

63921-8

63921-8

NO. 63921-8-I

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

STATE OF WASHINGTON,

Respondent,

v.

BRIAN ROBERTSON,

Appellant.

REC'D
APR 30 2010
King County Prosecutor
Appellate Unit

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

The Honorable Mary Yu, Judge
The Honorable Sharon Armstrong, Judge
The Honorable Catherine Shaffer, Judge

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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

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

2. The trial court erred in finding Appellant's request to exercise his right to self representation was not "unequivocal." CP 55.

3. The trial court erred in concluding Appellant's desire to control the legal strategy for his defense "was not a sufficient basis for a request to proceed pro se at trial in this matter." CP 55.

Issue Pertaining to Assignment of Error

Did the trial court error in denying Appellant's request to exercise his right to self representation when the request was timely, not done with intent to delay trial, and because the denial was based on unsupportable findings that the request was not unequivocal and not made for a legitimate basis?

B. STATEMENT OF THE CASE

The King County Prosecutor charged appellant Brian Robertson with one count of custodial assault. CP 15; RCW 9A.36.100(1)(b). The prosecution alleged Robertson, "on October 6, 2008, did intentionally assault Officer S. Lao, knowing that he was a full or part-time staff member at an adult local detention facility, to-wit: King County Jail, who was performing official duties at the time of the assault[.]" CP 15.

At a pretrial hearing on May 22, 2009, before the Honorable Sharon Armstrong, Robertson submitted a pro se "Motion for Order for Funds to Investigate Conflicts of Interest" along with a statement outlining his complaints regarding his appointed counsel, George Sjursen. Supp CP ___ (sub No. 48, Order to File, 5/26/09); 1RP 2-4.¹ Robertson asserted Sjursen lied to him, refused to allow him to review discovery materials, failed to conduct research into his case and failed to contact any witnesses identified by Robertson. Id.

On May 27, 2009, the Honorable Catherine Shaffer heard argument on Robertson's pro se motion for an investigator. 2RP 2-6. Judge Shaffer denied the motion without prejudice, noting that although Robertson had shown a "potential conflict" exist between Robertson and Sjursen, it was not sufficiently proved to warrant granting the motion. 2RP 6-7.

On June 10, 2009, Judge Armstrong heard argument on Sjursen's motion to withdraw as Robertson's counsel on the basis that Robertson had filed a bar complaint against him. 3RP 2. Judge Armstrong deferred ruling on the motion until Robertson could provide additional

¹ There are eleven volumes of verbatim report of proceedings referenced as follows: 1RP - 5/22/09; 2RP - 5/27/09; 3RP - 6/10/09; 4RP - 6/24/09; 5RP 6/25/09 (a.m.); 6RP - 6/25/09 (p.m.); 7RP - 6/29/09 (first); 88RP - 6/29/09 (second); 9RP - 6/30/09; 10RP - 7/15/09; and 11RP - 7/17/09.

documentation regarding his complaints about Sjursen's representation.
3RP 4-5.

On June 24, 2009, the parties convened before the Honorable Mary Yu to address various pretrial motions brought by the prosecution, including a hearing to determine the admissibility of Robertson's alleged statements during the alleged incident. 4RP 3. Prior to addressing the prosecution's motions, however, Robertson submitted a pro se "Notice that Counsel has been Fired Due to a Conflict of Interest & Information in Support." CP 18-30; 4RP 3. After hearing from Robertson, Sjursen and the prosecutor, the court denied Robertson's demand to discharge Sjursen. 4RP 3-13.

After denial of his pro se motion to discharge Sjursen, Robertson submitted written "Notice of Assertion of Right to Go Pro Se" and "Notice of Pro Se Participation." CP 16-17; Supp CP __ (sub no. 71, Notice of Assertion of Right to Go Pro Se, 6/25/09); 4RP 23. Thereafter, the court and Robertson engaged in an extended colloquy about why Robertson wanted to represent himself. 4RP 23-28.

In response to the court asking him why he now wanted to represent himself, Robertson explained that the stakes for him were very high (life or death), and that he did not think Sjursen, or any other appointed counsel who had ever represented him before, properly

represented him and therefore he wanted represent himself. 4RP 23-26.

Although Robertson was never question regarding his knowledge of the rules of trial procedure or evidence, the court responded:

I don't think you are going to really be able to represent yourself in terms . . . of you not even knowing the Rules of Evidence. And what I'm hearing you saying you are simply just not happy with Mr. Sjursen at this point. I'm not inclined to fire him. I'm not inclined to let you proceed on your own either. You haven't demonstrated any knowledge or ability to be defending yourself in this matter.

4RP 27.

When Robertson reminded the court that he had previously filed multiple motions and had cited to case law, the court said, "You gave me a lot of cases but it's not the correct case law for what you want." 4RP 28. The court then denied Robertson's motion to proceed pro se. 4RP 28. A written ruling was subsequently entered in which the court found Robertson's request to proceed pro se was not unequivocal and, in any event, his desire to control the legal strategy for his defense "was not a sufficient basis for a request to proceed pro se at trial in this matter." CP 55. Subsequent pretrial requests by Robertson to proceed pro se were either ignored or summarily denied by the court. 4RP 103; 5RP 2.

With Sjursen as counsel, Robertson was convicted as charge. CP 56; 5RP-9RP. Thereafter, Robertson was sentence to 12 months of incarceration. CP 195-201; 11RP 13. This appeal follows. CP 188-89.

C. ARGUMENT

THE TRIAL COURT ERRED WHEN IT SUMMARILY DENIED ROBERSTON'S REQUEST TO PROCEED TO TRIAL PRO SE.

The federal and state constitutions guarantee a criminal defendant the right to self-representation. State v. Madsen, __ Wn.2d __, __ P.3d __, 2010 WL 1077894 at *2 (Slip Op. filed March 25, 2010); State v. Woods, 143 Wn.2d 561, 585, 23 P.3d 1046 (2001). This right is implied under the Sixth Amendment to the United States Constitution as applied to the states by the 14th Amendment. U.S. Const., amend. VI, XIV; Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). The Washington Constitution explicitly guarantees: "In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel. . ." Wash. Const., art. 1, § 22; State v. Silva, 107 Wn. App. 605, 617-18, 27 P.3d 663 (2001).

The right to self representation "is so fundamental that it is afforded despite its potentially detrimental impact on both the defendant and the administration of justice." Madsen, 2010 WL 1077894 at *2 (citing Faretta, 422 U.S. at 834; State v. Vermillion, 112 Wash.App. 844, 51 P.3d 188 (2002)). "The unjustified denial of this [pro se] right requires reversal." State v. Stenson, 132 Wn.2d 668, 737, 940 P.2d 1239 (1997) (emphasis added).

"Assertion of the right to self-representation does not require a showing of technical knowledge. If a person is competent to stand trial, he is competent to represent himself." Vermillion, 112 Wn. App. at 848.

It is well established that whether a defendant's motion to represent himself was properly granted or denied turns on whether the request was unequivocal, timely, knowing, voluntary and intelligent. Madsen, 2010 WL 1077894 at *3; State v. Breedlove, 79 Wn. App. 101, 106, 900 P.2d 586 (1995). If it was, then it is error to deny the request. If it was not, then it is error to grant the request.

Thus, before granting or denying a demand to proceed pro se, the trial court must establish whether the defendant's demand is unequivocally and made with "at least minimal knowledge of what the task entails, preferably through a colloquy on the record assuring that the defendant understands the risks of self-representation." Vermillion, 112 Wn. App. at 851 (citing City of Bellevue v. Acrey, 103 Wn.2d 203, 211, 691 P.2d 957 (1984)). Indeed, the purpose of asking the defendant about his experience representing himself and familiarity with court rules and procedure is solely to ensure that he understands the risks he faces by waiving his right to counsel. 112 Wn. App. at 857.

Here, both verbally and in writing, Robertson repeatedly and unequivocally asserted his right to self-representation. CP 16-17; Supp

CP __ (sub no. 71, supra); 4RP 23-28. The trial court, however, summarily rejected Robertson's demand without engaging him in a colloquy adequate to determine if he understood the risks of proceeding to trial without counsel. Rather, the trial court improperly assumed Robertson lacked the "knowledge or ability" to represent himself, and inexplicably concluded that Robertson's demand was not "unequivocal" and that disagreement with appointed counsel over trial strategy was an inadequate basis to exercise the right to self representation. CP 55; 4RP 27.

It is difficult to imagine how Robertson could have made his demand to proceed pro se any more unequivocal than submitting to the trial court a written statement that said, "I, Brian Robertson, the defendant, am asserting my right to go pro se, here and now." Supp CP __ (sub no. 71, supra); 4RP 23. The trial court's finding that Robertson's demand to exercise his right to self representation was not unequivocal is untenable give this record and should be rejected.

Similarly, it is difficult to imagine a more logical basis for wanting to exercise the right to self representation than disagreement over trial strategy. Yet for some reason the trial court found this was an inadequate basis to exercise the right. CP 55. Like the finding that Robertson's demand to represent himself was not unequivocal, the trial court's

determination that disagreement over trial strategy was an insufficient basis to proceed pro se is also untenable and should be rejected by this Court.

And for a least a few of reasons, the trial court's determination that Robertson lacked the "knowledge or ability" to represent himself does not withstand review or justify denying Robertson's request. 4RP 27. First, the trial court failed to ever ask Robertson what his experience was with regard to criminal trial proceedings, or whether he had ever represented himself in the past. Second, despite the lack of relevant questions from the trial court, Robertson explained that his desire to proceed pro se was based on his experience of appointed counsel failing to adequately represent him in the past, thereby at least implicitly noting he had some trial experience. 4RP 25-26. Finally, whether Robertson knew the Rules of Evidence or not is irrelevant because the "[a]ssertion of the right to self-representation does not require a showing of technical knowledge. If a person is competent to stand trial, he is competent to represent himself." Vermillion, 112 Wn. App. at 848.

In addition to being unequivocal, a motion to proceed pro se must be made in a timely fashion. In determining whether a request is timely, the trial court's discretion lies along a continuum corresponding to the time between the request and the start of trial and is expressed as follows.

The cases which have considered the timeliness of a proper demand for self-representation have generally held: (a) if made well before the trial or hearing and unaccompanied by a motion for continuance, the right of self-representation exists as a matter of law; (b) if made as the trial or hearing is about to commence, or shortly before, the existence of the right depends on the facts of the particular case with a measure of discretion reposing in the trial court in the matter; and (c) if made during the trial or hearing, the right to proceed pro se largely rests in the informed discretion of the trial court.

State v. Fritz, 21 Wn. App. 354, 361, 585 P.2d 173 (1978).

Furthermore, the analysis of timeliness is intimately tied to the question of whether the defendant sought to exercise his right for the purpose of delaying the court proceedings. "The request or demand to defend pro se must be knowingly and intelligently made, it must be unequivocal and it must be timely, i.e., it may not be used to delay one's trial or obstruct justice." Breedlove, 79 Wn. App. at 106 (emphasis added). Thus, "[w]hen the demand to proceed pro se is made before trial and without a motion for continuance, the right exists as a matter of law." State v. Hegge, 53 Wn. App. 345, 348, 766 P.2d 1127 (1989).

Here, timeliness was not a factor relied on by the trial court in denying Robertson's request to proceed pro se. This is not surprising given the request was made before trial and without asking for a continuance (thus delay was not what motivated the request), and thus

under Hegge, the court should have granted his motion as a matter of law. Id. As such, any argument by the State in response that denial of Robertson's request to proceed pro should be affirmed because it was untimely, should be rejected. The right to self-representation is either respected or denied; its deprivation cannot be harmless. Vermillion, 112 Wn. App. at 851 (citing McKaskle v. Wiggins, 465 U.S. 168, 104 S. Ct. 944, 79 L. Ed. 2d 122 (1984)). Thus, the erroneous denial of a Robertson's motion to proceed pro se requires reversal of his conviction without any showing of prejudice. Vermillion, at 858.

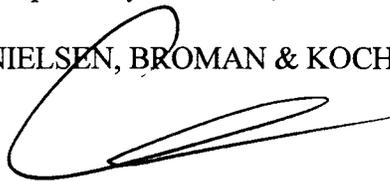
D. CONCLUSION

For the reasons stated herein, this Court should reverse Robertson's conviction and remand for a new trial.

DATED this 30th day of April, 2010.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



CHRISTOPHER H. GIBSON

WSBA No. 25097

Office ID No. 91051

Attorney for Appellant

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DIVISION ONE**

STATE OF WASHINGTON,)	
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Respondent,)	
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v.)	COA NO. 63921-8-1
)	
BRIAN ROBERTSON,)	
)	
Appellant.)	

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 30TH DAY OF APRIL, 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] BRIAN ROBERTSON
DOC NO. 876618
WASHINGTON STATE PENITENTIARY
1313 N 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 30TH DAY OF APRIL, 2010.

x Patrick Mayovsky

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STATE OF WASHINGTON
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