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62122-0

No. 62122-0-1

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

STATE OF WASHINGTON,

Respondent,

v.

SAMIYA BROWN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Jim Rogers
The Honorable Cheryl Carey
The Honorable Andrea Darvas

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENT OF ERROR

The trial court abused its discretion in finding Samiya Brown unequivocally waived her right to the assistance of counsel and thereafter granting her motion for self-representation.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

A valid waiver of the constitutional right to counsel must be knowing, intelligent and unequivocal. Ms. Brown told the court she wanted to represent herself only because she could not communicate with her attorney and had not been able to hire another attorney. Was the purported waiver equivocal, requiring reversal of the convictions?

C. STATEMENT OF THE CASE

On September 5 and 18, 2007, respectively, the Prosecuting Attorney for King County charged Samiya Brown with custodial assault and attempted robbery in the first degree. CP 1-4, 40-42. These matters were consolidated below and are consolidated on appeal.

On January 16, 2008 Ms. Brown moved the Honorable Jim Cheryl Carey to allow her to waive her right to counsel and proceed

pro se on these matters. 1/16/08RP(1) 1.¹ In explaining her motivation, Ms. Brown referred only to her frustration with her current attorney. The court failed to explore whether her choice to represent herself was a true, unequivocal choice, or merely a choice of the lesser evil. The court granted her motion. CP 6.

Later the same day, Ms. Brown entered an Alford² plea first degree attempted robbery and fourth degree assault before the Honorable Jim Rogers. CP 7-24, 49-57. The Honorable Andrea Darvus sentenced her to 30 months on the attempted robbery charge and 12 months suspended on the assault charge. CP 25-33, 59-61.

D. ARGUMENT

THE TRIAL COURT DEPRIVED MS. BROWN OF HER CONSTITUTIONAL RIGHT TO ASSISTANCE OF COUNSEL.

1. A person accused of a crime has a fundamental constitutional right to the assistance of counsel. A person accused of a crime has a fundamental right under both the federal and Washington constitutions to have the assistance of counsel for her

¹ Two proceedings were held on January 16, 2008, the first before the Honorable Cheryl Carey and the second before the Honorable Jim Rogers. They will be referred to as 1/16/08RP(1) and 1/16/08RP(2), respectively.

² North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970)

defense. The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." The assistance of counsel is also deemed fundamental and essential to a fair trial as a matter of due process of law under the Fourteenth Amendment. Gideon v. Wainwright, 372 U.S. 335, 342-43, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Article I, section 22 of the Washington Constitution declares a right to counsel similar to its federal counterpart: "In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel." Finally, the basic constitutional provision guaranteeing the right to counsel is implemented by CrR 3.1, which provides, "A lawyer shall be provided at every stage of the proceedings, including sentencing, appeal, and post-conviction review." CrR 3.1(b)(2).

2. A criminal defendant may refuse the assistance of counsel and represent herself, but only if the request is knowing, intelligent and unequivocal. The constitutional guarantee of the assistance of counsel is unusual among constitutional rights in that it is also a guarantee of its opposite, the right to refuse the assistance of counsel. Faretta v. California, 422 U.S. 806, 819, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); State v. Silva, 107 Wn. App.

605, 617-18, 27 P.3d 663 (2001). A criminal defendant thus has a choice to make, but the options are not equally easy to elect. The right to assistance of counsel is automatic; assuming the right is not waived, assistance must be made available at critical stages of a criminal prosecution, whether or not the defendant has requested it. Johnson v. Zerbst, 304 U.S. 458, 463, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938); Kirby v. Illinois, 406 U.S. 682, 689-90, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972). To exercise the right to self-representation, on the other hand, a criminal defendant must negotiate several procedural obstacles and the trial court must find she has affirmatively waived the right to be represented by counsel. Faretta, 422 U.S. at 835; Johnson, 304 U.S. at 464; City of Bellevue v. Acrey, 103 Wn.2d 203, 208-09, 691 P.2d 957 (1984) (citing Argersinger v. Hamlin, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972)).

The right of self-representation is conditioned on a valid waiver of the right to be represented by counsel. Chapman v. United States, 553 F.2d 886, 892 (5th Cir. 1977) (citing Faretta, 422 U.S. at 835; Johnson, 304 U.S. at 464-65). The record must show the defendant knowingly and intelligently waived the right to counsel, that “he knows what he is doing and his choice is made

with eyes open.” Faretta, 422 U.S. at 835 (quoting Adams v. United States ex rel. McCann, 317 U.S. 269, 279, 63 S.Ct. 236, 87 L.Ed. 268 (1942)). The defendant’s decision must also be unequivocal. State v. Luvane, 127 Wn.2d 690, 698, 903 P.2d 960 (1995); State v. Fritz, 21 Wn. App. 354, 360-61, 585 P.2d 173 (1978). Thus, courts appreciate that a defendant who requests to represent herself may well understand the nature and consequences of self-representation, and yet the request may not reflect the defendant’s true wishes.

The defendant’s true wishes are determinative, because the right to self-representation is fundamentally about freedom of choice. Faretta, 422 U.S. at 833-34. As the United States Supreme Court explained, “it is one thing to hold that every defendant, rich or poor, has the right to the assistance of counsel, and quite another to say that a State may compel a defendant to accept a lawyer he does not want.” Id. at 833. The right to self-representation is a personal right that must be honored out of respect for the individual. Id. at 834. Thus, although “[i]t is undeniable that in most criminal prosecutions defendants could better defend with counsel’s guidance than by their own unskilled

efforts,” courts must nonetheless allow defendants to make that choice. Id.

Not every request to dispense with counsel truly reflects a desire to exercise the constitutional right to self-representation, however. The precise choice to be made is a choice between representation by counsel and representation by oneself. United States v. Arlt, 41 F.3d 516, 519 (9th Cir. 1994). The choice must be explicit and reflect a true subjective desire for self-representation. Id.; State v. Chavis, 31 Wn.App. 784, 791, 644 P.2d 1202 (1982). In ruling on a defendant’s request to proceed pro se, therefore, the trial court must subject the defendant to a penetrating and comprehensive examination in an attempt to discern the defendant’s subjective reasons for making the request. Chavis, 31 Wn. App. at 791. For example, a defendant may request to proceed without counsel out of a mistaken belief that no state-appointed lawyer would zealously represent her or that a pro se appearance is necessary for a fair trial. Id. In such cases, the defendant’s request to defend herself truly reflects not a desire to dispense with counsel, but a desire to avoid what is perceived as a greater but unrelated evil. Id. In such cases, rather than grant the

defendant's request, the court should attempt to mitigate her concerns. Id.; Chapman, 553 F.2d at 892.

Courts must question a defendant closely regarding her true reasons for requesting to proceed without counsel, because a decision to defend pro se often jeopardizes the defendant's chances of receiving an effective defense. Fritz, 21 Wn. App. at 360; Chapman, 553 F.2d at 892. The constitution grants defendant's "a personal right to be a fool,"³ but where the defendant's request does not truly reflect a choice of self-representation, the defendant's countervailing interest in receiving adequate representation and having her guilt or innocence fairly determined must win out. State v. DeWeese, 117 Wn.2d 369, 376, 816 P.2d 1 (1991); Chavis, 31 Wn. App. at 792.

Thus, to protect the defendant's right to a fair and just proceeding, the law requires courts to indulge in every reasonable presumption against a defendant's waiver of her right to counsel. In re Detention of Turay, 139 Wn.2d 379, 396, 986 P.2d 790 (1999) (citing Brewer v. Williams, 430 U.S. 387, 404, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977)). Courts "should not quickly infer that a defendant unskilled in the law has waived counsel and has opted to

³Fritz, 21 Wn. App. at 359; see also Faretta, 422 U.S. at 834.

conduct her own defense.” Brown v. Wainwright, 665 F.2d 607, 610 (5th Cir. 1982). Any doubt as to whether the defendant is truly making an autonomous choice to proceed pro se must be resolved in favor of appointing counsel. Chavis, 31 Wn. App. at 792-93.

Finally, in determining the defendant’s true subjective wishes, the trial court must look beyond the defendant’s request to the record as a whole. The determination of whether the request is unequivocal depends upon the particular facts and circumstances surrounding the case. Johnson, 304 U.S. at 464.

3. Ms. Brown’s waiver of the right to counsel was equivocal.

Although Ms. Brown requested the trial court allow her to exercise her right to represent herself, an examination of the record as a whole reveals that she did not truly wish to proceed without counsel. Her request was equivocal, and thus the trial court should have denied the motion. State v. Stenson, 132 Wn.2d 668, 739-40, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008, 118 S.Ct. 1193, 140 L.Ed.2d 323 (1998); State v. Woods, 143 Wn.2d 561, 23 P.3d 1046 (2001); Luvane, 127 Wn.2d 690.

The record reveals that Ms. Brown’s pro se motion was not a true choice, but was compelled by dissatisfaction with her attorney. 1/16/08RP(1) 4, 12. She thus was not exercising her constitutional

right to choose self-representation. See Faretta, 422 U.S. at 833-34; Chavis, 31 Wn. App. at 791.

The Washington Supreme Court has held that where a defendant requests to proceed without counsel out of a desire to avoid what he perceives to be a greater evil, but where the outcome to be avoided is unrelated to a dissatisfaction with counsel, the request is equivocal and should not be granted. See Woods, 143 Wn.2d 561; Luvene, 127 Wn.2d 690. In Luvene, the trial court granted the defense attorney's request for a continuance three weeks before the scheduled trial date, because the attorney needed more time to prepare. 127 Wn.2d at 698. Mr. Luvene, however, strongly opposed any continuance, stating he had been in jail for several months and did not want to wait any longer, that he was prepared to defend himself, and that he wanted to go to trial. Id. The trial court nonetheless granted the continuance. Id. On review, the Supreme Court held the trial court properly determined the request to proceed without counsel was equivocal. Id. at 699. In the context of the record as a whole, the defendant's statement 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.

The Supreme Court reached a similar conclusion more recently in Woods, 143 Wn.2d 561. There, when defense counsel requested a continuance of the trial date, the defendant stated he was prepared to proceed to trial without counsel on the original trial date. Id. at 587. As in Luvane, the Supreme Court concluded the request could not be viewed as an unequivocal statement of his desire to proceed to trial pro se. Id. Rather, “[h]is statement, like that which we examined in Luvane, merely revealed the defendant’s displeasure with his counsels’ request to continue the trial for a lengthy period of time.” Id.

Similarly, in Stenson, the defendant’s motion to represent himself was found to be equivocal because it stemmed from disagreements over trial strategy between the defendant and his attorney. 132 Wn.2d at 739-40. The defendant told the trial court he did not want to represent himself but felt forced into it. Id. at 742. Therefore the court found that Stenson “really [did] not want to proceed without counsel” and properly denied his motion. Id.; see also Turay, 139 Wn.2d at 399 (defendant’s request to proceed pro se as an alternative to his counsel of choice was equivocal).

Here, the record demonstrates that Ms. Brown did not truly wish to represent herself, but felt compelled to do so by her inability

to communicate with her attorney or hire a new attorney. Ms. Brown first informed the court she wanted to represent herself “[b]ecause there’s a communication barrier between myself and [defense counsel] Mr. Johnson, and I’ve been unable to get to court to replace him... with another attorney.” 1/16/08RP(1) 4. At the end of the court’s colloquy, Ms. Brown elaborated, “All I’m doing – I don’t want to postpone this trial any further, and I’ve been trying to get an attorney, but that hasn’t – like I said, there’s... been a communication barrier.” 1/16/09RP(1) 11-12. Although Ms. Brown had offered no unequivocal explanation for her request, the court did not probe any further but agreed to grant her request. 1/16/09RP(1) 13. After the State argued that Ms. Brown’s request was equivocal, the court briefly conducted additional colloquy, but still did not inquire further into the reasons for her request. 1/16/09RP(1) 14-16. Ms. Brown again told the court she wished to go pro se, and the court granted her request. 1/16/09RP(1) 16.

Ms. Brown’s request was equivocal and thus did not amount to a waiver of her fundamental constitutional right to the assistance of counsel. Faretta, 422 U.S. at 835; Johnson, 304 U.S. at 464. As in Woods, Luvene, Stenson, and Turay, Ms. Brown’s request was the choice of a lesser evil. She told the court she did not want *this*

particular attorney, and even indicated that she had been trying to hire another attorney. 1/16/08RP(1) 4, 11-12. The court failed to ask what she meant by that (e.g. was she hoping to have another public defender appointed or could she have the resources to hire a private attorney, had she taken steps toward finding a new attorney, and would she rather move for new counsel or a continuance instead of waiving her right to counsel). The court also failed to explore how much her frustration with the delay influenced her decision to waive her right to counsel. In short, the court failed in its duty to “make a penetrating and comprehensive examination in order to properly assess that the waiver was made knowingly and intelligently.” Chavis, 31 Wn.App. at 790, citing United States ex rel. Martinez v. Thomas, 526 F.2d 750, 755 (2d Cir. 1975).

Because the court failed to make that assessment and the record shows that the waiver was not knowing and intelligent, the trial court should have denied the request to proceed pro se.

4. The convictions must be reversed. The Supreme Court has held “no conviction can stand, no matter how overwhelming the evidence of guilt, if the accused is denied the effective assistance of counsel.” State v. Cory, 62 Wn.2d 371, 376, 382 P.2d 1019 (1963). Representing herself, Ms. Brown abruptly decided to enter

an Alford plea after the court denied her motion to dismiss based on a speedy trial violation, based on her misunderstanding of the law. 1/16/09RP(2) 6. This demonstrates a high likelihood of prejudice from her invalid waiver of the right to counsel. However, prejudice need not be established, because “[i]t is fundamental that ‘deprivation of the right to counsel is so inconsistent with the right to a fair trial that it can never be treated as harmless error.’” Silva, 108 Wn. App. at 541, quoting Frazer v. United States, 18 F.3d 778, 782 (9th Cir. 1994), citing Chapman, 386 U.S. at 23 n.8.

Because Ms. Brown’s waiver was equivocal, reversal is the proper remedy. Silva, 108 Wn.App. 536; Chavis, 31 Wn.App. 784; Nordstrom, 89 Wn.App. 737; Buelna, 83 Wn.App. 658.

E. CONCLUSION

For the reasons set forth above, Ms. Brown respectfully requests that this Court reverse her convictions.

DATED this 10th day of August, 2009.

Respectfully submitted,



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Washington Appellate Project – 91052
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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I**

STATE OF WASHINGTON,)	
)	NO. 62122-0
Respondent,)	
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v.)	
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SAMIYA BROWN,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, ANN JOYCE, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

1. THAT ON THE 10TH DAY OF AUGUST, 2009, A COPY OF **APPELLANT'S OPENING BRIEF** WAS SERVED ON THE PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL TO THE ADDRESSES INDICATED:

[X] King County Prosecuting Attorney
Appellate Division
W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104

[X] Samiya Brown
893571
Washington Correction Center for Women
9601 Bujacich Road N.W.
Gig Harbor, WA 98332-9300

SIGNED IN SEATTLE, WASHINGTON THIS 10TH DAY OF AUGUST, 2009

x 