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COURT OF APPEALS  
DIVISION II

NO. 37797-7-II

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

STATE OF WASHINGTON  
BY                       
DEPUTY

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STATE OF WASHINGTON, Respondent

v.

CHARLES RAY BILYEU, Appellant

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FROM THE SUPERIOR COURT FOR CLARK COUNTY  
THE HONORABLE ROBERT A. LEWIS  
CLARK COUNTY SUPERIOR COURT CAUSE NO. 07-1-00915-9

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BRIEF OF RESPONDENT

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## I. STATEMENT OF THE FACTS

The State accepts the general outline of the statement of the case as set forth by the appellant. Where additional information is necessary or clarification of the record, it will be done so in the argument portion of this brief.

## II. RESPONSE TO ASSIGNMENT OF ERROR NO. 1

The first assignment of error raised by the defendant is a claim that the trial court unjustifiably denied his right to self representation. The defendant argues that on the eve of trial he had made a request to the court to represent himself in this matter and that the trial court rejected it out of hand.

This matter came before the court on May 13, 2008 at a pretrial hearing. The court noted that the defendant had already had conflicts with attorneys in the past and because of that there had been delays in his case. (RP May 13, 2008, 3-4). Nevertheless, when the defendant raises this issue it is apparent that he is claiming a conflict with his new attorney. When asked to clarify to the court he indicates that the gentleman doesn't understand how many points he may have and that also he should be out on bail, which he's already posted and he's still in custody. The court

indicated that they thought he was serving a sentence from Lewis County and that's why he was then in custody. He denies that and indicated that he had never missed a court date and wanted that to be understood by the court. (RP May 13, 2008, 4-5).

The defense attorney clarified for the court that the defendant was currently in custody, even though he had attempted to post bail, because another Superior Court Judge had looked into the facts and noted that the defendant had missed his readiness hearing and that he had failed to appear when ordered. Because the trial was coming up fairly quickly at that point the Judge decided that he should stay in custody until the trial. (RP May 13, 2008, 5-6).

It's at that point that the court asks if they are prepared to go to trial. The defense attorney indicates that he is ready but it's the defendant who says, "No, no I – I don't even want him, your Honor. I'll – I'll defend myself...". (RP May 13, 2008, 6, L8-9).

At that point the court reminded the defendant that he had attempted to tell him that once before when the other attorney had been withdrawn and further reminded the defendant that, "Now why would you represent yourself if you just told me three minutes ago that you don't even know what you're charged with?". (RP May 13, 2008, 7 L7-9). The defendant was making the request to defend himself apparently, because

he was told that he had a 99.9 percent chance of losing and he figured that he could do just as well as the attorney. (RP May 13, 2008, 6).

The trial court then asks the deputy prosecutor if he has anything to add and the deputy prosecutor makes the following representation on the record:

MR. PEARCE (Deputy Prosecutor): Your Honor, just basically that, you know, he's – when we were here in – December 7<sup>th</sup>, in front of Judge Nichols, and he wanted to fire Mr. Rucker, Judge Nichols expressed on the record – and I've got a copy of it – his reluctance to even substitute counsel. He even said that – basically, Judge Nichols said that his concern was that Mr. Bilyeu was going to do this with another – with another attorney. And prophetically, here we are again: One day before trial, he's requesting another attorney.

Your Honor, the State would just – would just ask that we would – that he be – retain Mr. Vukanovich, to stay with the case, and that we proceed to trial tomorrow morning. The State's ready. We're ready for trial.

He's had Mr. Vukanovich since December 7<sup>th</sup>, 2007, and there's just – he indicates that he's been here all along. However, you know, in October of '07, he failed to appear for his supervised release hearing. We had to get a warrant. Then he failed last – failed to appear last week for readiness because he failed to appear for sentencing in Lewis County, and they picked him up and he had to serve sentencing. So he FTA'd Lewis County; that's why he FTA'd here last week.

I think that it'd be – I've had many discussions about this case with Mr. Vukanovich. We've gone over and over and over this case, probably more than I've touched or discussed any case in the last year with any attorney; and I

think it's been adequately discussed, and the State's ready to go to trial tomorrow.

-(RP May 13, 2007, 7, L19 – 8, L24)

When the defendant is asked if he has anything to comment concerning the recitation made by the deputy prosecutor, he again indicates that he doesn't like the attorney he currently has because he didn't properly conduct the bail hearing matter and was talking about other matters that may be brought up at the time of sentencing. The defendant again reiterates that he wants to represent himself, not because of whether or not he can do the job, but because he doesn't want anything to do with the attorney because the attorney was not properly preparing for, apparently, the sentencing. At this stage they hadn't even had the trial. (RP May 13, 2008, 10-11). The court then makes it's ruling as follows:

THE COURT: I understand that you've – I understand that you're asking to represent yourself. And normally, you have a constitutional right to do that. However, the court has the right to refuse requests to change counsel, and to decide to go from court-appointed counsel to self-representation in those circumstances where it appears to me that it's a stall tactic. That appears to be what it is here. So I'll deny your request. We'll proceed to trial tomorrow.

-(RP May 13, 2008, 11, L7-15)

The defendant in the appellate brief maintains that he then raised this again during the first witness at trial. And it appears that he has done

so. Yet in making this request, he obviously shows his lack of understanding as to the proceedings, what's going on, or any of the other matters that the court would normally look to, to determine whether or not a person could represent himself adequately. For example, the entire discussion comes up at a time when the defendant is arguing that what was put into evidence were photostatic copies and not original documents and that there's a rule that they had to be original documents. In fact, he chastises the court for allowing it to occur. In addressing the court he mentions, "That right there is a photostatic copy of some document that they picked up off some computer somewhere that's not – and it's not signed by a DMV employee or anything. And for you to sit and let something like that – you should have been on that case law a long time ago." (RP May 14, 2008, 45, L20-25). He's upset at the use of the photostatic copy and therefore he is saying that he can do a better job than the defense attorney. The court renewed its conclusion that this was all part of a stall tactic on the part of the defendant and further that from what he could see from the defendant's discussion with the court, that basically, the defendant didn't have the slightest idea what he was talking about. (RP May 14, 2008, 46).

The State submits, that, at best, this request to represent himself is equivocal. The State and Federal Constitutions guarantee a criminal

defendant both the right to counsel and the right to self representation. State v. Luyene, 127 Wn.2d 690, 698, 903 P.2d 960 (1995). However, the right to self representation is not self executing. State v. Woods, 143 Wn.2d 561, 586, 23 P.3d 1046 (2001). A criminal defendant who desires to waive the right to counsel and proceed pro se must make an affirmative demand, and the demand must be unequivocal in the context of the record as a whole. Luyene, 127 Wn.2d at 698-699; State v. Modica, 136 Wn. App. 434, 441, 149 P.3d 446 (2006). Further, because of the timing of this request by our defendant, and the fact of his previous activity in the Superior Court (which is not part of any transcription that has been prepared by the appellant) there has been no discussion shown on the record to indicate that the defendant could adequately represent himself, even if the court were to seriously consider it. Based on the defendant's prior conduct and timing of this motion, the court felt that this was nothing but a stall tactic on the part of this defendant. When a defendant's request to proceed pro se is actually an expression of frustration with the trial's delay, or with the attorney, rather than a true desire to proceed without an attorney, the request is equivocal. Modica, 136 Wn. App. at 442; Woods, 143 Wn.2d at 585-587; Luyene, 127 Wn.2d at 698-699. When a defendant makes a clear and knowing request to proceed pro se, such a request is not rendered equivocal by the fact that the defendant is motivated by

something other than a singular desire to conduct his or her own defense. This occurred in State v. DeWeese, 117 Wn.2d 369, 378-379, 816 P.2d 1 (1991), where the defendant's request to proceed pro se was deemed to be unequivocal, despite the reason given as being motivated by frustration with his attorney's performance.

Although the record is rather scant in our case as to exactly what was occurring, we can glean some evidence from the information supplied. As previously indicated, when the defendant was first raising this with the court, he didn't even know what he was charged with nor any of the penalties. Further, as it went on, it was obvious he didn't have a clue as to any of the rules of evidence that would be used in a court of law. As a preliminary matter, the proper inquiry in determining the "knowing" waiver of a right to counsel is the state of mind and knowledge of the defendant at the time the waiver is requested. United States v. Erskine, 355 F.3d 1161, 1169-1170 (9<sup>th</sup> Circuit), 2004. Accordingly, if a defendant accurately understands the penalty he faces at the time the waiver is made, such waiver is knowingly made and therefore valid. Erskine, 355 F.3d at 1169-1170. Furthermore, a valid waiver of the right to assistance of counsel generally continues throughout the criminal proceedings unless the circumstances suggest that the waiver was limited in some way. Our State Supreme Court has made clear that a defendant who elects to

proceed pro se must bear the risks of so doing and is not entitled to “special consideration”. DeWeese, 117 Wn.2d at 379.

The State submits that the record given to the appellate court does not indicate the activities that took place between this defendant and other judges on previous occasions. For example, there is nothing in this record to indicate that the trial court entered into the necessary colloquy with the defendant. Nevertheless, where no colloquy exists on the record, the appellate court can still look at any evidence on the record that shows the defendant’s actual awareness of self representation. Bellevue v. Acrey, 103 Wn.2d 203, 211, 691 P.2d 957 (1984). There simply is nothing in this record to indicate that the defendant was aware of the risks. Further, because of the timing of this (the day before trial and during the trial) the defendant has demonstrated that this was really an attempt to stall the proceedings.

### III. RESPONSE TO ASSIGNMENT OF ERROR NO. 2

The second assignment of error raised by the defendant is a claim that the trial court refused to redact relevant and unfairly prejudicial information from some of the exhibits. Specifically, the defendant is claiming that the documents dealing with his sentencing on Possession of

Heroin do not necessarily need to include the name of the charge and therefore wants the nature of the felony blacked out.

Decisions as to the admissibility of evidence are within the trial court's discretion and reversible only for an abuse of that discretion. State v. Powell, 126 Wn.2d 244, 258, 839 P.2d 615 (1995). The court abuses its discretion when its decision is manifestly unreasonable, or is exercised on untenable grounds or for untenable reasons. State v. Alexander, 125 Wn.2d 717, 731, 888 P.2d 1169 (1995). Evidentiary rulings generally are not of constitutional magnitude and therefore require reversal only if the defendant is prejudiced. State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). And that prejudice is not presumed. The error is prejudicial only if "within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred". State v. Tharp, 96 Wn.2d 591, 599, 637 P.2d 961 (1981).

This discussion took place prior to the admission of the Judgment and Sentence from the previous case. The charges the defendant was facing in our case were related to his assuming his brother's identity when he was found guilty of Possession of Heroin. He pled guilty under that false name and then it came to light that in fact he was our defendant and had a much more extensive criminal history than his unfortunate brother had.

With that in mind, the court reviewed the Judgment and Sentence and noted that it had a criminal history attached to it. However, this criminal history was related to the defendant's brother. The defense requested that that criminal history be removed and the court indicated "just to avoid confusion, then, it appears that that would probably be appropriate, if the counsel would take a minute to work with the clerk on altering 5 so that it doesn't include the criminal history". (RP May 14, 2008, 16, L16-19).

The defense attorney at that time also raised the question of the actual crime of Possession of Heroin, arguing that it wasn't relevant and that should possibly be redacted from the Judgment and Sentence form. The trial court in making a ruling on this, left it open for the attorneys to approach it later on again if they felt that there was an appropriate reason or need for it to be redacted. The court had some concerns that by removing potentially large sections of the Judgment and Sentence that it would confuse the jury or also cause them to speculate as to the nature and seriousness of the crime.

THE COURT: Yeah. Well, it may be a difficult thing. I don't know what the redact – if you want to look at it – the redactions – a possibility of redaction its fine; unfortunately, the particular type of case has to be tried the way it is. If the allegations are that he made – conducted

certain criminal acts in the course of a criminal proceeding, then the jury's going to know about the criminal proceeding. In some ways, it might be worse to have them speculate as to what the charge was.

So I'm not going to order any specific redactions. If you see a redaction that you'd like to make, if you can propose it; and I'll rule on that. But unfortunately, the jury's going to know that there's a criminal proceeding involved.

-(RP May 14, 2008, 17, L2-16)

At the time that the Judgment and Sentence (Exhibit 5) was discussed in front of the jury and moved to be admitted (RP May 14, 2008, 57-58) there was no objection to the admission of the exhibit.

The State submits that this matter has not been preserved for purposes of appeal. This issue was preliminarily ruled on by the court but the court gave wide latitude to the attorneys to raise redaction at any time it felt necessary. The exhibit came in without any objection. Further, this was a discretionary call on the part of the court and there is nothing to indicate that the court abused its discretion in so ruling.

#### IV. RESPONSE TO ASSIGNMENT OF ERROR NO. 3

The third assignment of error raised by the defendant is a claim that the sentencing court did not implement a DOSA alternative sentencing with this defendant.

RCW 9.94A.660 grants discretion to the sentencing court to sentence offenders using the DOSA option. It partly provides, “The Judge may waive imposition of a sentence within the standard sentence range and impose a sentence [under the DOSA alternative]” if it “determines that the offender is eligible... and that the offender and the community will benefit from use of the [sentencing] alternative”. RCW 9.94A.660(2).

Ordinarily, a sentencing court’s decision not to apply DOSA is unreviewable. State v. Conners, 90 Wn. App. 48, 53, 950 P.2d 519 (1998). A DOSA sentence is an alternate form of a standard range sentence because it “is split evenly between incarceration and community custody based upon the midpoint of the total standard range”. State v. Williams, 112 Wn. App. 171, 176, 48 P.3d 354 (2002). The State submits that the only way the defendant can have this matter reviewed is if it is an appeal of a standard range sentence on constitutional grounds. Conners, 90 Wn. App. at 52; State v. McNeair, 88 Wn. App. 331, 334, 944 P.2d 1099 (1997). It does not appear from the argument raised in the appellate brief that the defendant is raising a constitutional argument. Quite the contrary it simply is that the defendant is maintaining that the trial court should have considered a DOSA even though the crimes he was convicted of have nothing to do with drug offenses. It is well settled law that the appellate court will avoid a constitutional issue if it can find any other

basis for its decision. State v. Hall, 95 Wn.2d 536, 539, 627 P.2d 101 (1981). Here it is interesting to note that the defendant had been convicted of a Possession of Heroin, which actually was the nature of the documents that were entered at the trial as exhibits. At that previous sentencing, the defendant was not given a DOSA even though it clearly was within the necessary guidelines. All of the cases that are cited by counsel dealing with the DOSA situation are cases where the underlying offense was a drug offense.

At the time of sentencing in our case, part of the discussion raised with the defendant by the court was as follows:

THE COURT: All right. Well, I have had the opportunity to review the record. Obviously Mr. Bilyeu has a long history, and has a number of both failure-to-appears and resistance to authority in his contacts with law enforcement and custodial officers.

Apparently, from what I understand, the motive for this particular crime, Identity Theft and Forgery was because if his true offender score and standard range was known in the 2007 case, he would have received a substantially greater sentence than he ultimately received in that case; although I understand that that may be reversed at this point.

So he made a deliberate decision over a prolonged period of time to defraud the court and to misuse a relative's name. That distinguishes this from an isolated incident where he, maybe on one occasion – for example, on the time of the criminal impersonation – decided to use a false

name, and then, within a few hours, recanted it. He kept the charade up even after it was discovered, and as a result, is convicted of the crimes that the jury found he was guilty of.

It's not a low-end case, given the criminal history and the circumstances.

-(RP May 29, 2008, 16, L13 – 17, L10)

The State submits that the trial court was properly within its rights to deny a DOSA alternative in this situation. The defendant was caught perpetrating a fraud upon the court and the trial court felt that DOSA was not appropriate because none of the crimes that he was convicted of had anything to do with controlled substances. There is nothing to indicate that the trial court abused its discretion in making this finding.

V. CONCLUSION

The trial court should be affirmed in all respects.

DATED this 7 day of Jan, 2008.

Respectfully submitted:

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