

66872-2

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NO. 66872-2-1

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

STATE OF WASHINGTON,

Respondent,

v.

JOSHUA M. KNOX,

Appellant.

BRIEF OF RESPONDENT

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2012 MAY 21 AM 11:56
COURT OF APPEALS
STATE OF WASHINGTON
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I. ISSUES

(1) When a defendant never makes any unequivocal demand to proceed pro se, is the court required to advise him of the maximum possible sentence?

(2) Can a defendant be convicted of both controlled substances homicide and delivery of a controlled substance based on delivery of the same drugs?

(3) At sentencing, the court imposed conditions of community custody that precluded the defendant from possessing alcohol or frequenting establishments where alcohol is a chief commodity for sale. Does the record establish that these conditions are crime-related?

II. STATEMENT OF THE CASE

Brigette Jones and her boyfriend, Steven Duce, were drug users. Between January and October, 2009, they regularly used heroin together. Their usual supplier was the defendant, Joshua Knox. On Halloween, 2009, Mr. Duce came close to death from a drug overdose. As a result, he and Ms. Jones stopped using drugs. RP 143-51.

On December 10, 2009, the defendant spent the night with Ms. Jones. He supplied her with heroin. Twice during the night,

she woke him up complaining of ringing in her ears. At around 4 a.m., he was awakened by a loud snoring noise from her. He went back to sleep. At 8 a.m., he found that she wasn't breathing. RP 48-55. According to medical testimony, Ms. Jones died as a result of the combined effects of heroin, cocaine, and citalopram (an anti-depressant). RP 136.

The defendant was charged with controlled substances homicide and delivery of a controlled substance. CP 24-25. At the beginning of trial, he told the court that he wanted to "fire and dismiss my attorney." He said that he was "requesting a court-appointed attorney or the right to represent myself in this life-altering case." He proceeded to criticize the actions of his attorney. He did not again mention any desire to proceed pro se. He concluded as follows:

Once again, I am asking if I can fire and remove [counsel] from my case. Can you appoint me a public defender, as I have no income at this time.

RP 4-8.

The court proceeded to question the defendant concerning the potential consequences of proceeding pro se. In the course of the colloquy, the court asked the prosecutor to state the maximum sentence. The prosecutor said that it was 10 years on each count.

RP 13. This was incorrect – because the defendant had prior drug convictions, his maximum sentence could be doubled. RCW 69.50.408. The prosecutor correctly stated that the standard sentence ranges were 68-100 months for the controlled substances homicide and 20 to 60 months for the delivery.¹ RP 15.

After warning the defendant of how trial would proceed without counsel, the court asked him what made him think that he wanted to do it on his own. The defendant said that he didn't want to do it on his own – he wanted a public defender. Ultimately, the court asked if he wanted to do it on his own or be represented by existing counsel. The defendant said that he had no choice but to accept his existing counsel. RP 18-20. The case proceeded to a bench trial. The court found the defendant guilty. CP 15-20.

III. ARGUMENT

A. WHEN A DEFENDANT REFUSES TO WAIVE COUNSEL, THE COURT NEED NOT CONDUCT A COLLOQUY TO ESTABLISH THAT THIS DECISION IS VOLUNTARY.

The appellant's brief raises three issues, none of which were raised in the trial court. In his only challenge to the conviction, the

¹ As discussed below, the defendant could not properly be sentenced for both crimes. This would reduce his offender score from 5 to 4. It would not, however, change his sentence range, because the drug sentencing grid has a single column for offender scores from 3 to 5.

defendant claimed that he inadequately “waived” his right to proceed pro se. As this claim alleges “manifest error affecting a constitutional right,” it can be raised for the first time on appeal. RAP 2.5(a)(3).

The defendant’s brief sets out cases dealing with the requirements for waiving the right to counsel. Brief of Appellant at 16, citing Bellevue v. Acrey, 103 Wn.2d 203, 691 P.2d 957 (1984), and State v. Silva, 108 Wn. App. 536, 31 P.3d 729 (2001). He then assumes that the same requirements apply to “waiver” of the right to self-representation. This assumption is unfounded. The two rights are not equivalent:

Unlike the right to the assistance of counsel, the right to dispense with such assistance and to represent oneself is guaranteed not because it is essential to a fair trial but because the defendant has a personal right to be a fool. This right is afforded the defendant despite the fact that its exercise will almost surely result in detriment to both the defendant and the administration of justice.

State v. Fritz, 21 Wn. App. 354, 359, 585 P.2d 173 (1978), review denied, 92 Wn.2d 1002 (1979).

Because of this fundamental difference, the standards for exercising the two rights are entirely different. “[C]ourts are required to indulge in every reasonable presumption against a

defendant's waiver of his or her right to counsel." State v. Madsen, 168 Wn.2d 496, 504 ¶ 12, 229 P.3d 714 (2010). A waiver of the right to counsel must be affirmative and unequivocal. The court must ensure that this waiver is knowing, voluntary, and intelligent. Acrey, 103 Wn.2d at 207.

In contrast, the right to proceed pro se can be lost by inaction. "The right to proceed pro se is neither absolute nor self-executing." Madsen, 168 Wn.2d at 504 ¶ 13. To assert the right, the defendant must make an unequivocal demand. Absent such a demand, the trial court has discretion to require the defendant to proceed with counsel. State v. Stenson, 132 Wn.2d 668, 740-42, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998).

Here, it is questionable whether the defendant ever demanded to proceed pro se at all. At the commencement of trial, he sought to discharge retained counsel. In connection with this request, he said that he wanted "a court-appointed attorney or the right to represent myself." RP 4-5. Thereafter, he never mentioned any desire to represent himself. He concluded his statement by asking the court by asking the court to remove his attorney and appoint a public defender. RP 8.

It is possible for a request to proceed pro se to be stated in the alternative for a request for new counsel. A mere mention of a desire to proceed pro se is, however, not sufficient. The court will look at the record as a whole to determine whether there was an unequivocal demand. Stenson, 132 Wn.2d at 741-42. In Stenson, the defendant filed a “motion to continue trial, appoint new counsel, or in the alternative allow him to proceed pro se.” Id. at 730-31. In arguing the motion, the defendant said that he did not want to represent himself but the court and his counsel had forced him to do that. The Supreme Court held that because the defendant’s request was equivocal, the trial court did not abuse its discretion in refusing to allow him to proceed pro se. Id. at 742.

The facts of Stenson should be contrasted with those of Madsen. There, the defendant likewise requested to proceed pro se or terminate counsel’s representation. In Madsen, however, the defendant specifically said that he was better off representing himself. He repeatedly referred to his constitutional right of self-representation. When the court suggested assigning new counsel, the defendant responded that he would rather represent himself. Madsen, 168 Wn.2d at 501 ¶¶ 4-5. The Supreme Court held that

this constituted an unequivocal demand to proceed pro se. Id. at 507 ¶ 23.

The facts of the present case resemble those of Stenson rather than Madsen. After a brief reference to “the right to represent myself,” the defendant never again mentioned any desire to do so. Rather, he criticized his attorney and requested a public defender. RP 4-8. As in Stenson, the mere reference to a desire to proceed pro se does not constitute an unequivocal assertion of that right.

Since the defendant never unequivocally asserted his right to proceed pro se, no further inquiry by the trial court was necessary. Nevertheless, to ensure that the defendant’s right was protected, the court did proceed to conduct a colloquy. This colloquy clarified what was already implicit in the defendant’s request: he did not want to proceed pro se; he simply wanted a different attorney. RP 18-20.

The defendant points out that the colloquy included a mis-statement of the “maximum” sentence. Under the circumstances of this case, that mis-statement was of purely theoretical importance. The defendant was correctly informed of the standard sentence range. RP 15. The prosecutor had not filed notice of intent to seek

an exceptional sentence, and no grounds existed for the court to impose one without prior notice. Consequently, an exceptional sentence was impossible. As a practical matter, the standard range reflected the maximum possible sentence. RCW 9.94A, RCW 9.94A.535(2), RCW 9.94A.537(1).

The defendant cites cases holding that a defendant must be advised of the maximum sentence before waiving the right to counsel. This is part of the colloquy necessary to demonstrate a knowing, intelligent, and voluntary waiver. Sliva, 108 Wn. App. at 539; Acrey, 103 Wn.2d at 211. The defendant cites no cases applying similar requirements to a *refusal* to waive counsel. This is because no requirement that there be a voluntary waiver of that right to proceed pro se. As already pointed out, that right must be specifically and unequivocally asserted. Stenson, 132 Wn.2d at 740-42. It can be “waived” by mere failure to claim it in clear enough language. Since the court is not required to show a knowing waiver of that right, it is likewise not required to engage in any particular colloquy before allowing the defendant to proceed with counsel – particularly when the defendant never clearly asked to proceed *without* counsel.

In short, the defendant here asked to fire his attorney. The court's refusal of that request has not been challenged on appeal. In his request, the defendant briefly mentioned a desire to represent himself, but he never unequivocally asserted that right. Consequently, the court acted properly in proceeding to trial with the defendant represented by counsel. Any technical error in the court's colloquy did not violate the defendant's constitutional rights.

B. THE STATE CONCEDES THAT CONVICTIONS FOR BOTH CONTROLLED SUBSTANCES HOMICIDE AND DELIVERY OF A CONTROLLED SUBSTANCE CONSTITUTED DOUBLE JEOPARDY.

The defendant next claims that his convictions for both controlled substance homicide and delivery of a controlled substance constituted double jeopardy. Although this claim was not raised at trial, double jeopardy claims may be raised for the first time on appeal. State v. Adel, 136 Wn. App. 629, 631-32, 965 P.2d 1072 (1998).

In determining whether multiple punishments constitute double jeopardy, the question is whether the legislature intended to authorize such punishment. To answer this question, the court follows a three-part analysis. First, the court considers whether there is any statutory provision that expressly authorizes or

precludes multiple punishment. If there is no such provision, the court determines whether the two convictions are supported by the “same evidence” -- that is, whether each offense, as charged, includes elements not included in the other. Finally, the court considers whether there is any evidence of legislative intent for a result contrary to the “same evidence” test. State v. Calle, 125 Wn.2d 769, 776-79, 888 P.2d 155 (1995).

Applying this test in the present case, there is no specific statutory provision that either authorizes or precludes punishment for both controlled substance homicide and delivery of a controlled substance. Under the “same evidence” test, the crime of controlled substance homicide requires proof of an unlawful delivery. RCW 69.50.415(1). This creates a presumption that multiple punishment is not authorized. That presumption can “be overcome only by clear evidence of contrary [legislative] intent.” Calle, 125 Wn.2d at 780. The State agrees that there is no such evidence. Contrary, the court should conclude that the legislature did not intend to authorize convictions for both controlled substances homicide and delivery of a controlled substance based on the same act of delivery. The proper remedy is to vacate the delivery conviction

and remand for re-sentencing. See State v. Turner, 169 Wn.2d 448, 465-66 ¶ 27, 238 P.3d 461 (2010).

C. THE STATE CONCEDES THAT THE COMMUNITY CUSTODY CONDITIONS RELATING TO POSSESSING ALCOHOL AND FREQUENTING ESTABLISHMENTS WHERE ALCOHOL IS SOLD WERE NOT SHOWN TO BE CRIME-RELATED.

Finally, the defendant challenges certain conditions of community custody. Specifically, he challenges the conditions that he not possess alcohol and not frequent establishments where alcohol is a chief commodity for sale. Again, these challenges were not raised at sentencing, but they can be raised for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744 ¶ 5, 193 P.3d 678 (2008).

The State concedes that the record does not provide any indication that the defendant's crime was alcohol-related. Consequently, on this record, the conditions were not shown to be "crime-related." as required by RCW 9.94A.700(5). Unless further evidence on this point is presented at re-sentencing, the conditions should be stricken.

The defendant also argues that the prohibition against "frequenting establishments" is unconstitutionally vague. He cites cases dealing with prohibitions on possessing "pornography." Bahl,

164 Wn.2d at 752-60 ¶¶ 23-47; State v. Sansone, 127 Wn. App. 630, 638-41, 111 P.3d 1251 (2005). These cases are inapposite. Because First Amendment rights are implicated by conditions relating to pornography, such conditions are subject to “a stricter standard of definiteness.” Bahl, 164 Wn.2d at 753 ¶ 24.

When a prohibition does not implicate constitutional rights, it is unconstitutional only if it is “impermissible vague in all of its applications.” Id. at 745 n. 2. Some establishments fall unambiguously within the prohibition involved here – for example, liquor stores and taverns. Consequently, the condition is valid on its face. The possible existence of some “gray areas” does not warrant a pre-enforcement challenge.

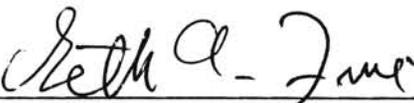
Furthermore, even under the vagueness standard relevant to pornography, the court upheld a similar prohibition. In Bahl, one of the challenged conditions precluded the defendant from frequenting “establishing whose primary business pertains to sexually explicit or erotic materials.” The court held that this condition was sufficiently clear to satisfy due process standards. Id. at 758-59 ¶¶ 38-42. The same is true of the condition in the present case. The sentencing court should be free to re-impose this condition on remand, if sufficient evidence is presented to render it “crime-related.”

IV. CONCLUSION

The conviction for controlled substances homicide should be affirmed. The conviction for delivery of a controlled substance should be vacated. The case should be remanded for re-sentencing.

Respectfully submitted on May 18, 2012.

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AFFIDAVIT OF MAILING

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 18th day of May, 2012, affiant deposited in the mail of the United States of America a properly stamped and addressed envelope directed to:

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BRIEF OF RESPONDENT

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I certify under penalty of perjury under the laws of the State of Washington that this is true.

Signed at the Snohomish County Prosecutor's Office this 18th day of May, 2012.

A handwritten signature in black ink, appearing to read "Diane K. Kremenich", written over a horizontal line. The signature is cursive and extends to the right of the line.

DIANE K. KREMENICH
Legal Assistant/Appeals Unit