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DIVISION II

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STATE OF WASHINGTON
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DEPUTY

NO. 37957-1-II
Clark County No. 07-1-00337-1

STATE OF WASHINGTON,

Respondent,

vs.

CHARLES RAY BILYEU

Appellant.

BRIEF OF APPELLANT

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PM 1-23-09

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C. STATEMENT OF THE CASE

The Appellant, Charles Ray Bilyeu, pled guilty to the crime of possession of a controlled substance (heroin) and was sentenced to 45 days of confinement for the crime (with a standard range of zero to sixty days). CP 3-10, 17-20. Mr. Bilyeu represented himself as Roger Gene Bilyeu (his brother) during the proceedings, with the intent of hiding his true offender score of seven points. RP 4-6. Mr. Bilyeu was subsequently charged and convicted in a separate proceeding of criminal impersonation, identity theft and forgery based on the deception. RP 40. Mr. Bilyeu was brought back before the court for re-sentencing and correction of all documents related to the case to reflect his true name of Charles Ray Bilyeu. Report of Proceedings, CP 39.

At re-sentencing, the State asked the court to include the three subsequent felonies related to the name deception, which would have

elevated his offender score from seven points to ten points. RP 40. The court ruled in Mr. Bilyeu's favor and denied the request, indicating that the amended judgment and sentence would be dated, nunc pro tunc, back to March 14, 2007 (the date of the original judgment and sentence) and Mr. Bilyeu would be sentenced according to his true offender score at the time (seven points). RP 41-44. Defense counsel asked that the court run the sentence concurrently to his other sentence in the forgery/criminal impersonation/identity theft case, however the court exercised its discretion to run the sentence consecutively (see RCW 9.94A.589 (3)) and expressly provided for such in the judgment and sentence. RP 43, CP 64.

When Mr. Bilyeu was first brought back before the court to address the fraudulent documents, he specifically requested that he not be appointed counsel and allowed to represent himself:

Mr. Bilyeu: "I wouldn't—I'd rather represent myself."

Court: "Well, Mr. Bilyeu, you have lots of problems."

Mr. Bilyeu: "I'll—I'll represent myself. I would just ask the Court to—"

Court: "Well, I don't think you better do that, because this is gonna be strictly a legal issue."

RP 24. The prosecutor then spoke, recommending that Mr. Vukanovich, who represented Mr. Bilyeu in the criminal impersonation/forgery/identity theft matter, be appointed to represent Mr.

Bilyeu. RP 24. Mr. Bilyeu specifically objected to the appointment of Mr. Vukanovich. RP 23-24. The court disregarded Mr. Bilyeu and appointed Mr. Vukanovich. RP 24.

At this same hearing Mr. Bilyeu moved to withdraw his guilty plea. RP 21. When he first moved to withdraw his plea, he was cut off by the prosecutor who interrupted him and began addressing the court about the appointment of counsel. RP 21. Undeterred at that point, Mr. Bilyeu again addressed the court and indicated his intent to move to withdraw his plea. RP 22. The court responded by telling Mr. Bilyeu that he essentially had no right to make such a motion:

Well, it isn't that simple, sir. He who gives a name fictitiously is stuck with it. And all the acts that took place under that. And in the plea statement it indicated that if additional criminal history was discovered, even so you cannot withdraw your plea of guilt. You understood that when you entered your plea. So it's not quite that simple.

RP 21-22. At the subsequent hearing when Mr. Bilyeu was re-sentenced, his appointed counsel Mr. Vukanovich did not make a motion to withdraw the guilty plea. RP 38-59. However, Mr. Bilyeu subsequently filed, pro se, a motion to withdraw his guilty plea. CP 77. The trial court is currently refusing to act on the motion, contending that it lacks jurisdiction to hear a collateral attack on his conviction while this appeal of his

judgment and sentence is pending. This timely appeal of the second amended judgment and sentence followed.

D. ARGUMENT

I. THE TRIAL COURT VIOLATED MR. BILYEU'S STATE AND FEDERAL CONSTITUTIONAL RIGHT TO SELF-REPRESENTATION WHEN IT REFUSED HIS REASONABLE AND TIMELY REQUEST TO REPRESENT HIMSELF AT HIS RE-SENTENCING.

The State and Federal Constitutions guarantee a criminal defendant the right to self-representation. U.S. Const. Amends. VI and XIV; Wash. Const. Art. I, Section 22. This right is afforded a defendant despite the fact that exercising the right will almost surely result in detriment to both the defendant and the administration of justice. *State v. Fritz*, 21 Wn.App. 354, 359, 585 P.2d 173 (1978). A defendant need not demonstrate technical knowledge of the law and the rules of evidence. *Faretta v. California*, 422 U.S. 806, 835, 95 S.Ct. 2525, 45 L.Ed. 2d 562 (1975). The right to self-representation is either respected or denied; its deprivation cannot be harmless. *McKaskle v. Wiggins*, 465 U.S. 168, 177 N.8. 104 S.Ct. 944, 79 L.Ed. 2d 122 (1984); *State v. Vermillion*, 112 Wn.2d 844, 851, 51 P.3d 188 (2002), *review denied*, 148 Wn.2d 1022 (2003).

Once the issue of self representation is raised by a defendant, the trial court should assume responsibility for assuring that the defendant's

decision is made with at least minimal knowledge of what the task entails, preferably through a colloquy on the record, assuring that the defendant understands the risk of self representation. *City of Bellevue v. Acrey*, 103 Wn.2d 202, 211, 691 P.2d. 957 (1984). At a minimum, a defendant should be apprised of the seriousness of the charge, the maximum potential penalty involved, and the existence of technical, procedural rules governing the presentation of the accused's defense. *Id.*

In order to exercise the right, the defendant's request must be unequivocal, knowingly and intelligently made, and must be timely. *State v. Breedlove*, 79 Wn.App. 101, 106, 900 P.2d 586 (1995). The right may not be exercised for the purpose of delaying the trial or obstructing justice. *Id.*

On appeal, a trial court's denial of a request for self-representation is reviewed for abuse of discretion. *State v. Breedlove*, 79 Wn.App. at 106. Discretion is abused if the trial court's decision is manifestly unreasonable, or is exercised on untenable grounds or for untenable reasons. *State v. Blackwell*, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993). In this context, a court's discretion lies along a continuum, corresponding to the timeliness of the request:

- (a) If made well before the trial... and unaccompanied by a motion for continuance, the right of self-representation exists as a matter of law;
- (b) if made as the trial ... is about to commence, or

shortly before, the existence of the right depends on the facts of the particular case with a measure of discretion reposing in the trial court in the matter; and (c) if made during the trial ... the right to proceed pro se rests largely in the informed discretion of the trial court.

Fritz, 21 Wn. App. at 361.

Here, the first obvious difference is that Mr. Bilyeu was not facing trial; he had already been convicted and was merely facing re-sentencing. As such, the issue of delay was not likely to be a factor, despite the prosecutor's unsubstantiated accusation to the contrary. Mr. Bilyeu's request was timely and perfectly reasonable. There is no reason, beyond the court's obvious opinion that it was foolhardy, that Mr. Bilyeu could not have represented himself at re-sentencing. The court, rather than totally ignoring the request, should have conducted a colloquy with the defendant about the risks of self-representation and given Mr. Bilyeu, after being apprised of those risks, an opportunity to state whether or not he still intended to represent himself.

It is clear from the court's response to Mr. Bilyeu that he found the possibility of Mr. Bilyeu both ill-advised and a potential inconvenience to the court. However, that is not the test. *State v. Vermillion*, 112 Wn.App. at 857. No showing of technical knowledge is required. *Faretta*, 422 U.S. at 835. If a person is competent to stand trial, that person is competent to

represent himself. *Godinez v. Moran*, 509 U.S. 389, 113 S. Ct. 2680, 125 L. Ed. 2d 321 (1993); *State v. Vermillion*, 112 Wn.App. at 857.

The purpose of asking the defendant about his experience, if any, in representing himself and his familiarity, if any, with the rules of evidence and other aspects of courtroom procedure is not to determine whether he has sufficient technical skills to represent himself. Rather, the purpose is to determine whether he fully understands the risks he faces by waiving the right to be represented by counsel, such as the risk that lack of familiarity with evidentiary rules could result in admission of prosecution evidence that could have been excluded by a proper objection, or exclusion of defense evidence that the defendant would like to present but cannot for some reason based upon evidentiary rules of which he has no knowledge. *State v. Hahn*, 106 Wn. 2d. 885, 889-90, 890, n. 3, 726 P.2d 25 (1986). A defendant need not himself have the skill and experience of a lawyer in order to competently and intelligently choose self-representation, but the record should establish that “ ‘he knows what he is doing and his choice is made with eyes open’ ”. *Id* at 889. (quoting *Faretta*, 422 U.S. at 835). “[I]t is the responsibility of the trial court to determine a defendant’s competency intelligently to waive the services of counsel and act as his own counsel, ... [but] any consideration of a defendant’s ability to ‘exercise the skill and judgment necessary to secure himself a fair trial’ was rendered inappropriate by *Faretta*” *Hahn*, 106 Wn.2d at 890 n.2. *Vermillion*, 112 Wn.App. at 857-58.

The court denied Mr. Bilyeu his constitutional right of self-representation and his case should be remanded for a new sentencing hearing so that Mr. Bilyeu can accomplish his true goal here, which is to make a motion to withdraw his guilty plea.

E. CONCLUSION

Mr. Bilyeu should be granted a new sentencing hearing, and the trial court should be instructed to follow the Superior Court Criminal

Court Rules and act upon Mr. Bilyeu's written motion to withdraw his guilty plea.

RESPECTFULLY SUBMITTED this 23rd day of January, 2009.



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Attorney for Mr. Bilyeu

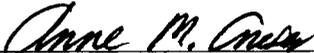
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Mr. Charles Bilyeu
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and that said envelope contained the following:

- (1) BRIEF OF APPELLANT
- (2) VERBATIM REPORT OF PROCEEDINGS (TO MR. CURTIS)
- (3) R.A.P. 10.10 (TO MR. BILLOW)
- (4) AFFIDAVIT OF MAILING

Dated this 23rd day of January, 2009.


 ANNE M. CRUSER, WSBA #27944
 Attorney for Appellant

I, ANNE M. CRUSER, certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Date and Place: Jan. 23, 2009, Kalama, WA

Signature: Anne M. Cruser