

NO. 63793-2-I

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

STATE OF WASHINGTON,

Respondent,

v.

GREGORY ALLEN,

Appellant.

REC'D
JUN 15 2010
King County Prosecutor
Appellate Unit

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

The Honorable Michael J. Fox, Judge
The Honorable Cheryl Carey, Judge
The Honorable Bruce Hilyer

BRIEF OF APPELLANT

CHRISTOPHER H. GIBSON
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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A. ASSIGNMENT OF ERROR

The court erred in denying Appellant's request to exercise his constitutional right to self-representation.

Issue Pertaining to Assignment of Error

Did the trial court err in summarily denying appellant's timely and unequivocal written motion to exercise his constitutional right to represent himself at trial?

B. STATEMENT OF THE CASE

1. Procedural Facts

On December 21, 2007, the King County Prosecutor charged appellant Gregory Allen with three counts of felony harassment, one count of felony stalking, and one count of misdemeanor stalking. CP 1-3; RCW 9A.46.110; RCW 9A.46.020(1), (2). The State alleged Allen sent letters to his appointed attorney in a prior King County criminal matter, and to an employee of the King County Office of Public Defense, threatening them with harm. CP 4-7. The State subsequently amended the charges by adding aggravating factors to each of the felony counts, alleging the acts "involved a destructive and foreseeable impact on persons other than the victim" or were committed "against an officer of the court in retaliation of the officer's performance of his duty to the criminal justice system[.]" CP 115-18; RCW 9.94A.535(3)(r), (x).

A jury trial was held May 18-20, 2009, before the Honorable Michael J. Fox. 16RP-17RP.¹ The jury convicted Allen as charged, including the aggravating factors. CP 152-64. Thereafter the court imposed an exceptional sentence of four consecutive five-year felony sentences and a concurrent 12-month misdemeanor sentence.² CP 212-13, 234-46; 19RP 22-28.

Allen appeals. CP 210-11.

2. Substantive Facts

The public defender agency "Society of Counsel" (a.k.a. "SCRAP"), was initially appointed to represent Allen. Supp CP __ (sub no. 4, Order Appointing Counsel, 1/3/08). It was subsequently determined, however, that a conflict existed between Allen and SCRAP, as well as the other King County public defender agencies and the King County Office of Public Defense, so Kirk Mosley, an attorney not affiliated with any of these organizations, was substituted in as Allen's

¹ There are nineteen volume of verbatim report of proceedings referenced as follows: 1RP - 1/4/08; 2RP - 22/25/08; 3RP - 3/28/08; 4RP - 4/25/08; 5RP 5/30/08; 6RP - 8/29/08; 7RP 9/5/08; 8RP - 10/31/08; 9RP - 11/14/08; 10RP 11/9/09; 11RP 1/30/09; 12RP - 2/4/09; 13RP - 2/9/09; 14RP - 3/13/09; 15RP 4/28/09; 16RP - 5/18-19/09; 17RP - 5/20/09; 18RP - 6/26/09; and 19RP - 7/10/09.

² In addition to each of the aggravating sentencing factors found by the jury, the trial court also found that Allen's high offender score (13+) and extensive misdemeanor history also independently warranted imposition of an aggravated exceptional sentence. CP 242-46.

counsel. Supp CP __ (sub no.6, Order Allowing Defense Counsel to Withdraw and Appointing Kirk Mosley as Counsel for Defendant, 1/4/08); 1RP 2-4.

The relationship between Allen and Mosley did not go well. Within a couple of months Allen requested new counsel, complaining that Mosley would not meet with him outside of court, could not be contacted by telephone, had a conflict that should preclude him from representing Allen, and had failed to engage in any of the investigation Allen thought necessary to develop his defense. Supp CP __ (sub no. 22, [Pro Se] Notice of Termination of Counsel/Request for New Counsel, 3/18/08); Supp CP __ (sub no. 23, [Pro Se] Motion for New Counsel, 3/18/08); 3RP 6-7, 10-11. Allen's request for new counsel was denied on March 28, 2008, by the Honorable Bruce Hilyer. CP 17-18; 3RP 7-9.

A couple of months later Allen filed a pro se "Notice of Motion to Withdraw Counsel and Allow Defendant to Proceed Pro Se." Supp CP __ (sub no. 34, 5/13/08). The same day, Allen filed an alternative pro se "Notice of Motion to Withdraw Counsel and Appointment of New Counsel." Supp CP __ (sub no. 35, 5/13/08). At the next hearing, on May 30, 2008, before the Honorable Cheryl B. Carey, Mosley acknowledged Allen's dissatisfaction with his representation, but told the court he thought he and Allen had "resolved it." 5RP 3. Allen, on the other hand,

reiterated the problems he was having communicating with Mosley, noted that his recently filed pro se motions had neither been set for a hearing nor ruled upon, and confirmed that his ongoing inclination was to discharge Mosley as his counsel. 5RP 3-5. In response, the court held:

With that understanding, what I'm going to do, since it is my understanding the two of [you] have communicated, you have tried -- you're attempting to work through the system and set up some procedures that would allow you to have better communications. . . .

So I'm going to count on the representation here, counsel's going to come up and see you [in jail]. He's going to set up something that you can actually call out, and it's not a collect call and not something that he has to refuse.

So any motion to terminate that relationship is denied.

5RP 5-6.³

A couple of months later Allen again filed a pro se motion seeking to discharge Mosley as his counsel. Supp CP __ (sub no. 44, [Pro Se] Motion to Withdraw Counsel and Appointment of New Counsel with

³ After the court ruled, the prosecutor stated:

Your Honor, just for the record, I do want to note that Mr. Allen previously did bring a motion to have Mr. Mosley dismissed. That motion was denied by Judge Hilyer who was on the bench that morning. So there have been no other motions that have been before this Court or brought properly before the Court.

5RP 6. This was clearly incorrect in light of Allen's pro se filings of May 13, 2008.

Enclosures,⁴ 7/18/08). It does not appear this motion was ever ruled upon. On October 31, 2008, however, the court granted Mosley's request to withdraw. CP 76-77; 8RP 13. Two weeks later, with Allen's approval, the court reappointed Mosley. 9RP 14; CP 81. But on January 9, 2009, after an in-chamber ex parte meeting with Mosley and a request by Allen for new counsel, the court once again allowed Mosley to withdraw. CP 83; 10RP 2, 6, 11.

On February 9, 2009, attorney Karen Halverson was appointed to represent Allen. Supp CP __ (sub no. 78, Order Appointing Counsel, 2/9/09); 13RP 2. Thereafter, a jury trial was held at which Allen was convicted as charged. CP 152-64; 16RP-17RP.

C. ARGUMENT

ALLEN WAS DENIED HIS CONSTITUTIONAL RIGHT TO SELF-REPRESENTATION.

Both the Washington and federal constitutions guarantee a criminal defendant the right to assistance of counsel. Wash. Const. art. I, § 22 (amend.10); U.S. Const., Amend. 6, 14. A defendant, however, also has a right to self-representation under both state and federal law. Wash. Const.

⁴ Allen attached several documents to this motion including letters he had written to and received from the Washington State Bar Association regarding grievances he had filed against Mosley, and a "Motion to Withdraw Counsel and Letter [in] Support Thereof" signed by Allen and dated July 14, 2008.

art. I, § 22 (amend.10); Faretta v. California, 422 U.S. 806, 835, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). Because of the tension between these two rights, a defendant wishing to proceed pro se must make an unequivocal request to proceed without counsel, and the trial court must ensure that the waiver of counsel is “knowing, voluntary, and intelligent.” State v. DeWeese, 117 Wn.2d 369, 376-78, 816 P.2d 1 (1991). Self-representation is a grave undertaking, one not to be encouraged, and courts should indulge in every reasonable presumption against waiver. DeWeese, 117 Wn.2d at 379; State v. Chavis, 31 Wn. App. 784, 789, 644 P.2d 1202 (1982); Brewer v. Williams, 430 U.S. 387, 404, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977). However,

This presumption does not give a court *carte blanche* to deny a motion to proceed pro se. The grounds that allow a court to deny a defendant the right to self-representation are limited to a finding that the defendant's request is equivocal, untimely, involuntary, or made without a general understanding of the consequences. Such a finding must be based on some identifiable fact; the presumption [against waiver of the right to counsel] does not go so far as to eliminate the need for any basis for denying a motion for pro se status. Were it otherwise, the presumption could make the right [to self-representation] itself illusory.

A court may not deny a motion for self-representation based on grounds that self-representation would be detrimental to the defendant's ability to present his case or concerns that courtroom proceedings will be less efficient and orderly than if the defendant were represented by counsel. Similarly, concern regarding a defendant's competency alone is insufficient; if the court

doubts the defendant's competency, the necessary course is to order a competency review.

State v. Madsen, 168 Wn.2d 496, 504-05, 229 P.3d 714 (2010) (citations omitted).

A trial court must assume the responsibility for assuring that decisions regarding self-representation are made with at least minimal knowledge of what is demanded in pro se representation. City of Bellevue v. Acrey, 103 Wn.2d 203, 210, 691 P.2d 957 (1984). The favored way of making this finding is via a colloquy on the record that demonstrates the defendant understands the risks of self-representation. Acrey, 103 Wn.2d at 211.

Although there is no specific formula for the colloquy, it should, at minimum, inform the defendant of:

- 1) the nature and classification of charges,
- 2) the maximum penalty upon conviction, and
- 3) the existence of technical and procedural rules which would bind the defendant at trial.

DeWeese, 117 Wn.2d at 378; Acrey, 103 Wn.2d at 211; State v. Silva, 108 Wn. App. 536, 541, 31 P.3d 729 (2001). It is only with this critical information that a defendant can make a knowledgeable waiver of his constitutional right to counsel. Silva, 108 Wn. App. at 541. Moreover,

failure to ascertain whether a defendant is aware of this critical information precludes a trial court from properly deciding whether to grant or deny a request to proceed pro se. Madsen, 168 Wn.2d at 504-05.

Here, the trial court failed to engage Allen in the appropriate colloquy regarding his written request of May 13, 2008, to exercise his constitutional right to self-representation. Supp CP __ (sub no. 34, supra). Instead, the court summarily denied the request, apparently relying on Mosley's claim that he and Allen had "resolved" their conflict, and despite Allen's continued expressed desire to "fire" Mosley. 5RP 3, 5-6. This was error that requires reversal of Allen's judgment and sentence.

The recent decision in Madsen, supra, is instructive. Prior to trial, Madsen made three separate motions to exercise his right to self-representation. The trial court deferred ruling on the first two and instead appointed new counsel, and denied the third just prior to jury selection. 168 Wn.2d at 500. The issues on appeal were whether the trial court erred by 1) deferring rulings on the defendant's motions to proceed pro se and 2) by ultimately denying the motions. 168 Wn.2d at 505. As to the first issue, the Court noted that "if the requirements for pro se status were met . . . , then deferring ruling on the motion is as erroneous as a denial." 168 Wn.2d at 505.

Madsen's first request to proceed pro se was made orally in the midst of his attorney's request to withdraw. 168 Wn.2d at 506. In response, the trial court ask only why Madsen wanted to represent himself, to which Madsen explained it was because he thought he could resolve the matter on his own. 168 Wn. 2d at 505. Noting the trial court's failure to engage Madsen in the preferred colloquy to ascertain whether he understood the nature of the charges, the maximum penalties, and the existence of technical and procedural rules, the Supreme Court concluded there was no basis to find Madsen's request was not unequivocal, timely, voluntary, knowing, and intelligent. 168 Wn.2d at 505-06. The Court concluded, however, that deferring a ruling was appropriate in light of the timing and unexpected nature of Madsen's request. 168 Wn.2d at 506.

Madsen's second request to proceed pro se, unlike the first, was made in advance and in conjunction with an alternative request to fire his current counsel and, presumably, replace with new counsel. 168 Wn.2d at 506-07. In concluding the trial court erred in not granting this unequivocal, timely, voluntary, knowing, and intelligent request, the Supreme Court reject this Court's conclusion that Madsen's request was equivocal because it was made in conjunction with a request for new counsel, noting that such analysis had previously been rejected in State v. Stenson, 132 Wn.2d 668, 741, 737, 940 P.2d 1239 (1997). 168 Wn.2d at

507. The Supreme Court also soundly rejected a finding that the request was equivocal because there were subsequent hearing at which Madsen did not repeat the request, noting that reliance on future events to find a past request equivocal constitutes fallacious reasoning. 168 Wn.2d at 507 n.3.

Having reversed because the court erred denying Madsen's second request, the Supreme Court did not decide whether denial of Madsen's final request to on the eve of trial was further error requiring reversal. 168 Wn.2d at 510. The Court noted, however, that it was error for the trial court to have denied the request by finding it untimely because made right before jury selection, noting that the timeliness issue should have been evaluated based on dates of Madsen's two prior un-ruled upon requests, which were well before trial. 168 Wn.2d at 508, citing State v. Breedlove, 79 Wn. App. 101, 109, 900 P.2d 586 (1995).

Here, as in Madsen, Allen made a timely request to proceed pro se by filing written notice of his intent to do so on May 13, 2008, over a year before trial. Supp CP __ (sub no. 34, supra). That it was filed in conjunction with an alternative request for new counsel did not make it equivocal. Madsen, 168 Wn.2d at 507; Stenson, 132 Wn.2d at 741.

But unlike in Madsen, where the trial court made at least some inquiry into the request to proceed pro se, here the trial court made no

inquiry whatsoever, and instead summarily denied Allen's request based on Mosley's claims that his relationship with Allen was improving. 168 Wn.2d at 505; 5RP 2-3, 6. But what Mosley thought about his relationship with Allen was irrelevant to whether Allen's request to proceed pro se should have been granted. As the Madsen Court reiterated, denial of a request to proceed pro se is appropriate only if the record establishes that it is equivocal, untimely, or not knowing, voluntary and intelligent. 168 Wn.2d at 505-06.

As noted, there can no reasoned claim that Allen's request to proceed pro se was untimely, as it was made over a year before trial. And because the trial court failed to engage in a colloquy with Allen to ascertain whether his request was unequivocal, knowing, voluntary and intelligent, the trial court had no legitimate basis to deny the request. 168 Wn.2d at 505-06. The denial of Allen's request to proceed pro se without an appropriate support in the record requires reversal of Allen's convictions. Madsen, 168 Wn.2d at 510.

D. CONCLUSION

The trial court erred in denying Allen's request to exercise his constitution right to self-representation. Therefore, this Court to reverse his convictions and remand for a new trial

DATED this 15th day of June, 2010.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



CHRISTOPHER H. GIBSON,
WSBA No. 25097
Office ID No. 91051

Attorneys for Appellant

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

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v.)

GREGORY ALLEN,)

Appellant.)

COA NO. 63793-2-1

DECLARATION OF SERVICE

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

THAT ON THE 15TH DAY OF JUNE, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] GREGORY ALLEN
DOC NO. 806649
COYOTE RIDGE CORRECTIONS CENTER
P.O. BOX 769
CONNELL, WA 99326

SIGNED IN SEATTLE WASHINGTON, THIS 15TH DAY OF JUNE, 2010.

x *Patrick Mayovsky*