

72607-2

FILED
August 10, 2015
Court of Appeals
Division I
State of Washington

72607-2

NO. 72607-2-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

SIRAJ HAJI-SOMO,

Appellant.

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

APPELLANT'S OPENING BRIEF

TRAVIS STEARNS
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, WA 98101
(206) 587-2711

TABLE OF CONTENTS

A. INTRODUCTION 1

B. ASSIGNMENTS OF ERROR..... 1

 1. The court failed to make a meaningful inquiry in Mr. Haji-Somo’s request for self-representation..... 1

 2. The decision of the court to defer consideration of Mr. Haji-Somo’s request for self-representation and then deny it as untimely violated his due process rights. 2

 3. The denial of a continuance of no more than a week to allow Mr. Haji-Somo’s counsel the ability to investigate his case violated Mr. Haji-Somo’s right to present a defense. 2

C. ISSUES PERTAINING TO THE ASSIGNMENT OF ERROR..... 2

D. STATEMENT OF THE CASE 3

E. ARGUMENT..... 5

 1. Mr. Haji-Somo was denied the opportunity to proceed pro se. ... 5

 a. In order to deny a request for self-representation, the court must make a timely ruling on whether the waiver is knowing, voluntary and intelligently made. 5

 b. The court failed to rule upon Mr. Haji-Somo’s requests to represent himself until trial had commenced and then denied his request as not timely made. 7

 c. The failure to make a timely ruling on Mr. Haji-Somo’s request to proceed pro se requires reversal for a new trial. 9

 2. Mr. Haji-Somo was denied an opportunity to adequately present a defense..... 10

 a. The denial of a request for a continuance deprives a defendant of the right to present a defense where the accused is prejudiced and/or the result of the trial would likely have been different if the continuance had been granted..... 10

b.	Mr. Haji-Somo was prejudiced by the court’s denial of his request for a continuance for “at most a week.”	11
c.	The denial of Mr. Haji-Somo’s request for a brief continuance violated his right to present a defense.	12
F.	CONCLUSION.....	14

TABLE OF AUTHORITIES

Cases

<i>Brewer v. Williams</i> , 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977)	7
<i>Chambers v. Mississippi</i> , 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973)	10
<i>Faretta v. California</i> , 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975)	6
<i>State v. A.N.J.</i> , 168 Wn.2d 91, 225 P.3d 956, 966 (2010)	13
<i>State v. Downing</i> , 151 Wn.2d 265, 87 P.3d 1169 (2004)	11
<i>State v. Eller</i> , 84 Wn.2d 90, 524 P.2d 242 (1974)	11
<i>State v. Madsen</i> , 168 Wn.2d 496, 229 P.3d 714 (2010)	6, 7, 9, 10
<i>State v. Stenson</i> , 132 Wn.2d 668, 940 P.2d 1239 (1997)	6
<i>State v. Tatum</i> , 74 Wn.App. 81, 871 P.2d 1123 (1994)	11
<i>State v. Vermillion</i> , 112 Wn. App. 844, 51 P.3d 188 (2002)	6
<i>Washington v. Texas</i> , 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967)	11

Constitutional Provisions

U.S. Const. amend VI	6
Wash. Const. art. I, § 22	5

A. INTRODUCTION

When Siraj Haji-Somo asked the court to proceed pro se months before trial commenced, the court appointed new counsel instead of making an inquiry into whether the decision was knowing, intelligent and voluntary. The court never addressed Mr. Haji-Somo's request until he renewed his motion prior to opening statements, when the court found it to be not timely. Due process is not satisfied when the court appoints new counsel and then fails to make a proper inquiry into the request to proceed pro se. Mr. Haji-Somo's right to self-representation was violated by the failure of the court to make a meaningful inquiry into his request to represent himself.

Mr. Haji-Somo's right to present a defense was violated when the court denied his lawyer's request for a continuance of no more than a week in order to secure the testimony of necessary defense witnesses. Mr. Haji-Somo was thus prevented from presenting an adequate defense.

B. ASSIGNMENTS OF ERROR

1. The court failed to make a meaningful inquiry in Mr. Haji-Somo's request for self-representation.

2. The decision of the court to defer consideration of Mr. Haji-Somo's request for self-representation and then deny it as untimely violated his due process rights.

3. The denial of a continuance of no more than a week to allow Mr. Haji-Somo's counsel the ability to investigate his case violated Mr. Haji-Somo's right to present a defense.

C. ISSUES PERTAINING TO THE ASSIGNMENT OF ERROR

1. Where a request to proceed pro se is timely and unequivocal, the court must make an inquiry into whether waiver of counsel is knowing, voluntary and intelligently made. When the court failed to rule on Mr. Haji-Somo's request to proceed pro se made months before trial until he renewed his motion prior to opening statements result in a denial of his right to self-representation?

2. The right to present a defense is a fundamental due process right. Was Mr. Haji-Somo's denied the due process right to present his own witnesses at trial when the court failed to provide a continuance of no more than a week so Mr. Haji-Somo's counsel could investigate his case?

D. STATEMENT OF THE CASE

Mr. Haji-Somo was charged with one count of residential burglary. CP 1.¹ The information was amended to include an aggravating factor for sentencing that a victim was present when Mr. Haji-Somo exercised his right to trial. 8/7/14 RP 8.

When the court relieved Mr. Haji-Somo's first attorney on May 21, 2014, Mr. Haji-Somo asked the court whether he could represent himself. 5/21/14 RP 6-7. The court deferred ruling on his request to proceed pro se, instead appointing new counsel and continuing Mr. Haji-Somo's case. *Id.* at 15. Anna Busanowski was appointed to represent Mr. Haji-Somo on May 28, 2014. 5/28/14 RP 5.

The court did not revisit the issue of whether Mr. Haji-Somo could represent himself until Mr. Haji-Somo renewed his request on August 11, 2014. 8/11/14 RP 23. The court denied his request as untimely and one which would result in court delay. *Id.* at 24.

Mr. Haji-Somo had a hard time meeting with his attorney prior to trial. 8/11/14 RP 32-33. Once trial began, trial counsel requested a

¹ In this brief, I will refer to the transcript by the date found on the cover page of the transcript, e.g., 5/21/14 RP 1, except for references to voir dire and opening statements, which will be referred to with that additional reference. E.g., 8/17/14 (Voir Dire) RP 1.

continuance of no more than a week in order to complete an investigation of his case. *Id.* at 11-12. Defense counsel explained she needed to contact several witnesses who were necessary to her client's defense. *Id.* at 13. The court denied the motion for a continuance as untimely. *Id.* at 14.

The State argued Mr. Haji-Somo was not so drunk as to be unable to commit burglary. 8/14/14 RP 50. Stating the jury should instead judge whether Mr. Haji-Somo was too intoxicated to form intent, the prosecutor argued "this really comes down to really who's more credible, the defendant or the police and the Hill family." *Id.*, at 52. She then went on to argue that "other than him holding a bottle of the Patron, there's no testimony about the defendant appearing intoxicated, not being able to walk, not being able to talk, the things that you would expect of someone who's drinking nearly two bottles of liquor. *Id.*

Even though Mr. Haji-Somo was arrested in an apartment full of people, he presented no evidence other than his own testimony. *See*, 8/12/14 RP 35. At trial, he stated he had consumed alcohol all night and he had no memory of the event until he woke up in a holding cell. 8/14/14 RP 11, 13. Had the defense investigation been completed, Mr.

Haji-Somo's statements could have been verified by other witnesses. During the course of the suppression hearing, the court heard testimony from Detective James Sturgill that there were four people in the apartment where Mr. Haji-Somo was arrested. 8/7/14 RP 44. At least one male was sleeping or passed out on the living room floor. *Id.* at 45. Det. Sturgill reported Mr. Haji-Somo told him "he was throwing up inside the bathroom." *Id.* at 47-48. None of these witnesses were called at trial.

Mr. Haji-Somo was convicted of residential burglary. 8/14/14 RP at 66. He was sentenced to 90 days confinement, with the opportunity to participate in jail alternatives. 10/17/14 RP 19. He was also required to complete a drug and alcohol evaluation. *Id.*

E. ARGUMENT

1. Mr. Haji-Somo was denied the opportunity to proceed pro se.

a. In order to deny a request for self-representation, the court must make a timely ruling on whether the waiver is knowing, voluntary and intelligently made.

The Washington Constitution provides an explicit right to proceed pro se. Wash. Const. art. I, § 22 ("the accused shall have the right to appear and defend in person"); *State v. Madsen*, 168 Wn.2d

496, 503, 229 P.3d 714 (2010). The right is implicit under the United States Constitution. U.S. Const. amend VI; *Faretta v. California*, 422 U.S. 806, 819, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). The right to self-representation is so fundamental it is afforded despite its potentially detrimental impact on both the defendant and the administration of justice. *Faretta*, 422 U.S. at 834; *State v. Vermillion*, 112 Wn. App. 844, 51 P.3d 188 (2002). “The unjustified denial of this [pro se] right requires reversal.” *Madsen*, 168 Wn.2d at 503 (quoting *State v. Stenson*, 132 Wn.2d 668, 737, 940 P.2d 1239 (1997)).

When a request to proceed pro se is made, the court must determine whether it is timely and unequivocal. *Madsen*, 168 Wn.2d at 504 (citing *Stenson*, 132 Wn.2d at 737). The court must then determine whether the waiver of counsel is voluntary, knowing and intelligent. *Faretta*, 422 U.S. at 835. A request to proceed pro se is valid even if combined with an alternative request for new counsel. *Stenson*, 132 Wn.2d at 741. A court may defer the ruling if the court is unprepared to immediately respond to the request. *Madsen*, 168 Wn.2d at 504. There is no requirement a request to proceed pro se must be made at every opportunity and a defendant is not under an obligation to continue to raise the issue with the court for the request to be effective. *Id.* at 507.

While the court shall indulge in “every reasonable presumption” against a defendant’s waiver of the right to counsel, “this presumption does not give a court carte blanche to deny a motion to proceed pro se.” *Madsen*, 168 Wn.2d at 507 (citing *Brewer v. Williams*, 430 U.S. 387, 404, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977)). “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.” *Madsen*, at 504-05. The denial must be based upon some identifiable fact and were it otherwise, “the presumption could make the right itself illusory.” *Id.* at 505.

b. The court failed to rule upon Mr. Haji-Somo’s requests to represent himself until trial had commenced and then denied his request as not timely made.

Mr. Haji-Somo made two requests to represent himself, the first of which was not ruled upon and the second of which the court found to be untimely.

Mr. Haji-Somo first sought to represent himself on May 21, 2014, when his initial attorney was relieved by the court. 5/21/14 RP 6. Mr. Haji-Somo explained, “I just feel the need to speak for myself.” *Id.* at 7. In asking to represent himself, he also told the court he hadn’t

decided whether he would hire new counsel. *Id.* While the court allowed Mr. Haji-Somo's attorney to be relieved, the court delayed making a decision on whether he could proceed pro se. *Id.* at 14. It does not appear the court made a decision on whether Mr. Haji-Somo could proceed pro se prior to the commencement of trial.

New counsel was appointed before the court reconvened on May 28, 2014. 5/28/14 RP 5. Ms. Brusanowski appeared but Mr. Haji-Somo was not in court and she had not communicated with him prior to the hearing. *Id.* When court reconvened, Mr. Haji-Somo's attorney told the court "Mr. Haji-Somo was very clear that he actually did not want a new appointed attorney. He's in the process of hiring his own private attorney his family actually knows." *Id.*

While the court never addressed whether Mr. Haji-Somo could proceed pro se, he raised the issue again on August 11, 2014. 8/11/14 RP 23. The court denied the request, finding no conflict between Mr. Haji-Somo and his lawyer and that delay might result from his request. *Id.* at 24.² The court also found this request to be "very untimely." *Id.*

² The reasons for Mr. Haji-Somo's renewed request were not preserved in the record because they were inaudible. 8/11/14 RP 23.

Mr. Haji-Somo again asked the court to have current counsel discharged. 8/11/14 RP 31. He told the court he really wanted to represent himself and that he felt he would be good as his own lawyer. *Id.* He told the court he “barely spoke” with his counsel prior to trial. *Id.* at 32-33. The court admonished Mr. Haji-Somo, telling him that if he had been having communication issues with his attorney that he should “have brought this [motion to have counsel relieved] at a much earlier time, which would and could have been more appropriate.” *Id.* at 35. The court again denied Mr. Haji-Somo’s request to represent himself. *Id.* at 36.

c. The failure to make a timely ruling on Mr. Haji-Somo’s request to proceed pro se requires reversal for a new trial.

Before denying the request for self-representation, the court must provide some factual basis supporting the denial. *In re Det. of Turay*, 139 Wn.2d 379, 396, 986 P.2d 790 (1999). “The court cannot stack the deck against a defendant by not conducting a proper colloquy to determine whether the requirements for waiver are sufficiently met.” *Madsen*, 168 Wn.2d at 506.

While delaying the decision on May 21st to determine whether Mr. Haji-Somo’s request to represent himself was not error, the failure

to return to the issue until after trial had commenced denied Mr. Haji-Somo his right to self-representation. Mr. Haji-Somo cannot be punished because the court deferred decision on whether he should represent himself until after he had spoken with newly appointed counsel. *See, Id.* at 508.

Because Mr. Haji-Somo's request to proceed pro se was timely and the court failed to rule upon it until after trial had commenced, Mr. Haji-Somo is entitled to reversal and remand for a new trial. *Madsen*, 168 Wn.2d at 510.

2. Mr. Haji-Somo was denied an opportunity to adequately present a defense.

a. The denial of a request for a continuance deprives a defendant of the right to present a defense where the accused is prejudiced and/or the result of the trial would likely have been different if the continuance had been granted.

“The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations.” *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). This right is basic in our system of jurisprudence. *Id.*

The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to

present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967).

Where a defendant's request for a continuance in order to complete the investigation of his case is denied, the reviewing court will examine whether "the accused was prejudiced by the denial and/or that the result of the trial would likely have been different had the continuance not been denied." *State v. Tatum*, 74 Wn.App. 81, 86, 871 P.2d 1123 (1994) (citing *State v. Eller*, 84 Wn.2d 90, 95-96, 524 P.2d 242 (1974)). The reviewing court thereby determines whether the denial of a continuance violated a person's right to present a defense on a case-by-case basis. *State v. Downing*, 151 Wn.2d 265, 274, 87 P.3d 1169 (2004).

b. Mr. Haji-Somo was prejudiced by the court's denial of his request for a continuance for "at most a week."

After voir dire had begun, the State offered, apparently for the first time, a deferred sentence. 8/11/2014 RP 7. While the court

explained to Mr. Haji-Somo this would result in a dismissal of the charges against him, Mr. Haji-Somo was given very little time to contemplate this offer, having to make a decision that morning. *Id.* at 8.

After discussing the offer, Ms. Brusanowski asked the court for a brief continuance in order to call witnesses in the furtherance of his defense. *Id.* at 11. According to his attorney, Mr. Haji-Somo had not discussed potential witnesses with her previously. *Id.* Mr. Haji-Somo asked the court for “at most a week” to speak to witnesses who would have been able to assist in his defense at trial. *Id.* at 11-12. Mr. Haji-Somo’s attorney declared “that I do believe that these witnesses would be necessary to further that defense, and so they would not be simply frivolous witnesses with information that would not have a significant impact on my client's defense.” *Id.* at 13.

The State objected to the continuance, stating it was not “the proper time for him to be coming up with witnesses that may aid in his defense.” *Id.* at 12. The court found the request for a continuance to be “untimely” and denied Mr. Haji-Somo’s request. *Id.* at 14.

c. The denial of Mr. Haji-Somo’s request for a brief continuance violated his right to present a defense.

Had Mr. Haji-Somo's request for a continuance of no more than a week so that his lawyer could speak to his witnesses and investigate his case was reasonable and necessary to his ability to defend himself. *See, State v. A.N.J.*, 168 Wn.2d 91, 111-12, 225 P.3d 956, 966 (2010) (extent of investigation required vary depending upon the issues and facts of each case).

Without having spoken to the witnesses, Mr. Haji-Somo's attorney was unable to properly defend him. It is clear from the record counsel had not completed any significant investigation, as no witnesses were called other than Mr. Haji-Somo despite the fact he was arrested in an apartment full of other people. 8/12/14 RP 35. Mr. Haji-Somo explained he had been drinking tequila and vodka from seven to eight o'clock the prior evening. 8/14/14 RP 13, 11. As a result, he had no memory of the prior evening. 8/14/14 RP 13. Had the investigation been completed, Mr. Haji-Somo's excessive drinking could have been verified. 8/14/14 RP 13. This would have allowed defense counsel to argue his case from facts verified by witnesses other than her client, which would have strengthened her argument that Mr. Haji-Somo was unable to form the intent to commit the burglary. 8/14/14 RP 58-59.

In fact, lack of corroboration was a cornerstone of the prosecutor's closing argument. The State relied heavily upon the fact that Mr. Haji-Somo was the only witness called by the defense, pointing out that his innocence or guilt came down to "really who's more credible, the defendant or the police and the Hill family." 8/14/14 RP 52. Had defense counsel been granted the brief continuance to complete her investigation, she would have been able to address this argument and the jury would have been able to understand the depth of Mr. Haji-Somo's intoxication. Without the investigation, Mr. Haji-Somo was not able to present a complete defense.

A short continuance to allow defense counsel to prepare a constitutionally adequate defense would have allowed Mr. Haji-Somo's to present a defense and would have cured any inadequacies in his defense. Because the trial court denied his motion, this Court should remand this matter for a new trial.

F. CONCLUSION

This failure to make an adequate and timely inquiry into Mr. Haji-Somo's request to represent himself violated the right to self-representation. Mr. Haji-Somo was also denied the right to present a defense when the court denied his request for a brief continuance.

These violations of his right to due process of law entitle him to a new trial. Mr. Haji-Somo requests that this Court reverse his conviction and remand for further proceedings.

DATED this 10th day of August 2015.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. Stearns', with a long horizontal flourish extending to the right.

TRAVIS STEARNS (WSBA 29935)
Washington Appellate Project (91052)
Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 72607-2-I
v.)	
)	
SIRAJ HAJI-SOMO,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 10TH DAY OF AUGUST, 2015, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY	()	U.S. MAIL
[paoappellateunitmail@kingcounty.gov]	()	HAND DELIVERY
APPELLATE UNIT	(X)	AGREED E-SERVICE
KING COUNTY COURTHOUSE		VIA COA PORTAL
516 THIRD AVENUE, W-554		
SEATTLE, WA 98104		
[X] SIRAJ HAJI-SOMO	(X)	U.S. MAIL
7107 HOLLY PARK DR S	()	HAND DELIVERY
SEATTLE, WA 98118	()	_____

SIGNED IN SEATTLE, WASHINGTON THIS 10TH DAY OF AUGUST, 2015.

X _____ 

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710