

NO. 37957-1-II
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent

v.

CHARLES RAY BILYEU, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
THE HONORABLE ROBERT L. HARRIS
CLARK COUNTY SUPERIOR COURT CAUSE NO. 07-1-00337-1

BRIEF OF RESPONDENT

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I. STATEMENT OF THE FACTS

The State agrees with the statement of facts as set forth by the Appellant. Where additional information is needed, it will set forth in the argument section of the brief.

II. RESPONSE TO ASSIGNMENT OF ERROR

The assignment of error raised by the defendant in this case is a claim that the trial court violated the defendant's rights to self representation when it refused his request to represent himself at a resentencing.

The defendant pretended to be his brother for purposes of sentencing on a change of plea. (RP 4-6). When the true situation was discovered, he was charged with additional crimes because of the fraud he was perpetrating on the court (Criminal Impersonation, Identity Theft, Forgery). This appeal deals with his resentencing and correction of the documents relating to the earlier case to reflect his true name.

When the defendant appeared before the sentencing court on May 28, 2008, he was not in a very pleasant mood. For example, when he first discusses anything with the court it's a motion to withdraw his guilty plea. His claim was that the deal that he had struck with the State was "yanked

back” and so he should be allowed to withdraw the guilty plea. (RP 21).

It’s explained at that time by the prosecutor that he was representing himself to be his brother with a “0” offender score, when in fact he had criminal history and his sentence would be penitentiary time. At that point the prosecutor suggested that an attorney be appointed to help him at the resentencing. (RP 21).

The defendant at that point again wants to withdraw his guilty plea.

The court responds as follows:

THE COURT: 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 22, L4-11)

It was decided that the attorney that had represented him throughout the earlier matter would be reappointed to represent him for resentencing. At that time, the defendant changed tack and wanted to fire him.

THE DEFENDANT: I’ve – I’ve tried to fire him three times already, Your Honor. I don’t need Mr. Vukanovich to do nothing for me anyhow.

MR. VAUGHN (Deputy Prosecutor): Well, Your Honor, I think Mr. Bilyeu went through about three attorneys on that case, and so I think what might be easiest is to appoint Mr. Vukanovich on this one too.

THE DEFENDANT: Well, I'll - I'll - I'll - I would - I would object to that, Your Honor. Mr. Vukanovich has done absolutely nothing. He - when I had a jury trial with him, but the witnesses get up there and then he would just sit there and look at the ceiling, basically, he wouldn't even pay attention to what's going on.

He's - he's - he's - he's totally out of line. I - I wouldn't even been found guilty on account of him.

He even told the jury that I was guilty of - and I'm sitting there saying not guilty, and he even told the jury himself that I was guilty. And - and - and that raises a big conflict on - on - (indiscernible).

I wouldn't - I'd rather represent myself.

THE COURT: Well, Mr. Bilyeu, you have lots of problems.

THE DEFENDANT: I'll - I'll represent myself. I would just ask the court to -

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

MR. VAUGHN: I'd - I'd recommend to the court that Mr. Vukanovich be appointed since he's familiar with it. It appears Mr. Bilyeu's attempting to cause further delay on this case.

THE COURT: I'll appoint Mr. Vukanovich at this time and set this over to - when do I have a docket?

-(RP 22, L8 - 24, L19)

The next thing that the defendant says to the court is that he wants the Judge to disqualify himself from sitting on the case. (RP 24). The court advises him at that time that he is “stuck with me. Since I was the sentencing Judge and you misled me”. (RP 25, L9-10). The matter was then set over for resentencing.

At this hearing where the defendant was purportedly wanting to withdraw his guilty plea, fire his attorney, represent himself, and disqualify the Judge, it came out that he had already gone through three attorneys on the case (RP 23) and that it appeared that “Mr. Bilyeu is attempting to cause further delay on this case”. (RP 24, L15-16).

This is the only time in the matter that the defendant is requesting that he represent himself. He goes through the resentencing without any problems, nor is he objecting to it. He does raise a motion to withdraw his guilty plea, but never makes a motion to represent himself.

In order to exercise the right to represent himself, a 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. Even when a request is unequivocal, a defendant may still waive the right to self representation by subsequent words or conduct. State v. Luvene, 127 Wn.2d 690, 699, 903 P.2d 960 (1995). 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. Luvene, 127 Wn.2d at 698-699. Courts should indulge every reasonable presumption against finding that a defendant has waived the right to counsel. State v. Chavis, 31 Wn. App. 784, 789, 644 P.2d 1202 (1982).

The appellate court reviews a trial court's denial of a request for self representation for abuse of discretion. 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).

Finally, when a defendant's request to proceed pro se is actually an expression of frustration, rather than a true desire to proceed without an attorney, the request is equivocal. State v. Woods, 143 Wn.2d 561, 585-587, 23 P.3d 1046 (2001); Luvene, 127 Wn.2d at 698-699.

It is clear from the record that the trial court did not believe that this was an unequivocal request by a defendant to represent himself. Quite the contrary, it appeared to be another stalling tactic by a recalcitrant defendant who had already once perpetrated a fraud upon the court. All of the cases dealing with this involve situations where the request is made before trial or immediately during the course of the trial. In order to

invoke the unconditional self representation right, an unequivocal assertion of that right must be made within a reasonable time before trial. People v. Windham, 19 Cal.3d 121, 128-129, 560 P.2d 1187, 1191, 137 Cal. Rptr. 8, 12 (1977). As it gets closer to the time of trial, the existence of the right depends more on the facts with the measure of discretion being greater with the trial court. State v. Fritz, 21 Wn. App. 354, 361, 585 P.2d 173 (1978). In the absence of a substantial reason, a late request should generally be denied. Especially if the granting of the request may result in delay of the trial. State v. Garcia, 92 Wn.2d 647, 656, 600 P.2d 1010 (1979). In our situation the record clearly demonstrates that this was extremely late in the proceedings where the only thing left was a modification and resentencing to reflect the defendant's true name and offender score. In fact, the defendant is given the benefit of the doubt by not counting the later points and the sentence running nunc pro tunc to the earlier time of sentencing. This was not an unequivocal demand by a defendant. In fact, it appears to be nothing more than another attempt to stall or delay proceedings in some way.

III. CONCLUSION

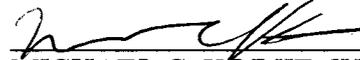
The trial court should be affirmed in all respects.

DATED this 5 day of March, 2009.

Respectfully submitted:

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DECLARATION OF
TRANSMISSION BY MAILING

STATE OF WASHINGTON)

: ss

COUNTY OF CLARK)

On Mar 6, 2009, I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to the below-named individuals, containing a copy of the document to which this Declaration is attached.

TO:	David Ponzoha, Clerk Court of Appeals, Division II 950 Broadway, Suite 300 Tacoma, WA 98402-4454	Anne Cruser Attorney at Law PO Box 1670 Kalama, WA 98625
	Charles R. Bilyeu, DOC#267446 Airway Heights Corr. Center PO Box 1899 Airway Heights, WA 99001-1899	

DOCUMENTS: Brief of Respondent

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Annifer Casey
Date: Mar 6, 2009.
Place: Vancouver, Washington.