a firearm. CP 47-48. The court sentenced Jones to a total of 161 months in confinement. CP 90-93. This appeal follows. CP 89.

2. Pre-Trial

On January 22, 2009, Judge Sharon Armstrong denied Jones's pre-trial motion for new counsel. CP 7; 1RP¹ 4-6. Attorney Daniel Felker represented Jones. 1RP 4.

On September 10, 2009, Judge Armstrong denied Jones's motion to substitute counsel on the ground that it was too late, the trial date being scheduled for September 14. 2RP 4-5.

On September 21, Jones moved to represent himself with the help of a paralegal named Kevin Johnson, who Jones identified as his "uncle." 3RP 4, 8. Judge Michael Hayden initially said Jones could not have a non-lawyer sitting next to him at the counsel table serving as advisor because of security issues. 3RP 10. "So, it has to be a lawyer, if you want to have anybody help you." 3RP 11.

¹ The verbatim report of proceedings is referenced 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 and 12/11/09; 7RP -10/20/09; 8RP - 10/21/09; 9RP - 10/22/09.

Judge Hayden granted Jones' motion to proceed pro se after a colloquy designed to confirm the decision was knowing, voluntary and intelligent. CP 13, 23; 3RP 11-26. Jones was ready to proceed with picking a jury and did not request a continuance. 3RP 19. Felker was made standby counsel with Jones's consent. 3RP 26-27, 47.²

During the course of the September 21 hearing, Kevin Johnson addressed the court, identifying himself as "a vendor at the office of public defender as a paralegal service provider for criminal defendants who represent themselves." 3RP 28. Judge Hayden was presented with a written motion requesting funds for "investigation." 3RP 29-32.

Judge Hayden said "I will deal with the issue of whether to appoint him a legal assistant after I have a chance to look at this and think about it." 3RP 33. The judge expressed concern that Jones did not have "the right to pick his own lawyer nor to designate to OPD who to hire and at this point he's asking for legal services even albeit paralegal services of a relative which creates a problem with -- whether those -- the advice he's receiving is objective advice. We don't usually -- certainly OPD would not pay for his brother to come in and represent him as a lawyer." 3RP 33.

² Context makes clear the transcriptionist mistakenly identified the speaker as Kevin Johnson rather than Felker. 3RP 47.

Jones then explained the term "uncle" was one of respect used for elders in Jones's Hawaiian culture; the two men were not actually related and had never met each other before September 21. 3RP 33-35. The court said "you know he could be a good friend of yours from outside the courtroom who's a -- what I'm suggesting is we don't usually pay public funds to hire friends -- personal friends of a defendant to represent them." 3RP 34. The court recessed without further addressing the issue.

On September 22, Judge Hayden denied Jones's motion for an order granting him funds to hire Kevin Johnson as his paralegal, investigator and advisor. CP 23; 4RP 5. In denying the request, Judge Hayden stated his concern that "hiring a paralegal for you would simply encourage the unauthorized practice of law by Mr. Johnson." 4RP 5.³ The court reiterated "if you want legal help you can do it through a lawyer." 4RP 6. According to the court, Jones could not get legal assistance from an "unstructured profession that reports to be assisting you in some legal way but is not authorized to practice law. In my judgment, paralegals work through lawyers they do not work on their own to provide legal services particularly the [sic] pro se criminal defendants." 4RP 7.

³ The prosecutor said she spoke with someone at OPD, who told her OPD does not employ, hire or contract with any paralegal vendors. 4RP 5-6.

At this point, the judge asked Jones if he still wanted to represent himself. 4RP 7. The judge told Jones there was no way to get a different public defender. 4RP 7. Jones responded "so, you are saying your honor, that I either represent myself all on my own or have Daniel Felker represent me?" 4RP 7. The judge answered "Correct." 4RP 7. Jones then said "Okay, then I'll guess I'll have Daniel Felker represent me." 4RP 7-8. The judge asked if Jones withdrew his request to proceed pro se and Jones said "Yeah." 4RP 8. Felker resumed the role of Jones's counsel and the pre-trial hearing continued. 4RP 8; CP 23.

On October 19, Jones moved to proceed pro se before Judge Catherine Shaffer. 6RP 7-8. The relevant exchange follows:

THE COURT: Thank you. Be seated. Good morning, everybody.

MS. UNGERMAN: May I call the case?

THE COURT: Yes. Kathy Ungerman appearing on behalf of the state. This is State versus Kokee Jones, 08-C-11804-1 Seattle. The defendant is present in custody with counsel, Dan Felker. We have already completed pretrial motions and motions in limine in this case. I've passed forward the documents outlining those to the court. The state's ready to proceed with jury selection at this point.

THE COURT: Thank you. Mr. Felker?

MR. FELKER: As are we. We do have a couple of preliminary matters.

THE COURT: Sure.

MR. FELKER: One is my client isn't clothed. He indicated to me that the clothes were not available to him. The court heard otherwise. But it's obviously a problem that we have.

THE COURT: He [sic] jail notified us when we ordered the defendant that he had been offered the chance to dress and he had refused the clothing that they had for him. Do you want to talk to him about it and see if we can get this done expeditiously? Because the court's ready to go forward to jury selection. Is there something else you wanted to take up before we get to you talking to your client?

MR. FELKER: Well, my client also has a motion.

THE COURT: Well, he's represented by you, Mr. Felker, so it's up to you to decide whether to bring it or not.

MR. FELKER: Okay. Well, he'd like to address the court and see if he can go pro se.

THE COURT: Didn't we go through this in Judge Hayden's court?

MS. UNGERMAN: Yes.

THE COURT: Okay. Mr. Jones, I'll hear from you, but I will tell you that once you've made the decision not to represent yourself, it's pretty much unheard of for the court to let you do it again.

THE DEFENDANT: Well, Your Honor, I made the motion to represent myself last time with the assistance of my paralegal. And I guess the judge didn't want to use some the state's funds to pay for him, so I have hired him, and at this time I would like him to represent me along with the assistance of Daniel because I would keep him on standby, and we have paid for him, though.

But that was the problem I have seen that the judge had the last time because we wanted the state to pay for him, but I've paid for him already, and I would like to be representing myself but with the assistance of my paralegal.

THE COURT: That motion was already denied, and I'm not going to revisit Judge Hayden's denial. Okay?

Without your paralegal, do you want to represent yourself?

THE DEFENDANT: Well, is there any way under the rules that you guys have that I have my --

THE COURT: I just told you that I'm not revisiting that ruling.

Without your paralegal, do you or do you not want to represent yourself?

THE DEFENDANT: No, Your Honor.
THE COURT: Okay.
THE DEFENDANT: But --
THE COURT: This is a non-issue. Go ahead and be seated.
THE DEFENDANT: Can I ask for something else?
THE COURT: Sure.
THE DEFENDANT: Is there any way that I could have my paralegal assist my lawyer in this case?
THE COURT: That's up to Mr. Felker. He's your attorney. Be seated, Mr. Jones.

6RP 6-9.

Felker allowed the paralegal to assist in the case. 6RP 12. The judge allowed the paralegal to sit at the counsel table. 6RP 13. Jury selection began October 19 and finished on October 20. 6RP 10, 14; 7RP 5. The evidentiary phase of the trial began the next day. 7RP.

C. ARGUMENT

THE COURT VIOLATED JONES'S CONSTITUTIONAL RIGHT TO SELF-REPRESENTATION BY PREVENTING HIM FROM PROCEEDING PRO SE WITH THE ASSISTANCE OF A PRIVATELY-RETAINED PARALEGAL.

The trial court denied Jones's request to represent himself with the help of a privately-hired paralegal. Reversal is required because the denial was based on an untenable ground or reason.

Criminal defendants have the constitutional right to self-representation. State v. Madsen, 168 Wn.2d 496, 504, 229 P.3d 714 (2010); Faretta v. California, 422 U.S. 806, 819, 95 S. Ct. 2525, 45 L. Ed.

2d 562 (1975); Wash. Const. art. I, § 22; U.S. Const. amend. VI. A trial court's denial of a request to proceed pro se is reviewed for abuse of discretion. Madsen, 168 Wn.2d at 504.

Judge Shaffer rejected Jones's motion to proceed pro se with the assistance of the paralegal on the basis that the motion was "already denied" by Judge Hayden. 6RP 8. Judge Shaffer refused to "revisit Judge Hayden's denial." 6RP 8. Judge Shaffer abused her discretion in denying Jones's motion to proceed pro se with the assistance of legal counsel on this basis.

"A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard." In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P. 2d 1362 (1997).

Judge Shaffer's ruling rests on facts unsupported in the record. Judge Shaffer maintained she would not revisit Judge Hayden's denial of Jones's motion, but Judge Hayden denied a different motion.

Before Judge Hayden, Jones moved to proceed pro se with the assistance of a *state-funded* paralegal. 3RP 4-26. Judge Hayden granted

Jones's motion to proceed pro se on September 21, expressly reserving decision on whether to authorize state funding for paralegal assistance. CP 13, 23; 3RP 33. The next day, the court denied what it described as Jones's motion for an order granting him "funds to hire Kevin Johnson as the defendant's paralegal, investigator and advisor." CP 23. Judge Hayden then allowed Jones to "withdraw" his motion to proceed pro se. 4RP 8.

On September 22, Judge Hayden ruled he would not order state funds to pay for Kevin Johnson. Jones did not ask Judge Shaffer to revisit this denial. Before Judge Shaffer, Jones moved to proceed pro se with the assistance of a *privately hired* paralegal. 6RP 6-8. Jones attempted to explain he no longer sought state funding for Johnson, to no avail.

Judge Hayden never ruled on a motion to proceed pro se with the assistance of a privately hired paralegal. Judge Shaffer abused her discretion in denying Jones's motion based on the erroneous belief that the same motion had already been ruled on and denied by Judge Hayden. As a result of that erroneous belief, Judge Shaffer did not exercise her discretion on whether to grant Jones's motion to proceed pro se on its merits. The failure to exercise discretion is an abuse of discretion. See In re Pers. Restraint of Mulholland, 161 Wn.2d 322, 332-34, 166 P.3d 677 (2007) (trial court mistakenly believed it was without discretion to impose

concurrent sentences for separate serious violent offenses); State v. Grayson, 154 Wn.2d 333, 341-42, 111 P.3d 1183 (2005) (failing to exercise discretion on whether to grant exceptional sentence downward).

In denying Jones's motion for a state-funded paralegal, Judge Hayden stated the granting of funds would encourage Kevin Johnson to engage in the unauthorized practice of law. 4RP 4-7. The record does not show Judge Shaffer considered or was even aware of this aspect of Judge Hayden's decision. Judge Shaffer did not reference it as a basis to deny Jones's motion.

Regardless, Judge Shaffer could not have justifiably denied Jones's motion to proceed pro se with the assistance of a privately-hired paralegal on the basis that granting such a motion would encourage Johnson to engage in the unauthorized practice of law. The courts recognize non-lawyers can assist pro se defendants, without regard to whether those non-lawyers could be accused of practicing law without a license. See, e.g., Carper v. DeLand, 54 F.3d 613, 616 (10th Cir.1995) (legal assistance to pro se defendant constitutionally sufficient when provided by non-attorneys trained in the law such as inmate law clerks, paralegals, or law students); Knop v. Johnson, 977 F.2d 996, 1006 (6th Cir. 1992) (constitutional right to court access for pro se defendant can be ensured through assistance from jailhouse lawyers or paralegals with at least some

training in the law); see also Faretta, 422 U.S. at 834 n.46 (pro se defendant cannot contend on appeal that the quality of his own defense amounted to a denial of effective assistance of counsel).

Any argument that Judge Shaffer could have legitimately denied Jones's request on the basis that Jones might receive advice from someone not qualified to give it must be rejected. Such a ruling would be based on what the court believes is best for Jones or what is best for the judicial system. That, however, is not the standard for ruling on requests to proceed pro se. The right to self-representation "is so fundamental that it is afforded despite its potentially detrimental impact on both the defendant and the administration of justice." Madsen, 168 Wn.2d at 503.

The bottom line is that "[t]he grounds that allow a court to deny a defendant the right to self-representation are limited to a finding that the defendant's request is equivocal, untimely, involuntary, or made without a general understanding of the consequences." Madsen, 168 Wn.2d at 504-05. The trial court here made no such finding. It did not deny Jones's request to proceed pro se with the assistance of a paralegal on any of these enumerated grounds. The court abused its discretion in applying the wrong legal standard. Id. at 504. The court's denial is also untenable because it is based on facts that do not meet the requirements of the correct legal standard. Littlefield, 133 Wn.2d at 47.

The doctrine of unconstitutional conditions is also instructive. This doctrine precludes the government from coercing the waiver of a constitutional right by conditioning the exercise of one constitutional right on the waiver of another. United States v. Ryan, 810 F.2d 650, 656 (7th Cir. 1987). In holding a defendant cannot be forced to choose between asserting a Fourth Amendment claim and his Fifth Amendment right to silence, for example, the United States Supreme Court found it "intolerable that one constitutional right should have to be surrendered in order to assert another." Simmons v. United States, 390 U.S. 377, 394, 88 S. Ct. 967, 19 L.Ed.2d 1247 (1968).

Jones's right to proceed pro se could not be conditioned on relinquishment of assistance from his privately hired paralegal. Jones had the right to self-representation. Jones also had the First Amendment right to associate with Johnson.

"Prison walls do not form a barrier separating prison inmates from the protections of the Constitution." Turner v. Safley, 482 U.S. 78, 84, 107 S. Ct. 2254, 2262, 96 L. Ed. 2d 64 (1987). A prison inmate retains those First Amendment rights "that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system." Pell v. Procunier, 417 U.S. 817, 822, 94 S. Ct. 2800, 41 L. Ed. 2d 495 (1974). To justify infringement on the right to association, the

actions of prison officials must be "reasonably related to legitimate penological interests." Turner, 482 U.S. at 89.

While in jail, Jones had the First Amendment right to associate with Johnson in the absence of a valid penological purpose restricting contact. Neither the court nor anyone else asserted any penological purpose that would justify deprivation of Jones's First Amendment right to associate with Johnson by procuring his help with the trial.

On September 21, Judge Hayden indicated Jones could not have a non-lawyer sitting next to him at the counsel table serving as advisor because of security issues. 3RP 10-11. The assertion has no bearing on whether Judge Shaffer justifiably denied Jones's request to proceed pro se with Johnson's help. At no time did Jones request that Johnson be allowed to sit with him at counsel's table. Jones's motion was not predicated on the ability of Johnson to sit next to him in the courtroom.

Judge Shaffer did not deny Jones's motion to proceed pro se on the basis of the security concern identified by Hayden. That being said, simply deferring to jail personnel on the security issue would have been an abuse of discretion. See State v. Fliieger, 91 Wn. App. 236, 238, 241-42, 955 P.2d 872 (1998) (in deferring to sheriff's office regarding whether shock box on defendant necessary in courtroom, court abused its discretion by failing to exercise its discretion).

In any event, nothing in the record indicates Johnson would not be free to visit or otherwise communicate with Jones consistent with jail rules and regulations, just as any non-inmate might. The court had no authority to prohibit Jones from associating with private individuals. Indeed, a friend or family member could have been the one helping Jones with his pro se defense and the judge would be powerless to forbid the relationship.

On this record, the court had no authority to prevent Jones from acquiring the assistance of a paralegal at his own expense. That being the case, the court had no authority to prevent Jones from proceeding pro se with assistance from that paralegal.

Under the doctrine of unconstitutional conditions, the court cannot require a criminal defendant to give up a constitutional right (in this case, the First Amendment right of association with Johnson) in order to exercise his right to self-representation. The court effectively denied or infringed on Jones's right to proceed pro se by conditioning its exercise on an improper basis. It is intolerable that one constitutional right should have to be surrendered in order to assert another, at least where, as here, the defendant is entitled to assert both rights simultaneously. Simmons, 390 U.S. at 394; United States ex rel. Wilcox v. Johnson, 555 F.2d 115, 120 (3d Cir. 1977) (conditioning exercise of right to testify upon waiver of the right to counsel is impermissible infringement upon both rights).

In sum, the trial court unjustifiably denied Jones's request to proceed pro se with the help of a privately-hired individual. The unjustified denial of the fundamental right to proceed pro se right requires reversal. Madsen, 168 Wn.2d at 503; see also State v. Vermillion, 112 Wn. App. 844, 851, 51 P.3d 188 (2002) ("The right to self-representation is either respected or denied; its deprivation cannot be harmless."); State v. Breedlove, 79 Wn. App. 101, 110, 900 P.2d 586 (1995) ("The erroneous denial of a defendant's motion to proceed pro se requires reversal without any showing of prejudice."). This Court should therefore reverse conviction and remand for a new trial.

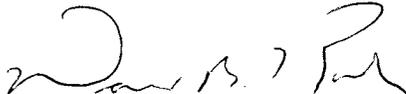
D. CONCLUSION

For the reasons set forth above, this Court should reverse conviction and remand for a new trial.

DATED this 9th day of July 2010.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.

 #23789 (for)

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 64599-4-I
)	
KOKEE JONES,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 13TH DAY OF JULY, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] KOKEE JONES
DOC NO. 712756
MCNEIL ISLAND CORRECTIONS CENTER
P.O. BOX 881000
STEILACOOM, WA 98388

SIGNED IN SEATTLE WASHINGTON, THIS 9TH DAY OF JULY, 2010.

x *Patrick Mayovsky*