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NOTE: UNPUBLISHED OPINION, SEE RCWA 2.06.040

Court of Appeals of Washington,
Division 1.

STATE of Washington, Respondent,
v.
Samiya A. BROWN, Appellant.

Nos. 62122-0-I, 63528-0-I. Jan. 11, 2010.

Appeal from King County Superior Court; Honorable Andrea A. Darvas, J.

## Attorneys and Law Firms

Washington Appellate Project, Attorney at Law, Vanessa Mi-jo Lee, Attorney at Law, Seattle, WA, Samiya A. Brown (Appearing Pro Se), Bellevue, WA, for Appellant.

Prosecuting Atty King County, King Co Pros/App Unit Supervisor, Seattle, WA, Michael Thomas Jerem Hogan, Attorney at Law, Kent, WA, for Respondent.

## Opinion

UNPUBLISHED OPINION

COX, J.

*1 Samiya Brown appeals her conviction of attempted robbery in the first degree and assault in the fourth degree. Because Brown's request to proceed pro se on the first day of the scheduled trial was unequivocal, the trial court properly exercised its discretion in granting her request. We affirm.

In three separate informations, the State charged Brown with attempted robbery in the first degree and two counts of custodial assault. She was represented by two state-appointed attorneys on the three charges. **Tim** Ray **Johnson** represented her on the attempted robbery charge and on one of the custodial assault charges, which were consolidated below and are consolidated here. Another attorney represented her on the second custodial assault charge.

On the day of the scheduled trial, Brown moved to proceed pro se on the consolidated charges for attempted robbery and custodial assault. After conducting a colloquy, the court granted Brown's motion to proceed pro se. At Brown's request, the court also appointed attorney **Johnson** as stand-by counsel.

Later the same day, Brown entered an *Alford*[1] plea on all three charges, under which the custodial assault charges were reduced to assault in the fourth degree. Consistent with the plea agreement, Brown was sentenced to 30 months in confinement and restitution on the attempted robbery charge and 12 months suspended on each of the custodial assault charges.

Brown appeals.

WAIVER OF RIGHT TO COUNSEL

Brown's sole argument is that her request to proceed pro se was equivocal and therefore invalid. We disagree.

The United States Constitution and the Washington State Constitution guarantee criminal defendants the right to self-representation.[2] In *Faretta v. California,*[3] the United States Supreme Court announced the rule that a court cannot force a defendant to accept counsel because the Sixth Amendment grants defendants the right to make a personal defense without the assistance of an attorney.[4] Likewise, our supreme court has recognized that criminal defendants are guaranteed the right to self-representation.[5]

However, the right to self-representation is not self-executing.[6] To exercise the right, a defendant's request must be knowingly and intelligently made.[7] The demand must be unequivocal in the context of the record as a whole[8] and the choice must reflect the defendant's true subjective desire for self-representation.[9] In addition, the trial court is required to apprise the defendant of (1) the nature of the charges; (2) the possible penalties; and (3) the disadvantages of self-representation .[10]

A request to waive assistance of counsel that indicates dissatisfaction with a trial delay or with appointed counsel may indicate that the request to proceed pro se is equivocal.[11] "However, when a defendant makes a clear and knowing request to proceed pro se, such a request 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."[12]

*2 For example, in *State v. Modica,*[13] this court held that the defendant's request to proceed pro se was unequivocal despite being motivated by frustration with a trial delay.[14] Similarly, in *State v. DeWeese,*[15] our supreme court held that the defendant's request to proceed pro se was unequivocal even though it was motivated by frustration with his attorney.[16]

The controlling inquiry in determining whether a request to proceed pro se is valid is whether the defendant has unequivocally asserted the right, not what motivated his desire to assert the right.

In order to protect the defendant's right to a fair trial, "[c]ourts should indulge every reasonable presumption against finding that a defendant has waived the right to counsel."[17]

We review a trial court's grant of a motion to proceed pro se for abuse of discretion.[18]

Here, Brown does not challenge her plea or the sentence. Rather, her sole argument is that that an examination of the record as a whole reveals that her request was equivocal because it was allegedly compelled by dissatisfaction with her attorney, not by a true desire to proceed pro se. We disagree.

Brown cites *State v. Woods*[19] and *State v. Luvene*[20] to support the argument that her request was equivocal. Specifically, she asserts that *Woods* and *Luvene* stand for the general proposition that a request to proceed pro se is equivocal if it is made in order to avoid something that the defendant perceives to be a greater evil-in this case proceeding to trial with Mr. **Johnson** as counsel. The proposition that Brown suggests is broader than the holdings in those cases.

It is true that the court in both *Luvene* and *Woods* denied the defendant's request to proceed pro se, finding that it was actually an expression of frustration with trial delay, rather than a true desire to proceed without an attorney.[21] In *Luvene,* the defendant stated that he would represent himself if necessary and went on to express his anger at how long it was taking to get to trial.[22] The defendant also equivocated by stating that "I'm not even prepared about that," and "[t]his is out of my league."[23] The court held that Luvene's statement indicated a frustration with the delay in going to trial, not an unequivocal assertion of his right to self-representation.[24]

In *Woods,* the defendant objected to his lawyer's request for a second continuance and said he was prepared to proceed without counsel.[25] However, his assertion of the right was spontaneous and primarily expressed frustration with the delay and not a real desire to invoke the right to self-representation.[26] The supreme court held that Woods'

request was equivocal because it merely revealed the defendant's displeasure with his attorney's request for a continuance.[27]

In both *Luvene* and *Woods*, the request to proceed pro se was denied because it was primarily an expression of frustration with delay in getting to trial and not an unequivocal waiver of the right to counsel.

*3 Here, Brown did express frustration with her appointed counsel at two points during the court's colloquy. When initially asked why she wanted to represent herself, Brown answered, "[b]ecause there's a communication barrier between myself and Mr. **Johnson**, and I've been unable to get the court to replace him." Later, she stated: "All I'm doing-I don't want to postpone this trial any further, and I've been trying to get an attorney, but that hasn't-like I said, there's a-been-been a communication barrier."

But while Brown did express dissatisfaction with her appointed attorney, she was unequivocal about her desire to represent herself. After being informed of (1) the nature of the charges against her, (2) the possible penalties, and (3) the disadvantages of self-representation, Brown unequivocally expressed her desire to waive assistance of counsel.[28]

First, Brown's decision to proceed pro se was not arbitrary or reluctant. Her appointed counsel indicated that she had approached him with the request to waive assistance of counsel a week and a half prior to the date that the court heard the motion. He indicated that "Ms. Brown ... has made it quite clear that she would like to represent herself."

Second, over the course of the court's colloquy with her, Brown repeatedly insisted that she wanted to proceed pro se. She confirmed her intent to the trial court at every opportunity. She continued to insist on representing herself even after being strongly advised against doing so by the trial court. Brown also asked for, and was appointed, stand-by-counsel.

Finally, after the court granted her motion for self-representation, Brown was again asked if she was certain that she wanted to represent herself prior to proceeding with trial later that afternoon. She confirmed, "Yeah."

Other than her two remarks to the court indicating dissatisfaction with Mr. **Johnson**, Brown's many additional responses to the court's questions were all firm and unambiguous.[29]

> Q. It's my understanding that you want to represent yourself. I need to tell you I would strongly, strongly advise you against it. Is this still something that you want to do?
>
> A. Yes.[30]
>
> ...
>
> Q. Ms. Brown, based on the questions that I've asked you-and I think you're a smart woman. I think you understand the situation you're in.
>
> A. I do.[31]
>
> ...
>
> Q. Now, your attorney is standing next to you. He's tried many, many cases, and I'm hearing you say you're okay with him as stand-by counsel, but you don't want him representing you. So, I'm going to ask you once again, what is it that you want to do? Do you want to go forward with trial? My understanding is that you want to go immediately. You want to go on your trial date. And I understand that. And do you want to go with stand-by counsel-
>
> A. Yes
>
> Q.-where you represent yourself?
>
> A. Yes
>
> Q. And are you ready to do that?
>
> A. Yes

Q. And is there any question about what it is that you want to do?

*4 A. No. [32]

Brown also cites *State v. Stenson* [33] to support her argument that a request to proceed pro se is equivocal if it arises from a disagreement over trial strategy. There, the court found that the request was equivocal because the defendant expressed that his primary desire was for a change in counsel and not a desire to proceed pro se. [34] That is not the case here.

Brown also argues that the trial court erred by failing to explore further why she wanted to proceed pro se during the colloquy. She suggests that her answers may have been more equivocal if the trial court had probed further into her reasons. We are not required to speculate on what her answers would have been had the court questioned her further.

While the preferred procedure for determining the validity of a request to waive counsel involves a colloquy, there are no formal requirements regarding the substance of the colloquy. [35] Generally, it should include a discussion about the seriousness of the charge, the possible maximum penalty involved, and the existence of technical procedural rules governing the presentation of the accused's defense. [36] These topics were more than adequately covered during the trial court's lengthy colloquy with Brown.

The trial court informed Brown of the maximum penalties associated with the charges levied against her, as well as the technical and procedural rules applicable to a criminal jury trial. The court also asked Brown several questions to ascertain her level of legal knowledge and alert her to the difficulty of self-representation. The court explicitly asked Brown if she had any additional questions about representing herself. She did not. Finally, the court strongly warned her against proceeding pro se. The trial court's colloquy with Brown was sufficient and did not require any further inquiry into her reasons for wanting to proceed pro se.

Here, the record, when viewed as a whole, shows that Brown's request to represent herself was unequivocal. The trial court did not abuse its discretion in granting Brown's motion to proceed pro se.

We affirm the judgment and sentence.

WE CONCUR: LEACH and APPELWICK, JJ.

### Parallel Citations

2010 WL 60197 (Wash.App. Div. 1)

### Footnotes

1 *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

2 U.S. CONST., amend. VI and XIV; WASH. CONST., art. I § 22.

3 422 U.S. 806, 819, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

4 *Id.*

5 *State v. Luvene*, 127 Wn.2d 690, 698, 903 P.2d 960 (1995).

6 *State v. Woods*, 143 Wn.2d 561, 586, 23 P.3d 1046 (2001).

7 *State v. Vermillion*, 112 Wn.App. 844, 851, 51 P.3d 188 (2002).

8 *Luvene*, 127 Wn.2d at 698-99.

9 *State v. Chavis*, 31 Wn.App. 784, 790-91, 644 P.2d 1202 (1982).

10 *Woods*, 143 Wn.2d at 588 (citing *United States v. Balough*, 820 F.2d 1485, 1487 (9th Cir.1987)).

11 *Woods*, 143 Wn.2d 561; *Luvene*, 127 Wn.2d 690.

12 *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)).

13 136 Wn.App. 434, 149 P.3d 446 (2006).

14 *Id.* 378-79.

15 117 Wn.2d 369, 816 P.2d 1 (1991).

16 *Id.* at 378-79.

17 *Vermillion*, 112 Wn.App. at 851.

18 *State v. Modica*, 136 Wn.App. 434, 442, 149 P.3d 446 (2006), *affirmed*, 164 Wn.2d 83, 186 P.3d 1062 (2008).

19 143 Wn.2d 561, 23 P.3d 1046 (2001).

20 127 Wn.2d 690, 903 P.2d 960 (1995).

21 *Woods*, 143 Wn.2d at 585-87; *Luvene*, 127 Wn.2d at 698-99.

22 *Luvene*, 127 Wn.2d at 698-99.

23 *Id.*

24 *Id.* at 699.

25 *Woods*, 143 Wn.2d at 587.

26 *Id.*

27 *Id.*

28 *Woods*, 143 Wn.2d at 588 (citing *United States v. Balough*, 820 F.2d 1485, 1487 (9th Cir.1987)).

29 Report of Proceedings (Jan. 16, 2008)(1) at 1-4, 9, 12-15.

30 *Id.* at 12.

31 *Id.* at 14.

32 *Id.* at 15-16.

33 132 Wn.2d 668, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008, 118 S.Ct. 1193, 140 L.Ed.2d 323 (1998).

34 *Stenson*, 132 Wn.2d at 741-42.

35 *Modica*, 136 Wn.App. at 441.

36 *Id.*

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