

NO. 34885-3

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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

ALFRED JOHN TAISACAN, APPELLANT

FILED  
COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
BY *[Signature]*  
DEPUTY

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Appeal from the Superior Court of Pierce County  
The Honorable John R. Hickman

No. 05-1-03923-1

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**BRIEF OF RESPONDENT**

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the defendant make an unequivocal request to proceed pro se at sentencing? (Assignment of Error No.1).
2. Does the trial court's failure to engage in a colloquy with defendant regarding the risks and disadvantages of proceeding pro se at sentencing necessitate a new trial? (Assignment of Error No.2).
3. Did the trial court comply with CrR 4.5 by setting a time for an omnibus hearing? (Assignment of Error No.3).
4. Did defendant receive constitutionally effective assistance of counsel? (Assignment of Error No.4).

B. STATEMENT OF THE CASE.

1. Procedure

On August 11, 2005, Alfred John Taisacan, hereinafter "defendant," was charged with unlawfully possessing a controlled substance in violation of RCW 69.50.4013. CP 1-2.

On February 28, 2006, both parties appeared for jury trial. (02/28/2006) RP<sup>1</sup> 5. Following a CrR 3.5 hearing, the defendant's statements made to deputies were admitted without objection. CP 58-59;

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<sup>1</sup> (02/28/2006) RP shall refer to the February 28, 2006, hearing on CrR 3.5, and the defendant's jury trial. RP shall refer to the consecutively numbered volumes from March 24, 2006, and May 12, 2006. The March 24, 2006, volume contains the hearing from the first scheduled sentencing date. The May 12, 2006, volume contains the sentencing.

(02/28/2006) RP 12-13. The defendant was convicted as charged following a jury trial. CP 49; (02/28/2006) RP 78.

On March 21, 2006, defendant filed a motion to impeach counsel. CP 50-53. On March 24, 2006, defendant filed a supplemental motion to impeach counsel. CP 56. The defendant's motions were addressed and denied after the following colloquy with the defendant.

**Defendant:** I'm asking for a new counsel.

**The Court:** Are you hiring your own?

**Defendant:** No. Through the Department.

**The Court:** I'm going to deny your motion for a new counsel. I do not believe it is supported in fact in terms of ineffective assistance of counsel. I think Mr. Shaw put up every known defense and testimony that he could understand under the circumstances, and I want to proceed with sentencing now.

(03/24/2006) RP 5.

On March 24, 2006, the defendant filed a motion to continue sentencing. CP 54-55. On March 30, 2006, defendant filed a motion to reconsider the motion to impeach counsel. CP 65-66. On May 12, 2006, the parties appeared for sentencing. (05/12/2006) RP 3. The following colloquy occurred:

**The Court:** Mr. Taisacan, what is your position on proceeding with today and whether or not you want Mr. Shaw to continue to represent you on this matter?

**Defendant:** Thank you, Your Honor. Good afternoon. As of the record, Alfred Taisacan, I filed this motion to impeach my attorney for his misrepresentation and I would ask the court if I can be pro se or be assigned to proceed with my motions.

**The Court:** Are you wanting to proceed today on your own?

**Attorney Shaw:** Yes.

**Defendant:** Yes.

(05/12/2006) RP 5.

The court declined to appoint new counsel for the defendant and appointed Dave Shaw, defendant's attorney during the trial phase, as standby counsel for the sentencing phase. (05/12/2006) RP 11. Defendant was allowed to proceed pro se with standby counsel for purposes of sentencing and he was given an opportunity for allocution. (05/12/2006) RP 18-21. The defendant was also given the opportunity to have his standby counsel speak on his behalf for purposes of sentencing. (05/12/2006) RP 18-21. The court sentenced the defendant within the standard range. (05/12/2006) RP 22.

Defendant's notice of appeal timely followed. CP 109-125

## 2. Facts

Pierce County Sheriff's Deputy James Jones testified he had been a sheriff's deputy for 24 years. (02/28/2006) RP 24. Deputy Jones testified

that he has been a member of the Pierce County Methamphetamine Lab Team for the last four years. (02/28/2006) RP 25. Furthermore, Jones received training in the manufacturing of methamphetamine and has made approximately 300 arrests for drug possession. (02/28/2006) RP 26.

Deputy Jones was working "store operations," on August 10, 2005, at the Walgreen's at 121<sup>st</sup> and Pacific Avenue. (02/28/2006) RP 27.

Deputy Jones testified that during store operations, undercover deputies wait in vehicles in the parking lots of local businesses and observe people who purchase precursors that could be used in the manufacturing of methamphetamine. (02/28/2006) RP 26.

On August 10, 2005, Deputy Jones was parked in the parking lot of Walgreen's. (02/28/2006) RP 26-28. The defendant backed his vehicle into the stall next to where the deputy was parked. (02/28/2006) RP 28. Defendant pulled out a crank pipe and a butane lighter and started heating up the bowl of the pipe. (02/28/2006) RP 28-29. The defendant put the pipe to his lips and took two to three hits from the pipe. (02/28/2006) RP 31.

Deputy Shaffer testified that he had received training in the manufacturing of methamphetamine. Shaffer also testified that he had made over 1000 arrests for drug possession in his 10 years as a law enforcement officer. (02/28/2006) RP 37. On August 10, 2005, Deputy Shaffer contacted the defendant at his vehicle in the Walgreen's parking

lot and arrested him for drug possession. (02/28/2006) RP 30.

Deputy Shaffer spoke to the defendant post-Miranda, and the defendant admitted he had been smoking methamphetamine. (02/28/2006) RP 40-41.

C. ARGUMENT.

1. DEFENDANT MADE AN UNEQUIVOCAL REQUEST TO PROCEED PRO SE.

The United States Supreme Court recognizes a constitutional right of criminal defendants to waive assistance of counsel and to represent themselves at trial. Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L.Ed.2d 562 (1975). The Washington Constitution similarly provides that the accused in criminal prosecutions shall have the right to appear and defend in person. Const. art. 1, § 22 (amend. 10). State v. Barker, 75 Wn. App 236, 881 P.2d 1051, 1053 (1994).

A defendant's desire not to be represented by a particular court-appointed counsel does not by itself constitute an unequivocal request by the defendant for self-representation. State v. Garcia, 92 Wn.2d 647, 655, 600 P.2d 1010 (1979). A defendant's request to represent himself must be unequivocal. State v. DeWeese, 117 Wn.2d 369, 376, 816 P.2d 1 (1991). A criminal defendant's right under the Sixth Amendment to represent himself if he chooses does not encompass a right to choose any advocate if the defendant wishes representation. Wheat v. United States, 486 U.S. 153, 159, n. 3, 108 S. Ct. 1692, 100 L.Ed.2d. 140 (1988).

Whether an indigent defendant's dissatisfaction with his court-appointed counsel is meritorious and justifies the appointment of new counsel is a matter within the discretion of the trial court. State v. Sinclair, 46 Wn. App 433, 730 P.2d 742 (1986). review denied, 108 Wn.2d 1006 (1987). When an indigent defendant fails to provide the court with legitimate reasons for the assignment of substitute counsel, the court may require the defendant to either continue with current appointed counsel or to represent himself. Sinclair, at 437-38. If a defendant chooses not to continue with appointed counsel, requiring such a defendant to proceed pro se does not violate the defendant's constitutional right to be represented by counsel, and may represent a valid waiver of that right. State v. Staten, 60 Wn. App. 163, 802 P.2d 1384 (1991).

In Staten, the Court of Appeals rejected the defendant's contention that the trial court's denial of his motion to substitute counsel caused him to proceed pro se involuntarily. Id. at 166. The court held that a criminal defendant's unsubstantiated allegation that any public defender would be too overworked to prepare an adequate defense properly was not sufficient justification for the appointment of substitute counsel. Id. at 169-70.

In State v. Luvene, 127 Wn.2d 690, 903 P.2d 960 (1995), the court held that the defendant did not make an unequivocal assertion of his right to self representation. Id. at 699. The case involved an aggravate homicide in which the attorney for the defendant was seeking a

continuance to interview necessary witnesses. Id. at 697-698. Defendant was opposed to the continuance motion. Id. at 698. The following statements by defendant ensued:

Mr. Luvene:

I've been here since July. . . . You know, I don't wanna sit here any longer. It's me that has to deal with this. If I'm prepared to go for myself, then that's me. You know, can't nobody tell me what I wanna do. They say I did this, so why not -- if I wanna go to trial, why can't I go to trial on the date they have set for my life? I'm prepared. I'm not even prepared about that. I wanna go to trial, sir. . . .

I don't wanna extend my time. This is out of my league for doing that. I do not want to go. If he's not ready to represent me, then forget that. But I want to go to trial on this date.

Id. at 698.

Mr. Luvene argued that his statements represented an unequivocal request to proceed pro se and that by granting the continuance, the trial court denied him his state and federal constitutional rights to self-representation. Id. at 698. The court held that while Mr. Luvene stated that he was "prepared to go for myself," he also stated, "I'm not even prepared about that," and "this is out of my league for doing that." Id. at 698. The Supreme Court held that, taken in the context of the record as a whole, these statements could be seen only as an expression of frustration by Mr. Luvene with the delay in going to trial, and not as an unequivocal assertion of his right to self-representation. Id. at 699.

In State v. Stenson, 132 Wn.2d 668, 940 P.2d 1239 (1997), the trial court's conclusion that the request to proceed pro se was untimely was supported by the facts in the record. Id. at 733. Before the trial court denied the defendant's motion for new counsel, the following conversation ensued:

**Defendant:** . . . 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. As I said, I have been under the illusion that I was going to be defended. Not merely as Mr. Leatherman stated the other day, he would cross examine witnesses. That is not a defense.

**Court:** Mr. Stenson, I do not consider the issue of the trial strategy or trial tactics which are going to be undertaken here as anything which is resolved.

**Defendant:** Excuse me?

**Court:** I don't consider that resolved. That's a decision between you and your counsel and that will have to be resolved as we get into the trial. And I can't resolve that for you. As to a motion to represent yourself at this point in the trial, as I have indicated, certainly you have a constitutional right to do that if a motion is timely made. At this point in time I find that that motion is not timely made and I also find based upon your indications that you really do not want to proceed pro se without counsel.

**Defendant:** But likewise I do not proceed [sic] with counsel that I have.

**Court:** I understand that. Based upon those considerations, I'm going to deny the motion to allow you to proceed pro se.

Id. at 739-740.

It is not difficult to see why the defendant's request to proceed pro se in Stenson was denied as being equivocal. The defendant in that case told the court "I do not want to do this..." Id. at 739. The Stenson case is certainly distinguishable from the present case as no such contradictory statements were made in the present case.

In State v. Barker, 75 Wn. App. 236, 881 P.2d 1051 (1994), the defendant, prior to trial, moved for appointment of new counsel and then asked to represent himself, and the trial court denied his motion. Id. at 239-240. The following colloquy ensued between the judge and the defendant:

**Court:** I have told you what you have been told before. If you wish to hire your own attorney, you are free to do so.

**Barker:** Okay, but are you refusing my right to exercise my rights?

**Court:** Absolutely not. Mr. Ostlund would be your attorney.

**Barker:** What about *my rights as a citizen of California*?

**Court:** How many times do I have to tell you, if you wish to hire your own attorney, you may hire your own attorney.

**Barker:** I am not asking that. I am saying, to represent myself.

**Court:** At this time it's too late.

Id. at 244.

Barker was convicted and a timely appeal followed. Id. at 237.

The court found that Barker's request to proceed pro se was unequivocal, and reversed his conviction and remanded the case for a new trial. Id. at 240.

In the case at bar, the following colloquy took place between the judge and the defendant at the time for sentencing:

**Court:** Mr. Taisacan, what is your position on proceeding with today and whether or not you want Mr. Shaw to continue to represent you on this matter?

**Defendant:** Thank you, Your Honor. Good afternoon. As of the record, Alfred Taisacan, I filed this motion to impeach my attorney for his misrepresentation and I would ask the court if I can be pro se or be assigned to proceed with my motions.

**Court:** Are you wanting to proceed today on your own?

**Attorney Shaw:** Yes.

**Defendant:** Yes.

(05/12/2006) RP 5.

The defendant's assertion regarding his right to self representation

was clearly stated, not contradictory and was unequivocal. Similar to the defendant in Barker, the defendant clearly indicated his desire to proceed pro se. Assuming, arguendo that the failure to engage in a colloquy before allowing the defendant to proceed pro se at sentencing was error, the proper remedy is to remand for resentencing.

2. THE TRIAL COURT'S FAILURE TO ENGAGE THE DEFENDANT IN A VALID FARETTA COLLOQUY PRIOR TO THE SENTENCING STAGE REQUIRES THE CASE TO BE REMANDED FOR RESENTENCING.

Prior to allowing a defendant to represent himself pro se the requirements of a knowing and valid waiver must be met. Bellevue v. Acrey, 103 Wn.2d 203, 691 P.2d 957 (1984). The court should ascertain that the defendant makes the Faretta<sup>2</sup> waiver with at least a minimal knowledge of the task involved. Acrey, 103 Wn.2d at 210. A colloquy on the record is the preferred method; but in the absence of a colloquy, the record must reflect that the defendant understood the seriousness of the charge, the possible maximum penalty involved, and the existence of technical procedural rules governing the presentation of his defense. Id. at 211.

Whether the criminal defendant's waiver of the constitutional right

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

to be represented by counsel at trial is valid depends on the facts and circumstances of each case, and there is no checklist of the particular legal risks and disadvantages attendant to waiver which must be recited to the defendant. State v. Imus, 37 Wn. App. 170, 173-174, 679 P.2d 376, review denied, 101 Wn.2d 1016 (1984).

The defendant in this case was not preparing to go to trial when the assertions for self representation were made. The defendant here had already been represented by an attorney throughout his trial as well as during a subsequent sentencing hearing. Therefore, the issue of whether or not the defendant had been informed, prior to trial, about the seriousness of the offense, the maximum penalty, or that there were technical rules by which he would be bound in presenting his defense is moot.

The defendant in this case is asking the court to reverse his conviction and remand the case for retrial. Brief of Appellant at 13. This would be the proper remedy if the defendant proceeded to trial pro se absent the Faretta admonition regarding the risks and consequences of self representation. However, in the present case, the defendant was represented during the trial phase by counsel.

The defendant is not seeking the proper remedy by requesting a new trial. The proper remedy, assuming arguendo that an error occurred, is a resentencing.

The defendant in this case was sentenced within the standard range.

(05/12/2006) RP 16-22. It is unlikely, but nevertheless possible, that the defendant could receive an additional two months of incarceration as his standard range was six months and one day to eighteen months incarceration. Furthermore, by the time argument is heard in this matter the defendant may have been released.

Although there appears to be no Washington cases directly on point, the court should consider how other jurisdictions have dealt with similar situations; similar situations where a trial court fails to conduct Faretta hearings prior to allowing a defendant to represent himself at the sentencing phase.

In People v. Lopez, 71 Cal. App 3d 568, 138 Cal. Rptr. 36 (1977), the defendant had plead guilty to possession of heroin and was sentenced to prison. Id. at 570. Lopez had been represented by counsel at the plea stage, but elected to represent himself at sentencing. Id. at 570.

The following colloquy took place prior to sentencing:

**Court:** Well, does he want to represent himself?

**Public Defender:** Mr. Lopez wants to represent himself. He has a right to represent himself.

**Court:** Is that correct? Sir, you wish to represent yourself?

**Defendant:** Yes, sir.

**Court:** And you want me to relieve your appointed counsel?

**Defendant:** Yes, sir.

**Court:** All right. Your request is granted. However, I want you to understand, sir, that I think you'd be better off to have an attorney represent you, than to represent yourself."

Id. at 570.

The court held that the record did not establish that Lopez voluntarily and intelligently elected to represent himself at sentencing and reversed the sentence, and remanded for resentencing. Id. at 574.

In United States v. Virgil, 444 F.3d 447, (2006 5<sup>th</sup> Cir.), the defendant was convicted for being a felon in possession of a firearm. Id. at 449. At sentencing, the defendant was given the opportunity to be represented by prior counsel or to proceed pro se. Id. at 450. Defendant elected to proceed pro se at sentencing, and was sentenced absent the Faretta colloquy apprising the defendant of the perils and disadvantages of self representation. Id. at 454-455. The reviewing court affirmed the defendant's conviction, but reversed the sentencing and remanded the case for re-sentencing in light of the Faretta violation. Id. at 457.

In Hardy v. State of Florida, 655 So.2d 1245 (1995), the defendant elected to proceed pro se. Id. at 1246. Prior to the trial phase, the court apprised the defendant of the risks and consequences of defending pro se via a valid Faretta colloquy. Id. at 1246. The defendant subsequently entered into a plea of guilty to forgery and uttering a false or forged instrument pro se. Id. at 1246. The defendant elected to proceed with

sentencing pro se. Id. at 1246. The trial court failed to reiterate the Faretta colloquy prior to the sentencing phase. Id. at 1247. The court concluded that the Faretta colloquy prior to the trial was adequate, and that the trial court did not abuse its discretion in allowing the defendant to represent himself during the plea. Id. at 1247. The court affirmed the conviction, but set aside the sentencing because the trial court did not renew the offer of assistance at the sentencing stage. Id. at 1247. The case was remanded for resentencing. Id. at 1248.

In Hinrichs v. State of Florida, 659 So.2d 1389 (1995), a case similar to Hardy, the trial court allowed the defendant to proceed to trial pro se. Id. at 1389. The defendant was given the Faretta colloquy to ensure the he understood the risks and disadvantages of self representation. Id. at 1389. The trial court failed to renew the offer of assistance of counsel prior to sentencing. Id. at 1389. The court affirmed the conviction, but reversed the sentencing and remanded the case for resentencing. Id. at 1389.

Likewise, the conviction in this case should be affirmed because the defendant was represented by counsel during the trial stage. Furthermore, because the defendant was represented by counsel during the trial stage, the existence or lack of a valid Faretta colloquy prior to trial becomes a non-issue. If the trial court's failure to conduct the Faretta colloquy at the sentencing stage was error, the Court of Appeals should at most remand for resentencing.

3. THE COURT COMPLIED WITH CrR 4.5 BY  
SETTING A TIME FOR AN OMNIBUS HEARING.

This court should decline to address defendant's claim that he did not receive an omnibus hearing for failure to support that claim with evidence from the record. Brief of Appellant at 16-17.

RAP 10.3 requires in part:

The argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record.

RAP 10.3(a)(5).

Defendant argues that an omnibus hearing never occurred in this case. Brief of Appellant at 16. Yet the defendant has given the court no support for this conclusion. The parties in this case appeared for a pre-trial conference on August 23, 2005, at which time they scheduled an omnibus hearing for August 31, 2005, pursuant to CrR 4.5. CP 4. On August 31, 2005, the defendant was unavailable, and his attorney rescheduled the omnibus hearing for September 8, 2005. CP 5. On September 8, 2005, the parties met, and the defendant thereafter moved for a continuance of the trial date setting another omnibus hearing for October 12, 2005. CP 6. On October 12, 2005, the parties met for an omnibus hearing during which the defendant scheduled another trial continuance for October 19, 2005. CP 143. On October 19, 2005, the parties met and the defendant motioned the court for a continuance and scheduled another omnibus hearing on

November 16, 2005. CP 7. On November 16, 2005, the parties met and thereafter the defendant scheduled a motion to continue the trial date. CP 8.

The record in this case clearly establishes that defendant's attorney complied with CrR 4.5 in setting a time, or numerous times, for an omnibus hearing. There is no evidence in the record that during the numerous omnibus hearings the defendant's attorney failed to (i) complete discovery; (ii) conduct further investigation of the case; or (iii) continue plea negotiations. See CrR 4.5.

State v. Wilson 28 Wn. App. 821, 626 P.2d 998, 1002 (1981), describes how an omnibus hearing can be waived by counsel. In Wilson, the court described the CrR 4.5 the following way:

CrR 4.5 is procedural and not substantive as it merely allows for accelerated disclosure of information which ultimately must be revealed at trial and its purpose is to prevent last-minute surprise, trial disruption, and continuances and to encourage the early disposition of the cases through settlement. State v. Nelson, 14 Wn. App. 658, 545 P.2d 36 (1975); State v. Dault, 19 Wn. App. 709, 578, P.2d 43 (1978). **An attorney is impliedly authorized to waive procedural matters in order to facilitate a hearing or trial.** In re Adoption of Coggins, 13 Wn. App. 736, 739, 537 P.2d 287 (1975); State v. Franulovich, 18 Wn. App. 290, 567 P.2d 264 (1977).

Wilson 626 P.2d at 1002 (emphasis added).

This court should decline to address defendant's claim that he did not receive an omnibus hearing for failure to support that claim with evidence from the record.

4. DEFENDANT RECEIVED CONSTITUTIONALLY EFFECTIVE ASSISTANCE OF COUNSEL

The right to effective assistance of counsel is found in the Sixth Amendment to the United States Constitution and in Washington State Const. Article 1, Sec. 22 of the Constitution of the State of Washington. The right to effective assistance of counsel is the right "to require the prosecution's case to survive the crucible of meaningful adversarial testing." United States v. Cronin, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L.Ed.2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment has occurred. Id. The court has elaborated on what constitutes an ineffective assistance of counsel claim. The court in Kimmelman v. Morrison, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L.Ed.2d 305 (1986), stated that "the essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial rendered unfair and the verdict rendered suspect."

The test to determine when a defendant's conviction must be overturned for ineffective assistance of counsel was set forth in Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984), and adopted by the Washington Supreme Court in State v. Jeffries, 105 Wn.2d 398, 418, 717 P.2d 722, cert. denied, 497 U.S. 922 (1986).

The test is as follows:

First, the defendant must show that the counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as "counsel" guaranteed the defendant by the Sixth Amendment.

Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

Id. See also, State v. Walton, 76 Wn. App. 364, 884 P.2d 1348 (1994); State v. Denison, 78 Wn. App. 566, 897 P.2d 437 (1995); State v. McFarland, 127 Wn.2d 322, 899 P.2d 1251 (1995); State v. Foster, 81 Wn. App. 508, 915 P.2d 567 (1996).

The Washington Supreme Court, in State v. Lord, 117 Wn.2d 829, 822 P.2d 177 (1991), gave further clarification to the intended application of the Strickland test. The Lord court held the following:

There is a strong presumption that counsel have rendered adequate assistance and made all significant decisions in the exercise of reasonably professional judgment such that their conduct falls within the wide range of reasonable professional assistance. The reasonableness of counsel's challenged conduct must be viewed in light of all of the circumstances, on the facts of the particular case, as of the time of counsel's conduct.

Strickland, at 689-90.

Under the prejudice aspect, “[t]he defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Strickland, at 694. Because [the defendant] must prove both ineffective assistance of counsel and resulting prejudice, the issue may be resolved upon a finding of lack of prejudice without determining if counsel’s performance was deficient.

Strickland, at 697. Lord, 117 Wn.2d at 883-884.

Competency of counsel is determined based upon the entire record below. McFarland, 127 Wn.2d at 335 (citing State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972)). The reviewing court must judge the reasonableness of counsel’s actions “on the facts of the particular case, viewed as of the time of counsel's conduct.” Id. at 690; State v. Benn, 120 Wn.2d 631, 633, 845 P.2d 289 (1993). Defendant has the “heavy burden” of showing that counsel’s performance was deficient in light of all surrounding circumstances. State v. Hayes, 81 Wn. App. 425, 442, 914 P.2d 788 (1996). Judicial scrutiny of a defense attorney's performance

must be “highly deferential in order to eliminate the distorting effects of hindsight.” Strickland, 466 U.S. at 689.

The reviewing court will defer to counsel’s strategic decision to present, or to forego, a particular defense theory when the decision falls within a wide range of professionally competent assistance. Strickland, 466 U.S. at 489; United States v. Layton, 855 F.2d 1388, 1419-20 (9th Cir. 1988), cert. denied, 488 U.S. 948 (1988). If defense counsel’s trial conduct can be characterized as legitimate trial strategy or tactics, then it cannot serve as a basis for a claim that defendant did not receive effective assistance of counsel. Lord, 117 Wn.2d at 883. Defendant must therefore show, from the record, an absence of legitimate strategic reasons to support the challenged conduct. McFarland, 127 Wn.2d at 336. Defendant may not supplement the record on direct appeal. Id. Finally, in determining whether trial counsel’s performance was deficient, the actions of counsel are examined based on the entire record. State v. White, 81 Wn.2d 223, 225, 500 P.2d 964 (1993).

In this case defendant has failed to establish that the trial attorney’s assistance was deficient and that the deficiency resulted in prejudice to defendant. The record clearly establishes that defendant’s attorney complied with CrR 4.5 in setting a time for an omnibus hearing. There is no evidence that during the multiple omnibus hearings in the present case

defendant's attorney was not able to complete discovery, conduct further investigation of the case, or continue plea negotiations with the State.

An attorney is impliedly authorized to waive procedural matters such as an omnibus hearing in order to facilitate a hearing or trial. In re Adoption of Coggins, 13 Wn. App. 736, 739, 537 P.2d 287 (1975); State v. Franulovich, 18 Wn. App.290, 567 P.2d 264 (1977). Defendant's argument only supplies the court with unsupported conclusions. Defendant's claims that the absence of an omnibus hearing was to his "detriment," but fails to explain how or why. Defendant argues that his attorney failed to thoroughly investigate the case and failed to apprise defendant of pertinent evidence, however, there is nothing in the record to support these conclusions.

The defendant in this case has failed to show that his counsel's performance was deficient. There has also been no showing that counsel made errors so serious that he was not functioning as "counsel" guaranteed the defendant by the Sixth Amendment.

The evidence in this case included a Deputy's personal observation of the defendant smoking methamphetamine from a drug pipe. (02/28/2006) RP 41. Furthermore, the defendant acknowledged to one of the deputies that he was smoking "Ice." (02/28/2006) RP 41. The decision by defendant's counsel to not cross examine the deputy was a tactical decision and makes sense in light of what the deputy observed.

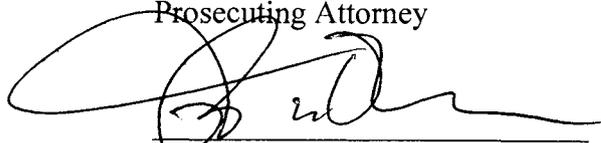
This does not amount to ineffective assistance of counsel. For these numerous reasons stated above, the defendant's argument fails and the conviction should be upheld.

D. CONCLUSION.

The defendant's request for a reversal of his trial conviction should be denied. Reversal of a trial conviction is not the proper remedy for failure to conduct a Faretta hearing prior to the sentencing stage, particularly when the defendant was represented at trial by an attorney. Furthermore, the defendant has failed to establish that his attorney's representation was deficient and that the deficiency prejudiced the defendant. This court should affirm the defendant's conviction.

DATED: January 4, 2007.

GERALD A. HORNE  
Pierce County  
Prosecuting Attorney

A handwritten signature in black ink, appearing to read 'Raymond Odell', is written over a horizontal line. The signature is stylized and cursive.

Raymond Odell  
Deputy Prosecuting Attorney  
WSB # 32181

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

1/4/07 Merend  
Date Signature

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