

COA No.67356-4-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

RODNEY SCHREIB,

Appellant.

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STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT
OF SKAGIT COUNTY

The Honorable Michael Rickert
The Honorable David Needy

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. Mr. Schreib's 6th and 14th Amendment and Article 1 section 22 right to counsel was denied when the trial court permitted him to represent himself at a hearing on his motion to withdraw his guilty plea.

2. Mr. Schreib's motion to withdraw his guilty plea was not untimely where he was never properly advised of the RCW 10.73.090 time limits on collateral attack at the time of his original sentencing, pursuant to RCW 10.73.110 and CrR 7.2(b).

3. Mr. Schreib's motion to withdraw his guilty plea was timely under RCW 10.73.090 where the trial court had entered an Order Modifying Judgment and Sentence on December 1, 2010.

4. Mr. Schreib's motion to withdraw his guilty plea was not untimely where the trial court entered its Order Denying Defendant's Motion to Withdraw Guilty Plea on June 22, 2011, following the court's June 15, 2011, Order Modifying Judgment and Sentence and Revoking SSOSA. CP 92, 94.

5. The trial court improperly dismissed Mr. Schreib's motion to withdraw his plea as untimely under RCW 10.73.090 where the judgment, as modified, was invalid on its face.

6. The trial court improperly dismissed Mr. Schreib's motion to withdraw his plea as untimely where the court was required to transfer the motion to the Court of Appeals pursuant to CrR 7.8.

7. The trial court's order amending Mr. Schreib's judgment and sentence and ordering a term of community custody for a period of life was without statutory authority.

8. The trial court erred in entering Finding of Fact I.2 in its Findings and Order Re Waiver of Counsel, stating that the defendant was aware of the maximum penalties for the charges.

9. The trial court erred in entering Finding of Fact I.3 in its Findings and Order Re Waiver of Counsel, stating that the defendant was aware of technical rules binding the presentation of his case, and that representing himself will involve more than just telling his story.

10. The trial court erred in entering Finding of Fact I.5 in its Findings and Order Re Waiver of Counsel, stating that the defendant has presented sufficient reason that would not justify the appointment of counsel and has not requested that counsel be appointed, where counsel had already been appointed.

11. The trial court erred in entering Finding of Fact I.6 in its Findings and Order Re Waiver of Counsel, stating that the

defendant expressed a desire to represent himself “in the face of the above noted facts.”

12. The trial court erred in entering Finding of Fact II (labeled “Conclusion of Law”) in its Findings and Order Re Waiver of Counsel, stating that the defendant “has knowingly and voluntarily chosen to represent himself.”

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Mr. Schreib has a constitutional right to counsel at all critical stages of the litigation. Was Mr. Schreib’s right to counsel denied where the trial court permitted him to refuse appointed counsel and instead represent himself at a hearing on his motion to withdraw his guilty plea?

2. Was Mr. Schreib’s motion to withdraw his guilty plea improperly deemed untimely where he had never been properly advised of the time limits on collateral attack at the time of his original sentencing?

3. Was Mr. Schreib’s motion to withdraw his guilty plea not untimely where the trial court had previously entered an Order Modifying Judgment and Sentence on December 1, 2010?

4. Was Mr. Schreib’s motion to withdraw his guilty plea not untimely where the trial court entered its Order Denying

Defendant's Motion to Withdraw Guilty Plea on June 22, 2011, following the court's June 15, 2011 Order Modifying Judgment and Sentence and Revoking SSOSA? CP 94, CP 92.

5. Did the trial court improperly dismiss Mr. Schreib's motion to withdraw his plea as untimely where the judgment, as modified, was invalid on its face?

6. Did the trial court improperly dismiss Mr. Schreib's motion to withdraw his plea as untimely where the court was required to transfer the motion to the Court of Appeals?

7. Was the trial court's order amending Mr. Schreib's judgment and sentence and ordering a term of community custody for a period of Life entered without statutory authority?

C. STATEMENT OF THE CASE

According to the affidavit of probable cause, sixteen year old Rodney Schreib, d.o.b. 10/10/90, allegedly committed multiple acts of first degree child molestation (RCW 9A.44.083) against CAJ between May 1, 2007 and August 31, 2007. CP 1-3. He had no prior criminal history. CP 14. These allegations were reported to the Skagit County Sheriff's Office on October 30, 2007. Supp. CP ____, Sub # 8. The affidavit referred to Mr. Schreib and his date of birth as "RAS JR aka JR, (D.O.B. 10/10/90)," and thereafter as

“JR.” CAJ. was subsequently interviewed at the Sheriff’s Office on November 8, 2007. Supp. CP ____, Sub # 8. The affidavit further indicated that on October 2, 2008, “JR was interviewed at the Sheriff’s Office,” where he admitted certain conduct as to CAJ. Supp. CP ____, Sub # 8.

5 days after JR reached the age of 18 on October 10, 2008, Deputy Prosecuting Attorney Rosemary Kaholokula filed the information on October 15, 2008, charging four counts of first degree child molestation against “Rodney Albert Schreib, Jr.” CP 1-3; Supp. CP ____, Sub # 8.

On March 26, 2009, Mr. Schreib entered a guilty plea to three counts of first degree child molestation. CP 4-12. The plea statement indicated in typed-in portions that Mr. Schreib faced a standard range of 98-130 months and a community custody term of 18-36 months, and that the maximum sentence was life. CP 5. The plea form’s pre-printed portions refer to sentencing under former RCW 9.94A.712 (now recodified as RCW 9.94A.507), and states that, for certain offenses including the offense of child molestation in the first degree committed after the defendant is at least 18 years old, community custody will be imposed from the time of release from confinement until the expiration of the

maximum sentence [Life], but that for sex offenses not previously listed, community custody is for a period of 36-48 months. CP 6-7. This portion of the plea statement was correctly in accord with former RCW 9.94A.712 and current RCW 9.94A.507(2), which states that a defendant who was 17 years old or younger at the time of the offense may not be sentenced under .507.

On May 14, 2009, Mr. Schreib was sentenced to concurrent terms of 98 months incarceration, but was given a SSOSA (Special Sex Offender Sentencing Alternative) sentence. 5/14/09RP at 5; CP 13-29.

On October 1, 2010, the prosecutor filed a petition for an order modifying the judgment and sentence. CP 50. The trial court subsequently issued an Order Modifying Judgment and Sentence on December 1, 2010, imposing four months in the Skagit County Jail and additional conditions regarding treatment. CP 52.

On March 14, 2011, the prosecutor filed a motion for revocation of Mr. Schreib's SSOSA sentence. CP 54-60.

On April 20, 2011, an initial hearing was held on the revocation motion, as well as on Mr. Schreib's motions to dismiss and to withdraw his plea which were supported by numerous handwritten pleadings. See Supp. CP ___, Sub # 104; CP 69; Supp.

CP ___, Sub # 106; CP 70, Supp. CP ___, Sub # 109; Supp. CP ___, Sub # 110. Mr. Schreib's counsel, Wes Richards, told the court that Mr. Schreib was asking to represent himself with current counsel as stand-by-counsel. Mr. Richards indicated he was willing to act as such, but only for the revocation matter. He expressed reservations about acting as stand-by counsel for purposes of Mr. Schreib's motions, because those motions included claims of ineffective assistance by his original trial counsel, who had been from Mr. Richard's office. 4/20/11RP at 3, 18. At the end of the hearing, at which the Honorable Michael E. Rickert granted Mr. Schreib's request to represent himself, the court indicated Mr. Richards remained as stand-by counsel for the moment. 4/20/11RP at 19. The court signed "Findings and Order Re Waiver of Counsel." CP 71.

On May 11, 2011, with Mr. Richards as stand-by counsel, Mr. Schreib, representing himself, argued for relief, citing CrR 7.8 and CrR 8.3(b), and asking to withdraw his plea of guilty. 5/11/11RP at 3-13. Although there was some discussion regarding the timeliness of these motions, the trial court was primarily under the impression that the motion to be heard that day related to access to legal materials. Judge Rickert told Mr. Schreib he

needed to make up his mind about what he was asking for and “file the appropriate request because you’re asking to withdraw the guilty plea.” 5/11/11RP at 6, 13.

Mr. Schreib noted that his stand-by counsel had a conflict because he was arguing that his prior attorney, from counsel’s same office, had been ineffective. Mr. Richards agreed that there was a conflict of interest. 5/11/11RP at 16-18. The court indicated that different counsel needed to be appointed for purposes of the motions to dismiss and to withdraw the guilty plea. 5/11/11RP at 22. Mr. Richards indicated that Mr. Schreib desired that he represent him as counsel for purposes of the State’s SSOSA revocation motion, “[b]ut not the motion to dismiss.” 5/11/11RP at 23.

On May 17, 2011, new counsel Sharon Fields entered a notice of appearance for purposes of Mr. Schreib’s motion to withdraw his guilty plea. Supp. CP ____, Sub # 124. Ms. Fields informed the court by motion filed May 20, 2011, that she had been appointed by the Office of Assigned Counsel for purposes of Mr. Schreib’s motion to withdraw his plea based on erroneous advice by counsel in connection with entry of the plea, but that Mr. Schreib

had indicated he wished to represent himself on that motion. CP 81-82.

Mr. Schreib filed a pro se motion to dismiss and to withdraw his guilty plea, citing CrR 7.8, on May 25, 2011. Mr. Schreib argued that he was 16 years old at the time of the commission of the offenses charged, that he should have been charged and tried in juvenile court, and that his trial counsel for purposes of the plea had failed to investigate “issues gravily [sic] prejudicing defendant’s rights.” CP 86. Mr. Schreib also argued that his counsel had failed to competently advise him regarding the admissibility of statements given to police after the interrogating officers had his father leave the interview room, and given in the circumstances of his mental disabilities. CP 87.

In court on May 25, 2011, attorney Fields appeared, and stated that she had been appointed as conflict counsel for Mr. Schreib for purposes of his motion to withdraw his plea. She then explained to the court that Mr. Schreib desired to represent himself, with her as stand-by counsel, for purposes of that motion, which he had not yet filed but with which she would assist him in filing. 5/25/11RP at 4-5.

The Honorable Dave Needy asked Mr. Schreib why he wanted to represent himself when Ms. Fields was there to represent him. Mr. Schreib told the court that he was “competent to somewhat understand” the law and that he desired to take advantage of all his constitutional rights. 5/25/11RP at 5-6. Judge Needy stated, “I think Judge Rickert has already allowed that. If he hasn’t, I certainly will.” 5/25/11RP at 7.

On June 1, 2011, Judge Rickert heard Mr. Schreib’s motion to withdraw his guilty plea. Mr. Schreib argued he was entitled to withdraw his plea because of violations of the Americans with Disabilities Act, the Due Process Clause, his right to the effective assistance of counsel, and because he was sentenced under the wrong “guidelines.” 6/1/11RP at 6-11. Mr. Schreib also argued that he had been provided with ineffective assistance of counsel because he had committed the offenses when he was 16 years old and should have been tried in juvenile court. 6/1/11RP at 9-11.

The trial court ruled that Mr. Schreib’s motion to withdraw his guilty plea under CrR 4.2 was governed by CrR 7.8 because it was being made after judgment was entered, but was untimely as outside the one year limit of the latter rule. 6/1/11RP at 14-17. Mr. Schreib argued that the court did not have authority to “deny an

untimely motion” and was required to transfer the motion to the Court of Appeals. 6/1/11RP at 15, 17.

In the remainder of the hearing, the trial court heard the State’s motion to revoke Mr. Schreib’s SSOSA sentence. Following the testimony of witnesses including Mr. Schreib, the court found that Mr. Schreib had violated conditions of his suspended sentence by having unapproved contact with minors, remaining overnight in a home with minors or spending time in that home with minors, and failing to disclose that contact to DOC or his treatment provider, and by failing to make satisfactory progress in treatment. 6/1/11RP at 63-66.

The court set the case over for a hearing to make a determination regarding Mr. Schreib’s argument regarding being sentenced under the incorrect guidelines, which, from his pro se pleadings, appeared to have to do with Mr. Schreib’s argument about juvenile court jurisdiction. 6/1/11RP at 66-68. At that hearing, held June 15, 2011, Mr. Schreib’s counsel Wes Richards told the court he could discern no error in the defendant’s sentence. 6/15/11RP at 3.

Mr. Schreib stated that a decline hearing had been required, and that the result of that hearing would likely have been that he

would be tried as a juvenile because of his mental disabilities. 6/15/11RP at 4. The court indicated that this matter had been handled and that the prior court had utilized the appropriate SRA sentencing standards. 6/15/11RP at 4-5.

The court signed the order Modifying Judgment and Sentence and Revoking SSOSA. 6/15/11RP at 5; CP 92. The order, in section 1.2, imposes community custody

for life pursuant to RCW 9.94A.507 (former RCW 9.94A.712).

(Emphasis added.) CP 92.

On June 15, 2011, Mr. Schreib filed a pro se written motion, making similar arguments regarding juvenile court jurisdiction. CP 92. On June 22, 2011, the court signed an Order Denying Defendant's Motion to Withdraw Guilty Plea. CP 94.

Mr. Schreib appeals. CP 95 (filed July 5, 2011).

E. ARGUMENT

1. THE TRIAL COURT ERRED IN FINDING MR. SCHREIB'S MOTION TO WITHDRAW HIS PLEA OF GUILTY WAS TIME-BARRED.

a. The record fails to indicate that the defendant received actual notice of the time limitations on collateral attack. Mr. Schreib filed various motions seeking relief in the court below. Although he was representing himself and did not craft each argument with the legal competence of an attorney, he cited CrR 7.8, asked to withdraw his plea, made substantive arguments regarding ineffective assistance of former counsel and the question of juvenile court jurisdiction, and disputed prosecutor Kaholokula's contention of time-bar.¹ The trial court dismissed the motions as time-barred. 6/1/11RP at 14-17. This was error.²

A criminal defendant seeking to vacate a judgment must comply with the time limits set forth in CrR 7.8(b) and RCW 10.73.090, .100, and .130. State v. Dallman, 112 Wn. App. 578,

¹ Had Mr. Schreib been represented by counsel, the appropriate argument regarding juvenile court jurisdiction would have framed the matter as one of ineffective assistance of his trial counsel in connection with the entry of his guilty plea, for failure to advise him of the argument that pre-accusatorial delay deprived the juvenile court of jurisdiction. See generally State v. Oppelt, 172 Wn.2d 285, 257 P.3d 653 (2011).

² This was also error because the trial court could not retain the motion and was required to transfer it to the Court of Appeals. See State v. Smith, 144 Wn. App. 860, 862, 184 P.3d 666 (2008).

582, 50 P.3d 274 (2002), review denied, 148 Wn.2d 1022, 66 P.3d 637 (2003). Both the rule and the statutes require the defendant to seek relief no “more than one year after the judgment becomes final.” This one year time limit is, however, subject to certain exceptions. RCW 10.73.100.

Here, the record of Rodney Schreib's sentencing does not indicate that he was ever advised of the time limits that apply to collateral attack. Although the judgment and sentence includes a paragraph stating that collateral attack on the judgment, including a motion to withdraw plea, must be filed within one year of “final judgment,” there is no indication in the record that Mr. Schrieb ever received a copy of this document. 5/14/09RP at 1-5. See In re Carter, 154 Wn. App. 907, 913-14, 230 P.3d 181 (2010) (proof of actual receipt of judgment and sentence document containing time limit notice rendered later collateral attack untimely, where trial court had not orally informed defendant of time limit).

Certainly, here, at Mr. Schreib's very brief sentencing hearing on May 14, 2009, the trial court did not engage in any colloquy with Mr. Schreib in a manner that placed on the record any advisement of the notice required by CrR 7.2(b)(6). The Rule

states that the defendant must be advised at the time of sentencing of the time limits that apply to the right to collateral attack:

(b) Procedure at Time of Sentencing. The court shall, immediately after sentencing, advise the defendant: (1) of the right to appeal the conviction; (2) of the right to appeal a sentence outside the standard sentence range; (3) that unless a notice of appeal is filed within 30 days after the entry of the judgment or order appealed from, the right to appeal is irrevocably waived; (4) that the superior court clerk will, if requested by the defendant appearing without counsel, supply a notice of appeal form and file it upon completion by the defendant; (5) of the right, if unable to pay the costs thereof, to have counsel appointed and portions of the trial record necessary for review of assigned errors transcribed at public expense for an appeal; and (6) of the time limits on the right to collateral attack imposed by RCW 10.73.090 and .100. These proceedings shall be made a part of the record.

(Emphasis added.) CrR 7.2(b). CrR 7.2(b)(6) clearly requires that notice of the time limits on the right to collateral attack imposed by RCW 10.73.090 shall be pronounced to the defendant at the sentencing proceeding, and also that such advisement shall be made a part of the record. Neither requirement was satisfied here. Additionally, no document such as a “Notice of Rights on Appeal

and Certificate of Compliance with CrR 7.2(b)" appears to have been filed in the court docket.³

The time limit of the cited statute, RCW 10.73.090, is conditioned on compliance with RCW 10.73.110, requiring notice of its terms in similar language to the Court Rule. In re Pers. Restraint of Vega, 118 Wn.2d 449, 451, 823 P.2d 1111 (1992) (when notice is required by statute, failure to comply creates an exemption to the time restriction, and a petition for collateral review must be treated as timely); State v Robinson, 104 Wn. App. 657, 664, 17 P.3d 653 (2001). Both the aforementioned criminal court rule, and RCW 10.73.110, are equally binding in their requirements and their mandatory nature. See State v. Billie, 132 Wn.2d 484, 491, 939 P.2d 691 (1997).

RCW 10.73.110 is unambiguous in the imposition of a duty on the court to advise the defendant at the time judgment and sentence is "pronounced" in a criminal case of the time limit specified in RCW 10.73.090. The general rule of statutory interpretation is that "shall" is imperative. State v. Krall, 125 Wn.2d 146, 149, 881 P.2d 1040 (1994) (interpreting RCW 9.94A.142(1)).

³ The judgment and sentence also failed to notify Mr. Schreib of his right to direct appeal, and no oral advisement of that right was given by the court at the time of sentencing. CP 13-29; 5/14/09RP at 1-5.

In State v. Golden, 112 Wn. App. 68, 47 P.3d 587 (2002), the defendant, like Mr. Schreib, also sought to withdraw his plea of guilty. Because the juvenile court had never informed Golden of the time limits on collateral review as required by statute and court rule, that time limit did not apply, and Golden's motion to withdraw his guilty plea was timely.⁴ Golden, 112 Wn. App. at 77-78. The Court stated:

RCW 10.73.110 is unambiguous. It imposes the duty that the court shall advise the defendant at the time judgment and sentence is pronounced in a criminal case of the time limit specified in RCW 10.73.090.

Golden, 112 Wn. App. at 78. In the present case, the court did not advise Mr. Schreib of the time limits on collateral attack when it pronounced sentence, therefore his motion was timely brought.

A similar result was reached in State v. Calhoun, wherein the defendant's collateral attack was in the form of personal restraint petition, filed 10 years after the judgment and sentence was entered. State v. Calhoun, 134 Wn. App. 84, 87-88, 138 P.3d 659 (2006) (finding time bar inapplicable where defendant "was not told of the time limit for review when his judgment and sentence was pronounced").

⁴ Golden was sentenced under JuCR 7.12(b), which incorporates CrR 7.2(b). Golden, at 78.

The trial court's ruling that Mr. Schreib's CrR 7.8 motions were time-barred was therefore erroneous and this Court should remand for consideration of his motion to withdraw his guilty plea on the merits.

b. Mr. Schreib's motion to withdraw his guilty plea was timely filed within "one year" of his judgment, considering that the judgment was later substantively modified, and because the judgment was invalid on its face. Mr. Schreib's motion to withdraw his guilty plea was timely filed.

(i) Invalidity on its face. The time limits applicable to collateral attack such as a motion to withdraw a guilty plea do not apply if the judgment and sentence is invalid on its face.

Under RCW 10.73.090(1), a petitioner must bring a collateral attack within one year "after the judgment becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction." RCW 10.73.090's one-year time bar does not apply if the judgment and sentence is "invalid on its face." In re Pers. Restraint of McKiearnan, 165 Wn.2d 777, 783, 203 P.3d 375 (2009).

"Invalid on its face" means the judgment and sentence evidences the invalidity without further elaboration. In re Pers.

Restraint of Hemenway, 147 Wn.2d 529, 532, 55 P.3d 615 (2002).

Where a judgment and sentence imposes a sentence in excess of the sentencing court's statutory authority, the time limits for collateral attack do not apply. See In re Pers. Restraint of Tobin, 165 Wn.2d 172, 176, 196 P.3d 670 (2008) (judgment invalid on its face where it exceeded statutory authority); see also In re Coats, --- P.3d ----, 2011 WL 5593063 (Wash. Nov. 17, 2011, at p. 5) (citing examples of "errors rendering a judgment invalid under RCW 10.73.090 where a court has in fact exceeded its statutory authority in entering the judgment or sentence").

Here, the trial court's judgment and sentence was invalid on its face. The judgment and sentence, as modified by the order of June 15, 2011, imposed a community custody term of life, and thus exceeded the sentencing court's statutory authority. For purposes of facial invalidity, this Court should consider the Order Modifying Judgment and Sentence issued June 15, 2011 as part of the original judgment. Indeed, the order specifically states that "the Judgment and Sentence and Warrant of Commitment entered herein shall be amended with the modification of the above section 1.2" (which section imposed the life term of community custody) CP 92. This order of modification renders the original judgment

and sentence invalid on its face. State v. Ammons, 105 Wn.2d 175, 189, 713 P.2d 719, 718 P.2d 796 (1986).

For convictions for first degree child molestation, the term of community custody is for life only where the defendant has certain prior convictions. RCW 9.94A.507. In addition, a defendant who was 16 years old at the time of the offense specifically may not be sentenced under .507. RCW 9.94A.507(2); RCW 9.94A.701(2), (3).

The judgment, considered with the order modifying it, exceeded the trial court's statutory sentencing authority and is therefore invalid on its face. State v. Smislaert, 103 Wn.2d 636, 639, 694 P.2d 654 (1985) (a judgment and sentence outside the authority of the trial court is invalid). Mr. Schreib's motions were not subject to the time bar.

(ii) Timely filed. In addition, Mr. Schreib's motion was timely as filed within one year of the judgment. His original motions under CrR 7.8 to dismiss and withdraw his plea were filed within one year of the trial court's December 1, 2010, order modifying judgment, which was entered during the SSOSA and imposed an additional punishment of 4 months in Jail.

Alternatively, the defendant's motions to withdraw his plea, including the motion litigated extensively below and later a handwritten June 15, 2011 motion, denied in a written order signed June 22, 2011, was within one year of the June 15, 2011 Order Modifying Judgment, which must be considered the final judgment and sentence considering that it expressly modified the original judgment, and also imposed an incorrect term of community custody.

On all these bases, the defendant's CrR 7.8 motions were "timely filed." RCW 10.73.090, .110. This Court should find that his motions were timely and the case should be remanded for further proceeding on Mr. Schreib's motions.

2. THE JUDGMENT EXCEEDED THE TRIAL COURT'S SENTENCING AUTHORITY.

Finally, the trial court exceeded its sentencing authority in its imposition of a life term of community custody, and Mr. Schreib, at a minimum, must be resentenced. For convictions for first degree child molestation, the term of community custody is for life only where the defendant has certain prior convictions. RCW 9.94A.507. In addition, a defendant who was 16 years old at the

time of the offense specifically may not be sentenced under .507.

RCW 9.94A.507(2).

**3. RODNEY SCHREIB DID NOT KNOWINGLY,
VOLUNTARILY, INTELLIGENTLY OR
UNEQUIVOCALLY WAIVE
REPRESENTATION BY APPOINTED
COUNSEL SHARON FIELDS ON HIS POST-
JUDGMENT MOTIONS.**

a. Mr. Schreib had a right to counsel. The Sixth

Amendment provides that “the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.” U.S. Const. amend. 6. In felony cases, a criminal defendant is entitled to be represented by counsel at all critical stages of the prosecution, including sentencing. Mempa v. Rhay, 389 U.S. 128, 134-37, 19 L. Ed. 2d 336, 88 S. Ct. 254 (1967). The Sixth and Fourteenth Amendments to the United States Constitution as well as art. I, § 22 of the Washington Constitution also allow criminal defendants to waive their right to the assistance of counsel. Faretta v. California, 422 U.S. 806, 807, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). The right to counsel may be waived, but the waiver must be knowing, voluntary, and intelligent. Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938).

The trial court must establish that in choosing to proceed pro se a defendant makes a knowing and intelligent waiver of the right to counsel:

[A] judge must investigate as long and as thoroughly as the circumstances . . . demand. The fact that an accused may tell him that he is informed of his right to counsel and desires to waive this right does not automatically end the judge's responsibility.

Bellevue v. Acrey, 103 Wn.2d 203, 210, 691 P.2d 957 (1984).

b. Mr. Schreib's waiver of counsel was equivocal at best.

Mr. Schreib asked to represent himself on April 20, 2011, at the initial hearing on the State's SSOSA revocation motion, and on Mr. Schreib's motion to dismiss and his motion to withdraw his plea. 4/20/11RP at 2-3. When the court asked Mr. Schreib if he wanted to represent himself, Mr. Schreib responded that his "main objective" was to "understand his rights" as a disabled person, and to "have his pro se materials" so he could "make sure that all my rights are being used, unlike the way they were last time back in '09." 4/20/11RP at 5.

The court commenced a colloquy with Mr. Schreib, who indicated he was 20 years old, and that he had not completed high school or obtained a GED. 4/20/11RP at 4-5. Mr. Schreib had been diagnosed with Post-traumatic stress disorder, Attention

Deficit Hyperactivity Disorder, and as bipolar 1 or manic depressive.⁵ 4/20/11RP at 5.

The court then advised Mr. Schreib that if his SOSSA was revoked, he faced up to 130 months on each of the three counts of child molestation, and thus “a jeopardy of up to 130 months.” 4/20/11RP at 5-6. This was technically incorrect and affected the voluntariness of Mr. Schrieb’s request to represent himself. State v. Silva, 108 Wn. App. 536, 539, 31 P.3d 729 (2001).

Critically, Mr. Schreib’s next series of statements showed that his request to represent himself was both equivocal, and that he failed to appreciate the risks and responsibilities of self-representation. A criminal defendant’s request to proceed pro se must be stated unequivocally. State v. Woods, 143 Wn.2d 561, 586, 23 P.3d 1046 (2001); State v. Stenson, 132 Wn.2d 668, 737, 940 P.2d 1239 (1997). Here, Mr. Schreib explained that his understanding was that he could be re-assigned his attorney if he simply felt, or apparently even if the judge felt, that he was not doing a good job representing himself:

⁵ According to the DSM-IV, being diagnosed as having bipolar disorder 1 is the same as being deemed manic depressive.

As it was explained to me, if I'm not understanding – or failing to act as pro se that I would give up my right to act as a pro se and turn it over to my attorney.

4/20/11RP at 7. This misunderstanding of self-representation was confirmed by Mr. Schreib's subsequent statement:

Well, if the Court sees fit, I would like to just read the books because I don't want to be unjustly used again and I don't know if I will be able to truly represent myself and that's why standby counsel would be there, if I decide that I'm not able to represent myself, then I could give up my pro se status without any hesitation; just being grateful that I was given a chance to try and understand my rights.

(Emphasis added.) 4/20/11RP at 7. Unfortunately, the trial court appeared to confirm to Mr. Schreib that the law provided that he could "give up his pro se status" at any time if he felt things were not going well. The court stated,

At any point in time, if you are allowed to be your own attorney or, as you call it, go pro se, at any time you can give that status up by just saying to me or any other judge I would like to be appointed an attorney now and you will get one immediately, do you understand that?

4/20/11RP at 9. Mr. Schreib answered yes. But this was incorrect.

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.

State v. DeWeese, 117 Wn.2d 369, 376-77, 816 P.2d 1 (1991).

Although this particular court might have indulged such a request by Mr. Schreib, the court was incorrect in its advisement that he would retain a right, on demand, to have counsel re-appointed at any future time. The trial court must apprise the defendant of the disadvantages of self-representation. United States v. Balough, 820 F.2d 1485, 1489 (9th Cir. 1987); DeWeese, 117 Wn.2d. at 378; Acrey, 103 Wn.2d at 211. The wholly discretionary nature of a trial court's later willingness to re-assign counsel is a crucial *disadvantage* of self-representation. By misinforming Mr. Schreib in this respect, the court below did not fulfill this responsibility.

Mr. Schreib's statements, questions and answers indicated he merely wanted to "take a stab" at representing himself, with the option to take back that decision at any time. This is not an equivocal request to proceed as his own counsel. Furthermore, his request was plainly based on a belief that he had a right to have standby counsel upon which to "fall back." But a defendant representing himself has no right to standby counsel. State v. Bebb, 108 Wn.2d 515, 524, 740 P.2d 829 (1987).

Mr. Schreib's statement also indicated he was requesting to represent himself because of concern for a conflict of interest with

defense counsel Richards, and a concern that his rights would not be adequately pursued by that attorney. A request to represent oneself in these circumstances of mere dissatisfaction with counsel is not unequivocal, and should therefore be denied. See State v. Luvene, 127 Wn.2d 690, 698-99, 903 P.2d 960 (1995).

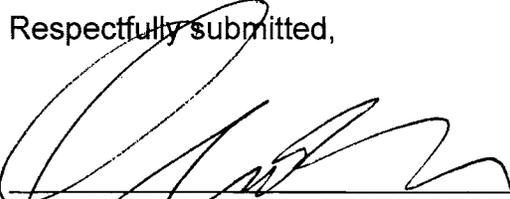
c. Reversal and remand is required. Courts should indulge in every reasonable presumption against waiver of the right to counsel. State v. Bebb, 108 Wn.2d at 525-26. The foregoing circumstances showed equivocality that required the court to deny Mr. Schreib's pro se request. This Court should reverse the trial court's denial of his motion to withdraw plea and his motion to dismiss and remand to the trial court.

E. CONCLUSION

For the reasons stated, Mr. Schreib respectfully requests that this Court reverse the judgment of the trial court.

DATED this 29 day of November 2011.

Respectfully submitted,


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Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 67356-4-I
v.)	
)	
RODNEY SCHREIB, JR.,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 29TH DAY OF NOVEMBER, 2011, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 29TH DAY OF NOVEMBER, 2011.

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