

NO. 66377-1-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

RASHID HASSAN,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE THERESA DOYLE
THE HONORABLE RONALD KESSLER

BRIEF OF RESPONDENT

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A. ISSUE

A trial court must indulge in every reasonable presumption against a defendant's waiver of his right to counsel, unless the defendant's unequivocal request to proceed pro se is made knowingly and intelligently. A frustrated Hassan told the court that he would "rather go pro se" after the court ruled that Hassan would not get a different appointed attorney. Where this request was made without a general understanding of the consequences and the court later found that Hassan was not bringing a motion to represent himself at trial, did the trial court abuse its discretion when it maintained Hassan's right to counsel?

B. STATEMENT OF THE CASE

Appellant Rashid Hassan was charged by information with Possession with Intent to Deliver Cocaine on July 21, 2010. CP 1. Hassan accused his first attorney of assaulting him in open court. 1RP¹ 4-5. That attorney withdrew following those allegations. 1RP 5; 2RP 4. The court then appointed Evgeniya Mordekhova to represent Hassan. 1RP 4-6; 2RP 4. On August 3, Hassan moved

¹ The Verbatim Report of Proceedings will be referred to as follows: 1RP (08/03/10); 2RP (09/08/10); 3RP (10/04/10 and 10/05/10); 4RP (10/06/10); 5RP (10/21/10).

to fire Ms. Mordekhova as his attorney because she would not request a "mistrial," she was "dishonest," and she was "disagreeing with me about everything." 1RP 3-5. Judge Armstrong denied this motion, finding that there was no cause for it, and that Ms. Mordekhova was a "very effective counsel" and told Hassan that "because you're not a lawyer some of the things that you expect are not true about the law." 1RP 6; CP 5.

On September 8, Hassan appeared before Judge Kessler with a second motion to appoint a different attorney. 2RP 3-4. Hassan again expressed his conflict with Ms. Mordekhova, saying that they were not agreeing about anything. 1RP 3. Hassan stated that "I need a new attorney, your Honor." Id. After reviewing the history of the case and that this was already Hassan's second appointed attorney, Judge Kessler denied Hassan's motion for new counsel. 2RP 5.

Frustrated, Hassan said that continuing to be represented by his current counsel violated his constitutional rights and that "I would rather go pro se, your Honor." 2RP 5. That led to following:

THE COURT: You have of [sic] the right to do so. I'll have to ask you some questions, however. Do you understand that you do have the constitutional right to a lawyer?

DEFENDANT HASSAN: This is not a constitutional right. She's entire [sic] against me, your Honor.

THE COURT: Do you understand that you have the constitutional right to a lawyer?

DEFENDANT HASSAN: Not to her, your Honor, not her. Not her. Not her. Not this kind of attorney. It's against my constitutional rights.

THE COURT: You're not answering my questions, sir. Do you understand that you have a constitutional right to a lawyer who can be provided to you at no expense to you?

DEFENDANT HASSAN: I don't, not like her.

THE COURT: Then I won't allow you to proceed pro se.

DEFENDANT HASSAN This is ridiculous.

2RP 5-6.

Judge Kessler issued a written order denying Hassan's motion to substitute counsel and proceed pro se. CP 6. In it, the trial court made a written finding that Hassan's motion to proceed pro se was denied because Hassan "does not understand that he has a right to a lawyer." CP 6.

The case went to trial on October 4 before Judge Doyle.

3RP 5. On the first day of trial, the prosecutor indicated to the court that the prosecutor did not believe that Hassan wanted to represent himself but asked the trial court to revisit the matter in order to make the record clear. 3RP 5-6. That led to following:

THE COURT: Very good. Okay. And did you understand what [the prosecutor] was saying just now?

THE DEFENDANT: Not really.

THE COURT: Okay. Do you want to -- are you asking still to represent yourself or not?

THE DEFENDANT: I have in the past. Me and my attorney, we were having differences in terms of strategy, of court strategy. Witnesses. I have witnesses that -- that will -- that were present at the time of my arrest, and there have been also previous contact with this officer who arrested me who is racist and pushed me to the ground. And I -- I have -- there is all those witnesses haven't been contacted, your Honor. And so I'm coming here with the mercy of the State. I mean, you know, I don't -- I don't see how I'm going to have chance for my case to be, you know, fair trial. To have fair trial. So . . .

THE COURT: Okay. But you are not asking to represent yourself, to be your own lawyer; is that correct?

THE DEFENDANT: Your Honor, I have in the past and, you know, and it's -- it would be hard, I know. It's, you know -- but also I like -- you know, I would like a fair trial where my own witnesses are present. That's what I'm asking for the Court.

THE COURT: Okay. So it sounds like there may be a difference of opinion between you and defense counsel regarding trial strategy; is that right?

THE DEFENDANT: Yeah.

THE COURT: Okay. All right. There's not a motion before the Court to -- for you to request pro se. So I won't address this issue, and it was difficult and that is certainly true. It's very, very difficult to represent yourself in a criminal trial. So at this point we will go forward. All right.

[Discussion continues regarding listening devices.]

3RP 6-7.

Hassan continued to trial represented by Ms. Mordekhova, where Hassan waived jury and was found not guilty as charged. 3RP 96-97; 4RP 17. He was found guilty of the lesser included offense of cocaine possession and was scheduled for sentencing on October 22. 4RP 17, 22-23. The day before sentencing, Hassan again set a motion to discharge Ms. Mordekhova. 5RP 4. Hassan informed the court that he was pleased with the court's verdict in the case, but was still upset with Ms. Mordekhova, and thus he wanted sentencing continued so that he could hire Robert Lind, a private attorney. 5RP 4-6. The court indicated that if Hassan wished to substitute counsel, the new attorney would have to appear before sentencing. 5RP 6-7. At Hassan's sentencing on

December 7, no private counsel appeared, and Hassan was represented by Ms. Mordekhova. CP 37-46. The trial court imposed a standard range sentence. CP 49-51. Hassan now appeals his conviction. CP 47-57.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY DENIED HASSAN'S REQUEST FOR SUBSTITUTE COUNSEL AND PRO SE REPRESENTATION.

Hassan contends that the trial court erred in refusing to grant his request to represent himself. This claim fails. The court properly denied Hassan's request for a third appointed attorney. The record supports the trial court's conclusion that Hassan did not fully understand his right to counsel, and that any request to proceed pro se was more an expression of his dissatisfaction with his current counsel than a knowing and intelligent desire to represent himself. In any event, Hassan's request to represent himself was equivocal, and thus the trial court properly exercised its discretion in maintaining counsel for him at trial.

A criminal defendant does not have an absolute Sixth Amendment right to choose a particular advocate.² State v. Stenson, 132 Wn.2d 668, 733, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998). Nor does the Sixth Amendment guarantee a "meaningful relationship" between the defendant and his attorney. Morris v. Slappy, 461 U.S. 1, 13-14, 103 S. Ct. 1610, 75 L. Ed. 2d 610 (1983). A general loss of confidence or trust in counsel is not sufficient to warrant new counsel. Stenson, 132 Wn.2d at 734; State v. Varga, 151 Wn.2d 179, 200, 86 P.3d 139 (2004).

To justify appointment of new counsel, a defendant must show good cause, such as a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication. Stenson, 132 Wn.2d at 734. When reviewing a trial court's refusal to appoint new counsel, the court considers: 1) the extent of the conflict, 2) the adequacy of the inquiry, and 3) the timeliness of the motion. State v. Cross, 156 Wn.2d 580, 607, 132 P.3d 80, cert. denied, 549 U.S. 1022 (2006). Mere disagreements about trial strategy are insufficient grounds of conflict to require appointment of substitute

² The right to counsel of choice does not extend to a defendant who requires appointed counsel. United States v. Gonzalez-Lopez, 548 U.S. 140, 144, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006) (citing Wheat v. United States, 486 U.S. 153, 159, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988)).

counsel. Id. at 608-10. Whether an indigent defendant's dissatisfaction with appointed counsel is meritorious and justifies appointment of new counsel is within the trial court's discretion. Stenson, 132 Wn.2d at 733.

Hassan was upset with the strategy undertaken by his counsel. 1RP 3-5; 2RP 5; 3RP 6-7. Hassan expressed his disagreement with her methods and witness selection. Id. The basis of the conflict in this case, a fundamental disagreement in strategy, is similar to the one that existed in Stenson. Like Hassan, Stenson had asked the trial court to either appoint new counsel for him or allow him to proceed pro se. Stenson, 132 Wn.2d at 730-31. The basis of the alleged conflict was Stenson's dissatisfaction with his attorneys' unwillingness to accuse another person (the wife of one of the victims) of the murders. Id. at 677, 734. The supreme court concluded that this defense was not supported by the law or the facts, and the disagreement thus did not support substitution of counsel. Id. at 734-35, 737. The court found that it was not an abuse of discretion to deny the request for new counsel. Id. at 737.

Similarly, the trial court here concluded that Hassan's disagreement with his counsel, which was at the heart of his frustration with his current representation, was without cause, and thus the disagreement did not warrant appointing new counsel.

1RP 3; 2RP 4-5; CP 5-6.

a. Pro Se Request.

Frustrated by the trial court's denial of his motion to discharge his attorney, Hassan said that he would "rather go pro se." 2RP 5. A criminal defendant has a constitutional right to waive the assistance of counsel and represent himself. U.S. Const. amend. VI; Wash. Const. art. I, § 22; Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). The unjustified denial of this right requires reversal. Stenson, 132 Wn.2d at 737.

However, a request to proceed pro se must be timely, knowingly and intelligently made, and unequivocally stated. Id.; State v. Imus, 37 Wn. App. 170, 172-74, 679 P.2d 376 (1984).

Both the United States Supreme Court and our supreme court have held that courts are required to indulge in "every reasonable presumption' against a defendant's waiver of his or her right to counsel." In re Det. of Turay, 139 Wn.2d 379, 396, 986

P.2d 790 (1999) (quoting Brewer v. Williams, 430 U.S. 387, 404, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977)). Because requesting pro se status is a waiver of the constitutional right to counsel, a trial court's denial of a request for pro se status is reviewed under an abuse of discretion standard. State v. Madsen, 168 Wn.2d 496, 504, 229 P.3d 714 (2010). Discretion is abused if a decision is manifestly unreasonable or "rests on facts unsupported in the record or was reached by applying the wrong legal standard." Id. (citing State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)). While a trial court does not have carte blanche to deny a motion to proceed pro se, if the trial court's finding is based on "some identifiable fact" that the request was made without a general understanding of the consequences or was made equivocally, the trial court's denial should be affirmed. State v. Madsen, 168 Wn.2d at 504.

- i. Hassan's request was made without a general understanding of the consequences.

A valid waiver of counsel must be made not only voluntarily, but also knowingly and intelligently. Faretta, 422 U.S. at 835. The

validity of a defendant's waiver³ of counsel is an issue which depends upon the particular facts and circumstances of each case. See Johnson v. Zerbst, 304 U.S. 458, 464, 58 S. Ct. 1019, 1023, 82 L. Ed. 1461, 146 A.L.R. 357 (1938).

While a defendant does not need to know all the technical lawyer skills to validly waive counsel, he must generally understand the importance of giving up his right to an attorney and proceeding pro se. Imus, 37 Wn. App. at 173-74. The record must establish that "he knows what he is doing and his choice is made with eyes open." Id. at 174 (quoting Faretta, 422 U.S. at 835).

Hassan came to the trial court hoping to get a new attorney. 1RP 3-5; 2RP 4-5. Only after the court denied this motion to substitute counsel did Hassan say that he would rather proceed pro se. 2RP 5. Judge Kessler indicated that it was Hassan's right to do so and began a colloquy to determine whether Hassan generally understood the importance of giving up his right to an attorney. 2RP 5-6. When the court asked Hassan if he understood

³ Faretta v. California, 422 U.S. 806, 835, 95 S. Ct. 2525, 2541, 45 L. Ed. 2d 562 (1975) adopted the definition of "waiver" as stated in Johnson v. Zerbst, 304 U.S. 458, 464, 58 S. Ct. 1019, 1023, 82 L. Ed. 1461, 146 A.L.R. 357 (1938): "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege."

that he had a constitutional right to a lawyer, Hassan focused on how his attorney violated his constitutional rights. Id. Hassan appeared singularly focused on disparaging his current counsel and expressing his frustration. Id. Judge Kessler attempted to clarify whether Hassan even understood that he had a right to a lawyer. 2RP 5. Hassan said, "I don't, not like her." Id. Judge Kessler denied Hassan's pro se request, finding that Hassan "does not understand that he has the right to a lawyer." 2RP 6; CP 6. This serves as an "identifiable fact," which shows that Hassan did not generally understand the importance of giving up his right to an attorney. The trial court was not manifestly unreasonable in denying Hassan's half-hearted request to proceed pro se. In light of Hassan's failure to even present a general understanding that he was giving up his right to counsel and that he had such right, it was appropriate for the court to conclude that Hassan's request was not being knowingly and intelligently made, and thus there was no abuse of the trial court's discretion in denying Hassan's motion.

Hassan on appeal argues that the trial court "was wrong" when he rejected Hassan's request to go pro se. Appellant's Brief at 9. He claims that the trial court stopped the colloquy prematurely after the court found that Hassan failed to understand that he had a

right to counsel. He asks this Court to "infer a knowing waiver" from the record and find that the trial court abused its discretion. Appellant's Brief at 13. Hassan maintains, without authority, that reversal is required because Judge Kessler did not ask additional questions and make additional advisements on "the risks of self-representation, the seriousness of the charges, the rules to be applied to the presentation of evidence and argument, and the maximum possible punishment upon conviction." Appellant's Brief at 8 (citing State v. Lillard, 122 Wn. App. 422, 427-28, 93 P.3d 969 (2004)).

But these factors that help a trial court consider whether a defendant is validly waiving the right to counsel are merely indicators as to whether the defendant generally understands the import of giving up his right to an attorney. See Imus, 37 Wn. App. at 173-74; see also Lillard 122 Wn. App. at 427-48. If the trial court does not find that the defendant truly understands what it means to have an attorney -- and that he has a right to that attorney -- further colloquy is unnecessary. Indeed, to continue a colloquy after it is already clear to the trial court that the defendant does not really understand the nature or consequence of his request would be inconsistent with the required presumption against waiver. See

In re Det. of Turay, 139 Wn.2d at 396. For these reasons, any request to go pro se was not knowingly and intelligently made and the trial court did not abuse its discretion in maintaining counsel for Hassan.

ii. Hassan's request was equivocal.

Hassan was given an additional opportunity before trial to clarify whether he truly wanted to proceed pro se at trial. Hassan's ambiguous responses to these direct questions from the trial court raise doubts whether Hassan ever wanted to proceed pro se. Thus, even if his original request was knowingly made, his ultimate equivocation as to whether he wanted to proceed pro se invalidates his claim on appeal.

"To protect defendants from making capricious waivers of counsel and to protect trial courts from manipulative vacillations by defendants regarding representation, the defendant's request to proceed pro se must be unequivocal." Stenson, 132 Wn.2d at 740. A defendant may state a request to represent himself as an alternative to the appointment of new counsel. Id. at 741. However, where the request is conditional, it must be unequivocal in the context of the record as a whole. Id. at 741-42.

In Stenson, following denial of his motion for new counsel, the defendant moved to represent himself, adding: "I do not want to do this but the court and the counsel that I currently have force me to do this." 132 Wn.2d at 739. The supreme court found that this conditional request was equivocal, noting that the defendant's conversation with the court focused on his wish for substitute counsel, that the defendant did not refute the court's conclusion that he did not really wish to proceed without counsel, and that the defendant subsequently repeated his request for new counsel without mentioning the request to represent himself. Id. at 742. Under these circumstances, the court found that the trial court had not abused its discretion in refusing to allow Stenson to proceed pro se. Id.

Like Stenson, Hassan repeatedly told the court that his principal wish was to have new counsel in place of his current counsel. 1RP 3-5; 2RP 4-5. Also as in Stenson, Hassan did not clearly refute the trial court's conclusion that he did not really wish to proceed without counsel. Even after trial, Hassan was focused on hiring a private attorney to replace his current counsel, as opposed to proceeding pro se. 5RP 4-6.

Judge Doyle had expressly asked Hassan before trial whether he wanted to represent himself. 3RP 6. Hassan responded that his focus was getting a fair trial and his witnesses called. 3RP 6-7. The Court logically found, and Hassan agreed, that "it sounds like there may be a difference of opinion between you and the defense counsel regarding strategy." 3RP 6-7. Judge Doyle properly concluded that "There's not a motion before the Court to -- for you to request pro se." 3RP 7. Since Hassan did not unequivocally respond that he wanted to represent himself when directly asked, the trial court appropriately relied on the required presumption that Hassan wanted an attorney at trial. 3RP 7; see In re Det. of Turay, 139 Wn.2d at 396.

Hassan argues that his request to represent himself throughout trial "was unwavering." Appellant's Brief at 6. But the record shows that he was at best considering going pro se as a means of expressing his frustration with the trial court for rejecting his motion for substitute counsel. After his request for new counsel was denied, Hassan said that he would "rather go pro se." 2RP 5. Hassan never again stated a desire to represent himself, even when Judge Doyle gave him an opportunity to make or restate the motion. See supra. While it is true that a request to go pro se is

not rendered equivocal by the fact that the defendant is motivated by something other than a singular desire to conduct his or her own defense, the defendant must make that request clear and knowing. 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)).

Modica, unlike Hassan, repeatedly and clearly stated his desire to represent himself, even with the court's dissuading. Modica, 136 Wn. App. 434-39. This Court affirmed the trial court's denial of Modica's motion for reappointment of counsel after the start of trial because his prior requests to proceed pro se were so clear and unequivocal. Id. at 450-51. Hassan made no such clear and repeated expression to proceed pro se.

The state supreme court's decision in Madsen, relied upon by Hassan, is also not to the contrary. In Madsen, the defendant's first request, after private counsel withdrew, was not for different counsel, but to be allowed to proceed pro se. 168 Wn.2d at 501. The trial court deferred ruling on the pro se request, instead appointing new counsel. Id. About six weeks later, Madsen again asked to represent himself. Id. When the trial court suggested instead that new counsel be appointed, Madsen responded, "I'd

rather represent myself." Id. The court again appointed new counsel. Id. at 501-02. Almost two months later, Madsen renewed his motion to proceed pro se, noting that he was "almost forced into doing that." Id. at 502. The trial court again denied the motion, on the basis that Madsen was ill-equipped to represent himself and did not appear to "relish" the idea. Id. Under these circumstances, the supreme court found that Madsen's repeated requests to represent himself were not equivocal. Id. at 507. Madsen was clear from the start that his wish was to represent himself. By contrast, Hassan made it clear from the start that his wish was for new counsel. Accordingly, Madsen does not control this case. Indeed, after his motion to substitute counsel, Hassan never again restated a request to proceed pro se.

The cases referenced by Hassan consistently show that absent a clear and unequivocal request to proceed pro se, a trial court acts properly by keeping a defendant represented by counsel. See State v. Woods, 143 Wn.2d 561, 586-88, 23 P.3d 1046 (2001) (a defendant's frustration with trial delays, where he says "I will be prepared to proceed with -with this matter here without counsel [by trial]"); State v. Luvene, 127 Wn.2d 690, 698-99, 902 P.2d 960 (1995) (expression of frustration by Luvene with the delay in going

to trial where "I'm prepared to go for myself . . .") ; State v. Garcia, 92 Wn.2d 647, 653, 600 P.2d 1010 (1979) (expression of frustration by Garcia with his current counsel and that "I do not wish to have this attorney with me because I believe that he hasn't been representing me right.").

Finally, Hassan argues that his request to represent himself was timely because he did not ask for additional time to represent himself. Normally, a request to proceed pro se can be denied as untimely if it is made with a request for a continuance at trial. See State v. Fritz, 21 Wn. App. 354, 361, 585 P.2d 173 (1978). But this is a moot issue. Hassan did not ask for a continuance at trial because he did not ask Judge Doyle to represent himself. 3RP 6-7. The trial court never had to consider the timeliness of a pro se request, because Hassan did not make such a request. See supra. There was no motion to proceed pro se before the trial court. 3RP 7. The lack of the trial court's consideration of the timeliness of the request serves as further proof that the trial court found that Hassan was not making a clear request to represent himself. After all, had there been a motion or request before the court, Judge Doyle would have properly considered the timeliness of the motion. Absent a clear, unequivocal motion and request to represent

himself at trial, Hassan's claim on appeal that he was denied his right to represent himself at trial fails.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Hassan's conviction.

DATED this 20th day of December, 2011.

Respectfully submitted,

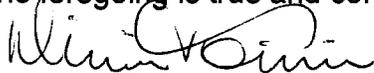
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Andrew Zinner, the attorney for the appellant, at Nielsen Broman, 1908 East Madison Street, Seattle, Washington 98122, containing a copy of the Brief of Respondent, in STATE V. RASHID HASSAN, Cause No. 66377-1, in the Court of Appeals, Division I, for the State of Washington.

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



Name

Done in KENT, Washington

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