

60127-0

60127-0

NO. 60127-0-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JESUS GONZALEZ-QUEZADA,

Appellant.

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STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. A defendant's right to represent himself is not absolute and is waived if not asserted in a timely and unequivocal manner. Here, the defendant indicated several times prior to trial that he wished to proceed pro se. However, each time he did so it was coupled with statements indicating that he was upset with his representation and the delays in his trial. He refused to cooperate with the court's attempt to conduct a colloquy. The court denied the defendant's requests to proceed pro se. On the first day of trial, the defendant was given another opportunity to assert his right to represent himself, but indicated that he now wished to be represented by counsel. Was the defendant improperly deprived of the right to represent himself?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant, Jesus Gonzalez-Quezada, was convicted of delivery of cocaine. CP 1, 10. The trial court sentenced him within the standard range. CP 147-54. This Court accepted Gonzalez-Quezada's appeal as timely.

In August of 2008, Gonzalez-Quezada's appellate counsel

moved withdraw and to allow Gonzalez-Quezada to represent himself on appeal. This court denied that motion of November 17, 2008, finding that Gonzalez-Quezada had abused the appellate process through the filing of multiple meritless motion and engaged in misconduct that obstructed and impacted the orderly administration of justice. Gonzalez-Quezada filed a motion for discretionary review of that decision in December of 2008. This court stayed this appeal pending a decision from the Supreme Court.

In April of 2009, the Supreme Court deferred ruling on the motion for discretionary review pending the outcome in State v. Rafay, 167 Wn.2d 644, 222 P.3d 86 (2009). The Supreme Court then denied Gonzalez-Quezada's motion for discretionary review in March of 2010 and this court lifted its stay in April.

2. SUBSTANTIVE FACTS

On June 12, 2006, at about 8:15 p.m., Seattle Police Department Officers Boggs and Harris and Sergeant Brotherton were in an unmarked vehicle in the Belltown area of Seattle. 4RP 7-

8, 37-38.¹ All three officers were in plain clothes, but were not undercover and had visible police badges, department handguns, and police radios. 4RP 8-9, 39. Officer Harris was driving, Sergeant Brotherton was in the front passenger seat, and Officer Boggs was in the rear seat on the passenger side. 4RP 8, 38-39.

As the officers were driving, Officer Boggs had her window rolled down. 4RP 10-11. Officer Boggs saw Gonzalez-Quezada yell and wave at their vehicle. 4RP 10. Officer Boggs could see that Gonzalez-Quezada's left fist was clenched. 4RP 10. Based on her training and experience, Officer Boggs suspected that Gonzalez-Quezada was flagging the vehicle down in an attempt to sell narcotics. 4RP 10. Officer Boggs yelled out the window, "Got twenty?"² 4RP 10-11. Gonzalez-Quezada yelled back, "Yeah!" and

¹ The State designates the Verbatim Report of Proceedings as follows:

"1RP" = August 11, 2006;
"2RP" = August 30, 2006;
"3RP" = August 31, 2006 (morning);
"4RP" = August 31, 2006 (afternoon);
"5RP" = September 5, 2006;
"6RP" = October 27, 2006;
"7RP" = December 5, 2006;
"8RP" = December 14, 2006;
"9RP" = January 3, 2006;
"10RP" = January 17, 2006;
"11RP" = January 19, 2006; and
"12RP" = March 9, 2007.

² Based on her training and experience, Officer Boggs understood the term "twenty" to mean twenty dollars worth of crack cocaine. 4RP 6-7.

nodded. 4RP 11. Officer Harris pulled the vehicle over to the curb. 4RP 12, 39-40. Gonzalez-Quezada then started walking toward the officers' vehicle. 4RP 12.

As Gonzalez-Quezada walked up to the car, Officer Boggs could see that he was holding his left hand open and facing up. 4RP 12. Gonzalez-Quezada had a light tan piece of paper in that hand that he was opening up. 4RP 12.

When Gonzalez-Quezada reached the officers' vehicle, Officer Harris exited and began walking around the vehicle. 4RP 13, 40. At the same time, Gonzalez-Quezada approached Officer Boggs's window with his palm facing up. 4RP 13. Officer Boggs could see that Gonzalez-Quezada had two small white rocks in his hand. 4RP 12-14. Based on her training and experience, Officer Boggs recognized the rocks as being about \$20 of crack cocaine. 4RP 13-14. Officer Boggs showed Gonzalez-Quezada a twenty-dollar bill. 4RP 13. Gonzalez-Quezada handed Officer Boggs the cocaine. 4RP 14-15. As this occurred, Officer Harris came around the corner of the vehicle and immediately arrested Gonzalez-Quezada. 4RP 15, 40-41.

The rocks seized from Gonzalez-Quezada later tested positive for cocaine. 4RP 57.

C. ARGUMENT

1. THERE WAS NO ABUSE OF DISCRETION IN DENYING GONZALEZ-QUEZADA'S REQUEST TO PROCEED PRO SE.

Gonzalez-Quezada argues that his right to represent himself was violated because the court improperly denied his motions to proceed pro se. This argument fails for two reasons. First, Gonzalez-Quezada ultimately withdrew his motion. Second, Gonzalez-Quezada has failed to demonstrate that the court abused its discretion in denying his earlier requests.

a. Applicable Law.

Criminal defendants have a constitutional right to waive assistance of counsel and represent themselves. State v. Stenson, 132 Wn.2d 668, 737, 940 P.2d 1239 (1997) (citing Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L.Ed.2d 562 (1975)). However, this right is neither absolute nor self-executing. State v. Woods, 143 Wn.2d 561, 585-86, 23 P.3d 1046 (2001); State v. Vermillion, 112 Wn. App. 844, 851, 51 P.3d 188 (2002). Indeed, the court must "indulge in every reasonable presumption" *against* a

defendant's waiver of his right to counsel. In re Detention of Turay, 139 Wn.2d 379, 396, 986 P.2d 790 (1999).

Because of the presumption against waiver of counsel, a motion to proceed pro se should be granted only if it is knowing, intelligent, and unequivocal. Vermillion, 112 Wn. App. at 851; Stenson, 132 Wn.2d at 740-41. This helps protect defendants "from making capricious waivers of counsel and [] protect[s] trial courts from manipulative vacillations by defendants regarding representation." Stenson, 132 Wn.2d at 740.

In this context, a defendant's request to represent himself must not only be unequivocally stated, but must be unequivocal in the context of the record as a whole. Id. at 741-42 (citation omitted); Woods, 143 Wn.2d at 586. A request to proceed pro se as an alternative to substitution of counsel and/or granting a continuance suggests that the request is not unequivocal. Stenson, 132 Wn.2d at 740-41. In such a context, a court does not abuse its discretion in denying the request to proceed pro se. Id. at 740-42.

For example, in Stenson, the defendant told the trial court that he did not want to represent himself, but was forced into doing so by the court and his counsel. 132 Wn.2d at 742. Because of the defendant's wavering, the Washington Supreme Court upheld

the trial court's determination that the defendant's request was equivocal. Id. Similarly, in State v. Luvene, the Washington Supreme Court upheld the trial court's determination that the defendant's expression of frustration with his counsel and the trial delay rendered his request to proceed pro se equivocal. 127 Wn.2d 690, 698-99, 903 P.2d 960 (1995).

Moreover, even after a defendant has asserted the right to represent himself, he can later relinquish that right through words or actions. Such a subsequent relinquishment of the right to proceed pro se (and the acceptance of the assistance of counsel) renders moot any issue with regard to a defendant's earlier request to represent himself. See, e.g., State v. Bebb, 108 Wn.2d 515, 525-26, 740 P.2d 829 (1987). In this context, the standard for a defendant to relinquish the right to proceed pro se is far lower than the standard to waive counsel. Id.

This court reviews a trial court's denial of a request for self-representation for abuse of discretion. Vermillion, 112 Wn. App. at 855. A court abuses its discretion only when its decision is manifestly unreasonable or based on untenable grounds. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 482 P.2d 775 (1971).

b. Any Error In Denying Gonzalez-Quezada's Request To Represent Himself Is Moot Because He Ultimately Relinquished His Right To Proceed Pro Se.

As discussed above, any issue with regard to a defendant's initial request(s) to represent himself are rendered moot when the defendant subsequent relinquishes the right to proceed pro se and explicitly accepts the assistance of counsel. Such a relinquishment occurred here.

On August 30, 2006, the parties were assigned to a courtroom for trial in this case. 2RP 2. After motions, the State asked the trial court to instruct Gonzalez-Quezada that there was no "hybrid representation" in Washington and that Gonzalez-Quezada either needed to represent himself or go through his defense attorney in making motions to the court. 2RP 19. In response, counsel stated:

Your honor, I can represent on the record that I have discussed with my client the idea of proceeding pro se versus the idea of proceeding with counsel, and he has indicated to me that he would like not to proceed pro se. And we are working together and, so, I don't anticipate that would be a problem.

2RP 20. Gonzalez-Quezada was present and did not contest this statement. 2RP 20. Nor did he indicate any desire to proceed pro se. 2RP 20.

Thus, in this case any error in denying an earlier request to proceed pro se was irrelevant – at the time he actually went to trial, Gonzalez-Quezada no longer wanted to represent himself and, therefore, relinquished the right to do so. As a result, any denials of his earlier requests to proceed pro se were ultimately moot.

c. Even If The Issue Is Not Moot, Gonzalez-Quezada Has Not Demonstrated That The Court Abused Its Discretion In Denying His Initial Request To Proceed Pro Se.

As discussed above, a defendant's request to represent himself must be clear and unequivocal. Moreover, a trial court must engage in every reasonable presumption against finding a waiver of the right to counsel. Thus, a court does not abuse its discretion when it denies a request to proceed pro se that is equivocal. Here, Gonzalez-Quezada never unequivocally asserted his right to proceed pro se. As a result the court did not abuse its discretion in refusing to allow him to represent himself

In addition to the August 30th discussion (described above), the issue of Gonzalez-Quezada's desire to represent himself was addressed on five different occasions during the time relevant to

this appeal.³ First, on June 29, 2006, Gonzalez-Quezada appeared before Judge Ronald Kessler for a case scheduling hearing in his other case. CP 118.⁴ This case was not before the trial court at that time. CP 118. At the hearing, Gonzalez-Quezada moved to represent himself. He asserted that his lawyer was lying to him and trying to railroad him. CP 119. When asked if he wanted to be his own lawyer, Gonzalez-Quezada responded, "Yeah, because I already find out [defense counsel] was working for the prosecution. But if you can give me an attorney that I can trust, yeah, I can try another one . . ." CP 119. After trying to engage in a colloquy with Gonzalez-Quezada, Judge Kessler told him that he was not going to allow him to represent himself if he would not answer the court's

³ During this time, Gonzalez-Quezada had two different cases pending in King County Superior Court: (1) delivery of cocaine (hereinafter "this case" or "the delivery case"); and (2) an unrelated crime under (hereinafter "the other case"). In the other case, Gonzalez-Quezada was convicted of possession of stolen property, driving under the influence, and two counts of hit and run. This Court affirmed those convictions in the unpublished decision State v. Gonzalez-Quezada, 145 Wn. App. 1002, 2008 WL 2332599 (2008).

⁴ After Gonzalez-Quezada was convicted in this case, he brought a motion for a new trial. In addressing that motion, the trial court ordered the State to provide transcripts of four pre-trial hearings relating to both of Gonzalez-Quezada's cases. 8RP 7-10. All four hearings were in courts that used audio or audio-visual recording devices rather than court reporters. 9RP 2-3. The State had the transcripts prepared by the Word Processing Unit of the King County Prosecuting Attorney's Office. The transcripts were ultimately presented to the trial court, along with the State's briefing in opposition to the motion for a new trial. 10RP 2; CP 98-127. On appeal, Gonzalez-Quezada relies on the transcripts prepared by the State rather than making arrangements for preparation of an independent report of proceedings. See, e.g., Br. App. at 1-3. The State will do the same.

questions. CP 122-24. The court ended the hearing by saying: "If Mr. Gonzalez-Quezada decides he wants to represent himself and is prepared to listen to my questions and answer them, then I'll be happy to reconsider. But at this point there's a problem." CP 124.

To the extent that this constituted a denial of a motion to proceed pro se, it was not an abuse of discretion because Gonzalez-Quezada's request was entirely equivocal. Although Gonzalez-Quezada asked to represent himself, he also said that he would try another attorney if the court could provide him with an attorney that he could trust. CP 119. And because Gonzalez-Quezada would not answer the court's questions, the court could not properly engage in a colloquy to clarify whether Gonzalez-Quezada truly wanted to represent himself or was merely expressing dissatisfaction with his current attorney. In this context, there was no abuse of discretion in denying Gonzalez-Quezada's request to represent himself unless and until he was willing to engage in the necessary colloquy.

Second, on July 18, 2006, Gonzalez-Quezada appeared for a case scheduling hearing in this case before a judge pro tem. CP 103. Gonzalez-Quezada indicated that he wanted to represent himself. CP 103-04. The judge pro tem indicated that such a

motion could not be addressed at that hearing. CP 104. The parties set a trial date with the understanding that Gonzalez-Quezada would bring a motion to represent himself prior to that time. CP 104-05.

In other words, the court never denied Gonzalez-Quezada's request to represent himself. Rather, it simply declined to address the matter *at that time*. Given the context – a busy case scheduling calendar – it was not an abuse of discretion to require that it be properly noted and set for an appropriate hearing in the future.

Third, on July 21, 2006, Gonzalez-Quezada appeared before Judge Michael Fox for a motion to proceed pro se in both this case and the other one. CP 108-09. Gonzalez-Quezada moved to represent himself, stating that he no longer trusted his public defender. CP 108. Judge Fox conducted an extensive colloquy. CP 109-13. Gonzalez-Quezada told the court that he did not trust public defenders. CP 112-13. Judge Fox said that he had had the opposite experience with public defenders. CP 113. Gonzalez-Quezada responded, "We can try, but someone to really tell the truth, don't be lying. Yeah, we can try, yeah, we can try. And if doesn't work, then I represent myself." CP 113. Based on Gonzalez-Quezada's willingness to try different counsel, the court

denied his motion to proceed pro se, discharged his counsel, and authorized appointment of a new public defender. CP 113-114. To the extent that this constituted a denial of a motion to proceed pro se, it was not an abuse of discretion because Gonzalez-Quezada's request was equivocal and was ultimately withdrawn.

Fourth, one week later, on July 28, 2006, the parties appeared for a motion to continue in the other case, again before Judge Fox. CP 125. This case was not before the trial court at that time. CP 125. Gonzalez-Quezada's newly-appointed counsel and the State brought a joint motion to continue before Judge Fox. CP 125. The State indicated that it intended on adding DUI and hit-and-run charges. CP 125. Counsel wanted a continuance to review newly-received discovery and prepare for trial. CP 125-26. Counsel also informed the court that Gonzalez-Quezada "was adamant about not voluntarily waiving his right to a speedy trial" and that Gonzalez-Quezada wanted to renew his motion to proceed pro se if counsel moved for a continuance. CP 125-26. When asked if he had anything to say, Gonzalez-Quezada told the court that his counsel "cannot represent me because we start trial next week. So I got to represent myself, I don't got no other choice."

CP 126. Judge Fox granted the continuance and denied the request to proceed pro se without further colloquy. CP 126-27.

The denial of this motion was not an abuse of discretion because the motion was not unequivocal. Gonzalez-Quezada's request to represent himself was inextricably conflated with his expression of frustration with his counsel and the delay of trial. As in Stenson,⁵ in the context of the whole case and in light of Gonzalez-Quezada's past willingness to retain counsel, the court could have reasonably found that Gonzalez-Quezada's claim that he was forced into proceeding pro se rendered his request equivocal. Thus, the court did not abuse its discretion in denying Gonzalez-Quezada's requests⁶ and properly indulged a presumption against a waiver of the right to counsel.

Finally, on August 11, 2006, counsel and the State both moved to continue this case. 1RP 3-6. Counsel requested a continuance because the trial date conflicted with his prescheduled vacation. 1RP 4. Counsel said that Gonzalez-Quezada objected to

⁵ Stenson, 132 Wn.2d at 742.

⁶ Gonzalez-Quezada's assertion to the contrary, the court did not base its denial of his motion to proceed pro se (such as it was) on the subjective belief that he "could not do a good job." Br. App. at 9. Rather, when read in context, the court's discussion regarding whether a defense counsel or a defendant could be prepared was part and parcel of its ruling granting the continuance. CP 125-26.

the continuance. 1RP 4. He also stressed that Gonzalez-Quezada did not wish to proceed pro se, but did wish to discharge him as counsel. 1RP 4. The defendant was present and did not contest any part of this statement. 1RP 4. The State requested a continuance because the trial date conflicted with the prosecutor's vacation and with four other scheduled trials. 1RP 5-6. The court granted the continuances and set a new trial date of August 30, 2006, with an expiration date of September 29, 2006. 1RP 5-6. In this context, the trial court did not abuse its discretion by denying Gonzalez-Quezada's motion to proceed pro se because no such motion was before it.

Thus, Gonzalez-Quezada's assertions to the contrary, he never unequivocally asserted his right to represent himself during any of these hearings. As a result, to the extent that Gonzalez-Quezada ever actually moved to proceed pro se, his request was properly denied.

D. CONCLUSION

For all the foregoing reasons, the State asks this Court to affirm Gonzalez-Quezada's conviction

DATED this 6 day of July, 2010.

Respectfully submitted,

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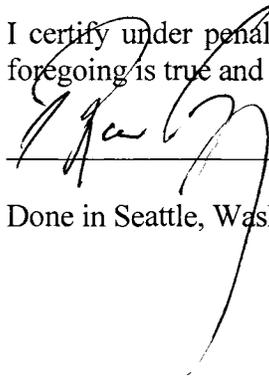
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I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



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