

NO. 63398-8-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JASON SANDBERG,

Appellant.

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COURT OF APPEALS
DIVISION I
JAN 11 2011

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CHERYL CAREY, JULIE SPECTOR
SHARON ARMSTRONG, PALMER ROBINSON AND
JEFFREY RAMSDELL

BRIEF OF RESPONDENT

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ORIGINAL

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A. ISSUE PRESENTED

A defendant has a constitutional right to self-representation so long as that request is unequivocal and timely. Here, after a thorough colloquy, the court granted Sandberg's request to proceed pro se. Was Sandberg's request unequivocal?

B. STATEMENT OF THE CASE

Jason Sandberg was charged with one count of felony Failure to Register as a Sex Offender during a period of time between May 19, 2008 and July 7, 2008. CP 17. On November 18, 2008, Sandberg was scheduled to begin trial and was represented by George Sjursen. 11/18/02RP 2.¹ Prior to being assigned out for trial, Sandberg made a motion, pro se, to dismiss the case for speedy trial violations. 11/18/02RP 3. After that motion was denied, Sandberg then made the request to proceed pro se and Judge Cheryl Carey engaged in the following colloquy:

¹ The State is not adopting the appellant's reference system because there are several volumes contained within the same transcript and the State has a motion pending before the Court of Appeals to supplement the record with the verbatim reports of proceedings from 1/6/09 and 1/30/09 and is awaiting that decision. Should the Court decline to allow supplementation of the record, the Court may disregard any argument which relies on these hearings. The State adopts the following reference system: 11/18/08RP; 12/12/08RP; 12/26/08RP; 1/6/09RP; 1/30/09RP; 2/4/09RP; 2/5/09RP; 2/9/09RP; 2/10/09RP; 2/11/09RP; 2/12/09RP; and 3/25/09RP.

THE COURT: The motion to dismiss right now is denied. My understanding is, at least as of right now, no one else has had an opportunity to speak. Your trial date is today. So what is the other matter that you wanted to go over?

MR. SANDBERG: I'd like to -- well, because you're denying that, I would like to -- I'll go pro se.

THE COURT: Well, let me ask you a few questions. This is required by law.

MR. SANDBERG: Yep.

THE COURT: Let me ask you this: Have you ever studied law before?

MR. SANDBERG: No, Your Honor.

THE COURT: Okay. Have you ever represented yourself or anyone else in a criminal action?

MR. SANDBERG: Right now I am, yes.

THE COURT: Okay. Besides today?

MR. SANDBERG: Yes.

THE COURT: Have you ever represented yourself in a trial before? Tell me a little bit about that.

MR. SANDBERG: I'm pro se on my '06 cause number.

THE COURT: Okay. What charge is that?

MR. SANDBERG: Failure to register.

THE COURT: Okay. And when's the trial on that?

MR. SANDBERG: Judge Craighead (phonetic) hasn't made a decision yet on that.

THE COURT: Hasn't made a decision about what?

MR. SANDBERG: It's been three and a half months. I'm still waiting for a decision on that. I filed a motion for a new trial.

THE COURT: So you actually represented yourself during that trial?

MR. SANDBERG: No, it did not go to trial, Your Honor. I'm waiting for a new trial by Judge Craighead. So I've been -- I'm pro se under that.

THE COURT: Do you want to help me understand better?

MR. SJURSEN: Yes. Your Honor, I believe there's a motion to withdraw his plea. He is representing himself on that.

THE COURT: So you actually pled guilty, if I understand correctly, with counsel and now you are moving to withdraw your plea without counsel; is that correct?

MR. SANDBERG: I'm already pro se. It's on the record. I'm already waiting for a ruling on that decision.

THE COURT: Okay, all right. Let me ask you this. I'm going to ask the State, if I can, and I realize you may not be the prosecutor, but you can actually state what the charges are. Go ahead.

MS. MCCULLOCH: I do know. I'm familiar with the case, Your Honor.

THE COURT: All right, thank you.

MS. MCCULLOCH: And his other case as well. Your Honor, the charge in this matter is failure to register as a sex offender, in that he did fail to report weekly as required for a person who has been registered as homeless.

THE COURT: And can you tell me what the standard range is if he were to be found guilty.

MR. SJURSEN: I believe it's 14 to 18 months, Your Honor.

THE COURT: Okay.

MR. SJURSEN: There might be some dispute about that. It was either 12 to 14 or 14 to 18.

THE COURT: Okay. And sir, can you tell me what the maximum penalty is for that charge.

MR. SANDBERG: Five years, \$10,000 fine.

THE COURT: And is that correct?

MS. MCCULLOCH: Yes, it is.

THE COURT: All right, excellent. All right, and you understand that if in fact you are going to be representing yourself, the trial court cannot in any way tell you how to try your case, cannot give you any kind of legal advice or any direction in that?

MR. SANDBERG: That's right, I understand that, Your Honor. I fully understand that. I just want to say the only reason why I'm asking to go pro se, Your Honor, is because I feel -- I'm not disputing the facts of the case of the failure to register. What I'm disputing is my side of the story. That's why my lawyer, I've been trying to tell for months, I'm not

disputing the fact of the failure to register. But there was something that happened, and he won't present the defense, and I have a right to.

THE COURT: Well, I'm trying to keep you [focused] a little bit here.

MR. SANDBERG: Right.

THE COURT: I want to make sure that you fully understand what it means to have you represent yourself before I can actually grant your request. Are you familiar with the rules of evidence?

MR. SANDBERG: Most of it, yes.

THE COURT: Can you tell me how that has come about.

MR. SANDBERG: I got -- I got rules of evidence in the law books and everything. I mean, I'm not a lawyer, Your Honor. I know where you're going with this. But I feel that I want to represent myself. I feel that my due process rights already have been violated. I want to represent myself. Like I said on record, you know what I mean -- you know what, that's my -- he's not representing me. Now if you want to say you can't go pro se and you want to give me new counsel, well then that's fine. But I want to present a defense, and he's not doing that.

THE COURT: You have indicated to the Court, and I think you have every right to represent yourself. But before I can grant that request, the law requires me to ask you these questions. Then the law requires me to make a determination that you are unequivocally asking to represent yourself, that you fully understand and know what you're doing, that you fully understand the consequences of representing yourself, that you understand that the rules of evidence will govern, any evidence will govern you at

trial. The rules of criminal procedure will also govern as well. It's my obligation to make sure that you understand that. It's my obligation to strongly recommend that you not represent yourself. You have counsel. You've talked about this before. You understand you don't have the right to choose any attorney. If you want to represent yourself, that's something that you have every right to do. But you will be responsible assuming this goes to trial to doing jury voir dire, jury selection, to follow all the rules. The Court will not be in a position to give you any kind of legal advice. If in fact you are found guilty, it's important that you understand what all the consequences are, which the State has just articulated to you what that might be. So I am simply making sure that in light of the penalty and in light of the charges and based on whatever information you have in terms of how to proceed to trial, that you fully understand what that means and that you are fully and completely and unequivocally wanting to go to trial. That's all I'm asking you.

MR. SANDBERG: Well, Your Honor, I just want to address the Court. If my lawyer would go with the defense like you just said on the record, as a defendant, I have the right to present any defense to trial. I mean, I told him months ago this is the defense I want to use. You know, he doesn't even say -- there's no dispute about the failure to register. The point is what happened, and he knows that. He won't go out there. 15 hours of investigation services, 15 hours. And the State's -- I mean, he can't even get a hold of the State's witnesses for some reason. I say why don't you get a subpoena.

THE COURT: The real issue that I'm addressing right now is whether or not it is your desire. You came out here, you've asked the Court to go pro se. I'm simply wanting to make sure that you understand what that means and that you have the ability to do so. Even if you don't, that you fully do understand

and that you are adamant that this is what you want to do. My question is: Is this what you want to do? Do you want to represent yourself?

MR. SANDBERG: That's right, Your Honor.

THE COURT: All right. And do you want standby counsel?

MR. SANDBERG: Yes.

THE COURT: All right. Then I am going to find that you have knowingly, voluntarily and unequivocally waived your right to counsel, that this is what you wish to do, that you are aware of the nature of the charges, the maximum penalty. You're aware of what the standard range might be. You have indicated that you're currently representing yourself in another matter. Therefor[e] I will make that finding. I am, counsel, going to appoint you as standby counsel. It's important that you understand that does not mean he is your attorney per se, but he is there to assist you in any way that he can. So --

11/18/02RP 4-11.

Between November 18, 2008, when the defendant was granted his request to proceed pro se, and February 9, 2009, when trial commenced before Judge Jeffrey Ramsdell, the defendant had numerous hearings on a variety of issues with regard to his case. See 12/12/08RP; 12/26/08RP; 1/6/09RP; 1/30/09RP; 2/4/09RP; 2/5/09RP; and 2/9/09RP. On January 6, 2009, Sandberg made a motion to continue his trial date. 1/6/09RP 6. While addressing the

issue of a continuance, the State and Judge Carey once again affirmed Sandberg's intention to proceed pro se:

MS. CHARLTON: I would be in agreement because I think there are enough pending issues, but this would be the last continuance. I think Mr. Sandberg should proceed as if he is not going to have a paralegal appointed. I have provided a case to him and Mr. Sjursen this morning that indicates a defendant who is pro se is not entitled to an investigator, or even a standby counsel, and he needs to prepare himself for trial as if he is acting pro se, if that is still his intention.

THE COURT: All right. Mr. Sandberg, let me ask you a few questions. Is it still your intention, and I know you have been in front of me on a number of occasions, as well, to go pro se?

THE DEFENDANT: Of course. I am not giving that right up.

THE COURT: All right. I want to make sure. I know that you were very strong in your opinion --

THE DEFENDANT: Oh, yes.

THE COURT: -- before this court before, but once again, I just want to make sure that that is still your desire. All right, with that understanding, my understanding is that Judge Spector has ruled on the paralegal; ...

1/6/09RP 4-5.

And again, on January 30, 2009, Judge Sharon Armstrong again addressed Sandberg's pro se status: "You know, we never think people are well served to go pro se because they don't know

the legal issues; they don't know how to describe them, but that is the choice you have made. You have a constitutional right to do that and that is what we will do." Sandberg's bench trial before Judge Ramsdell began on February 9, 2009. Sandberg was convicted on February 12, 2009. See 2/9/09RP; 2/12/09RP.

C. ARGUMENT

SANDBERG'S REQUEST TO PROCEED PRO SE WAS UNEQUIVOCAL

Sandberg argues that the trial court erroneously granted his request to represent himself. Specifically, Sandberg asserts that his request was not unequivocal. This argument should be rejected. Sandberg's request to proceed pro se was granted after a thorough colloquy of the defendant's unequivocal request.

Both the federal and state constitutions guarantee a defendant the right to self-representation. U.S. Const. amends. VI and XIV; Washington Const. art. I, § 22; see also *Faretta v. California*, 422 U.S. 806, 818-19, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1976). To exercise the right, the defendant must make an unequivocal, knowing, intelligent, and timely request, not invoked

for purposes of delay or obstruction of justice. *State v. Vermillion*, 112 Wn. App. 844, 51 P.3d 188 (2002) (citing *State v. Breedlove*, 79 Wn. App. 101, 106, 900 P.2d 586 (1995)). To determine the validity of a defendant's waiver of counsel, the court should conduct a colloquy on the record that includes a discussion about the seriousness of the charge, the possible maximum penalty involved, and the existence of technical procedural rules governing the presentation of the accused's defense. *State v. Lillard*, 122 Wn. App. 422, 427-30, 93 P.3d 969 (2004).

A defendant's request to proceed pro se must be unequivocal in the context of the record as a whole and courts should indulge in "every reasonable presumption against a defendant's waiver of his right to an attorney." *State v. Stenson*, 132 Wn.2d 668, 741-42, 940 P.2d 1239 (1997); *State v. Luvene*, 127 Wn.2d 690, 698-99, 903 P.2d 960 (1995). While a request to proceed pro se as an alternative to substitution of new counsel does not necessarily make the request equivocal, it can indicate equivocation when viewed in the context of the entire record. *Stenson*, 132 Wn.2d at 11. Furthermore, a request to proceed pro se is not rendered equivocal simply because the defendant "is motivated by something other than a singular desire to conduct his

or her own defense.” *State v. Modica*, 136 Wn. App. 434, 442, 149 P.3d 446 (2006) (citing *State v. DeWeese*, 117 Wn.2d 369, 378-79, 816 P.2d 1 (1991)).

*State v. Stenson*² provides a useful example. In *Stenson*, the defendant first brought a motion for appointment of new counsel and it was not until that request was denied that Stenson made a motion to proceed pro se. 132 Wn.2d at 739-40. In reviewing the record as a whole, the *Stenson* court found the defendant’s request to be equivocal since his primary request was that of new counsel. *Id.* at 741-2. The *Stenson* court noted:

Here, almost all of the conversation between the trial judge and the Defendant concerned his wish for different counsel. He repeatedly discussed which new counsel should be assigned. He explained he had contacted a number of attorneys and had asked for permission to talk with his newly-selected counsel. He told the trial court he did not want to represent himself but that the court and his counsel had forced him to do that. More importantly, the Defendant did not refute the trial court’s final conclusion that he “really [did] not want to proceed without counsel.” Report of Proceedings at 3313. After the trial judge denied the request for substitution of new counsel and the request to proceed pro se, the Defendant, pursuant to a request from the trial court to put his request in writing, filed a written request which sought appointment of new lead counsel, retention of the existing second counsel, appointment of Mr. Leatherman as counsel for the penalty phase, and a continuance. In that

² 132 Wn.2d 668.

request, the Defendant did not mention proceeding pro se. While the Defendant's request was conditional, it was also equivocal based on the record as a whole. The trial court's refusal to allow the Defendant to proceed pro se was not an abuse of its discretion.

Id. at 742.

Here, unlike the defendant in *Stenson*, whose primary request was that of new counsel, Sandberg's primary request all along was to proceed pro se. See 11/18/08RP 4-11. In fact, it is not until the court had completed much of the colloquy into whether Sandberg understood what proceeding pro se entailed, that Sandberg even raised the possibility of new counsel in the event the court denied his pro se request. 11/18/08RP 8. The fact that Sandberg's desire to represent himself may have stemmed from displeasure with his previous counsel does not render the request equivocal. See *State v. Modica*, 136 Wn. App. at 442 (defendant's choice to proceed pro se to avoid delay that would have occurred had new counsel been appointed did not render his request equivocal and the trial court's ruling was affirmed). Here, Sandberg's request to represent himself was granted only after a thorough colloquy was conducted by Judge Carey which included

discussion of Sandberg's prior self-representation in another case, his understanding of the charges against him, the penalties he faced, and his knowledge of the rules of evidence. 11/18/08RP 4-11.

Should there be any question as to Sandberg's intent, subsequent hearings only reiterate his intentions. On January 6, 2009, almost two months after his pro se status was granted, when asked if it was still his intention to proceed pro se, Sandberg was still steadfast in his decision. Sandberg emphatically told the court: "Of course. I am not giving that right up." 1/6/09RP 5. At no point did Sandberg make any mention of the need for new counsel. See 1/6/09RP. Later, on January 30, 2009, the defendant was again before the court and the court commented on the fact that it had been the defendant's choice to appear pro se and again, Sandberg made no mention of a desire for new counsel. See 1/30/09RP 28.

Because Sandberg's request to the court to represent himself and proceed pro se was unequivocal, the trial court properly granted Sandberg's motion. Sandberg's conviction should be affirmed.

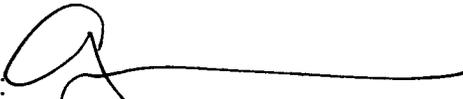
D. CONCLUSION

For the foregoing reasons, the State requests that the Court affirm Sandberg's conviction.

DATED this 26 day of May, 2010.

Respectfully submitted,

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