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NO. 66377-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

RASHID A. HASSAN,

Appellant.

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

The Honorable Ronald Kessler, Judge
The Honorable Theresa Doyle, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

HASSAN WAS UNLAWFULLY DENIED HIS RIGHT TO SELF-REPRESENTATION.

In the Brief of Appellant (BOA), Hassan contended he made a knowing, timely, and unequivocal request to represent himself, which was denied on September 8, 2010, after an insufficient colloquy. BOA at 6-16. The State, relying heavily on State v. Stenson¹ and the assigned trial judge's October 4, 2010, discussion with Hassan, responds that Hassan's request was neither knowing nor unequivocal and was "more an expression of his dissatisfaction with his current counsel" Brief of Respondent (BOR) at 6.

There are two fundamental shortcomings with the State's arguments. First, the equivocal nature of Stenson's motion is obvious. He stated, "I would formally make a motion then that I be able to allow [sic] to represent myself. I do not want to do this but the court and the counsel that I currently have force me to do this." Stenson, 132 Wn.2d at 739. Then, after the trial court observed that, "based upon your indications . . . you really do not want to proceed without counsel[,]" the defendant responded, "But likewise I do not proceed [sic] with counsel that I have." 132 Wn.2d at 740.

¹ 132 Wn.2d 668, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998).

In contrast, Hassan said he needed a new attorney as he and counsel were "not speaking at the moment." RP (9/8/10) at 3. After hearing a brief history of the case from defense counsel, the court summarily announced it was denying the motion. RP (9/8/10) at 4. Hassan said, "I rather go pro se, your Honor." RP (9/8/10) at 5. The court asked three times whether Hassan understood he had a constitutional right to counsel. Each time, Hassan made his dissatisfaction with counsel clear, stating counsel was not protecting his constitutional right. RP (9/8/10) at 5. At no time did he back off from his request or suggest he was being forced to represent himself. The trial court nevertheless concluded, "Then I won't allow you to proceed pro se." RP (9/8/10) at 5-6.

Unlike Stenson, Hassan did not conditionally request self-representation or state he really did not want to represent himself. Instead, he simply said he would rather represent himself. At that point, the preferred colloquy would have addressed the risks of self-representation, the seriousness of the charges, applicable rules, and the maximum possible punishment. State v. Woods, 143 Wn.2d 561, 587-88, 23 P.3d 1046, cert. denied, 534 U.S. 964 (2001); State v. Lillard, 122 Wn. App. 422, 427-28, 93 P.3d 969 (2004), review denied, 154 Wn.2d 1002 (2005).

The trial court's colloquy touched on none of these concerns and did not show Hassan's request was deficient. The following portion of State v. Madsen is instructive on this point:

The trial court's colloquy to determine whether Madsen's [first] motion was voluntary, knowing, and intelligent was limited to asking why Madsen wanted to represent himself, and Madsen answered that he thought he could resolve the case on his own. We need not decide whether this answer is sufficient to show that Madsen made a voluntary, knowing, and intelligent waiver of his right to counsel. Madsen gave a complete answer to the court's question. The court failed to inquire further or identify facts suggesting that Madsen's request was legally deficient. As stated above, the presumption in Turay² must be coupled with some factual basis; *the court cannot stack the deck against a defendant by not conducting a proper colloquy to determine whether the requirements for waiver are sufficiently met.* As the court failed to ask further questions and there is no evidence to the contrary, the only permissible conclusion is that Madsen's request was voluntary, knowing, and intelligent.

Madsen, 168 Wn.2d 496, 505-06, 229 P.3d 714 (2010) (emphasis added).

By merely asking Hassan whether he knew he had a constitutional right to counsel, and then promptly denying his pro se request, the judge at the September 8 hearing stacked the deck against Hassan. As in Madsen, Hassan cannot be punished by the court's perfunctory questioning. Under the circumstances, the "only permissible conclusion" is that Hassan's request was sufficient and should have been granted.

² In re Detention of Turay, 139 Wn.2d 379, 986 P.2d 790 (1999), cert. denied, 531 U.S. 1125 (2001).

The second shortcoming in the State's argument is its reliance on the trial court's October 4 colloquy. For the error occurred September 8; from that date forward, Hassan should have been representing himself. Madsen supports this claim as well:

The Court of Appeals also held that Madsen's motion was equivocal because Madsen waited over a month to renew his first motion, and Madsen did not subsequently renew his request for a period of time. Madsen, 2008 WL 625282, at *6. This is not the correct test. There is no requirement that a request to proceed pro se be made at every opportunity. *Further, a trial court's finding of equivocation may not be justified by referencing future events then unknown to the trial court. Such prophetic vision is impossible for the trial court.*

Madsen, 168 Wn.2d at 507 (emphasis added).

This Court should therefore reject the State's reliance on a proceeding that occurred after the unjustified denial of Hassan's unequivocal request to represent himself. Otherwise, this Court, as the Court of Appeals did in Madsen, will "succumb[] to the historian's fallacy by relying on then-future events to justify the trial court's denial of [Hassan's] request." Madsen, 168 Wn.2d at 507 n.3.

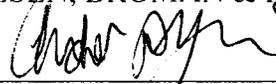
B. CONCLUSION

The trial court abused its discretion when it denied Hassan's motion to proceed pro se on September 8, 2010. For the reasons cited herein and in his Brief of Appellant, this Court should reverse Hassan's conviction and remand for retrial.

DATED this 19 day of January, 2012.

Respectfully submitted,

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State v. Rashid Hassan

No. 66377-1-I

Certificate of Service of brief of appellant by Mail

Today I deposited in the mails of the United States of America, a properly stamped and addressed envelope directed to:

Rashid Hassan 725705
Monroe Corrections Center
PO Box 777
Monroe, WA 98272

Containing a copy of the reply brief of appellant, in State v. Rashid Hassan,
Cause No. 66377-1-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.

John Sloane
Done in Seattle, Washington

1-19-12
Date

Today I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to attorneys of record at _____ containing a copy of the documents to which this declaration is attached.

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

Name Done in Seattle, WA Date 1-19-12