NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

DIVISION ONE
FILED: 06/18/2013
RUTH A. WILLINGHAM, CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 11-0549
	)	
Appellee,	)	DEPARTMENT D
	)	
v.	)	Maricopa County
	)	Superior Court
ANTHONY MERRICK,	)	No. CR2010-005367-001
	)	
Appellant.	)	
	)	**DECISION ORDER**
	)	
	)	
	)	
	)	
	)	

The Arizona Supreme Court has directed this court to address whether Appellant Anthony Merrick timely requested to discharge his appellate lawyer and represent himself on appeal. Presiding Judge Maurice Portley, and Judges Patricia K. Norris and Lawrence F. Winthrop, have reviewed the record and conclude that Appellant waived his right to represent himself on appeal.

Procedural Background

The facts of the case are outlined in *State v. Merrick*, 1 CA-CR 11-0549, 2012 WL 4955425, at *1 (Ariz. App. Oct. 18, 2012) (mem. decision). After the jury found him guilty,

Appellant waived counsel and acted as his own lawyer. He filed a number of unsuccessful motions, including one for new trial. He was subsequently sentenced and filed a notice of appeal on August 2, 2011.

This court appointed appellate counsel for Appellant ten days later. Counsel filed the opening brief on March 13, 2012. One week later, Appellant filed an unsuccessful pro se motion for permission to "file a supplemental brief raising additional issues or in the alternative to strike the brief filed and allow appellant to file another brief." He then moved for reconsideration on March 27, 2012, and argued that he did not authorize the opening brief to be filed and "ask[ed] this court to allow him his constitutional right to file his own appellate brief, pro per." The motion also stated that: Appellant did not want counsel; counsel does not speak for him; and counsel was supposed to have notified this court that he wanted to proceed pro per. The motion was denied.

Appellant then filed an unsuccessful motion to file a supplemental brief on April 10, 2012. After we resolved the merits of his appeal, Appellant filed a pro se petition for review. In addition to raising two challenges to the decision, he asserted that he was precluded from representing himself on

appeal.[1] The supreme court denied review on his first two issues, but directed this court to address whether Appellant timely requested to represent himself on appeal.

Analysis

Our supreme court has only once cited to Article 2, section 24 of the Arizona Constitution for the proposition that a defendant can represent himself on appeal. In *State v. Stevens*, after Stevens was sentenced and advised of his appellate rights, Stevens sought to represent himself by filing his notice of appeal and requesting that the transcripts and minutes be sent to him directly so he could "formulate his appeal." 107 Ariz. 565, 566, 490 P.2d 571, 572 (1971). The court gave him a number of extensions to file his brief and when he did not meet the deadline the appeal was ordered to be submitted for consideration on the record. *Id.*

[1] Appellant also claimed that he had to abandon eleven issues on appeal, which he listed as follows: (1) the prosecutor had three witnesses lie, one of whom was a detective who admitted the lie in a different case; (2) there was insufficient evidence for a conviction concerning five of the gift cards; (3) he was ordered to pay restitution on those five gift cards; (4) he was precluded from calling witnesses on his behalf; (5) the State used privileged material to secure his conviction; (6) the search of his room, business and car violated the law; "and several other issues/claims." Those issues are similar to the issues raised in his motion for new trial, excluding the claim for ineffective assistance of trial counsel. We also note that he filed a notice of petition for post-conviction relief two days after his notice of appeal.

Following *Stevens*, we assume without deciding that a defendant has a state constitutional right to represent himself on appeal, but note that *Stevens* did not address when or how a defendant can dismiss his appellate lawyer.[2] The Washington Supreme Court has held that although the state constitution allowed defendant to discharge counsel and represent himself on appeal, "the timing of the defendant's request [to represent himself] may be so tardy as to compromise the execution of an orderly and timely appeals process." *State v. Rafay,* 222 P.3d 86, 90, ¶ 16 (Wash. 2009). Although *Rafay* did not resolve the issue, the Supreme Court of Pennsylvania stated that a defendant cannot dismiss appellate counsel and prosecute his appeal pro se after the opening brief is filed. *Commonwealth v. Grazier*, 713 A.2d 81, 82 (Pa. 1998) (citing *Commonwealth v. Rogers*, 645 A.2d 223, 224 (Pa. 1994) (Flaherty, J., dissenting); *see also Webb v. State*, 533 S.W.2d 780, 784 (Tex. Crim. App. 1976) (rejecting the appellant's attempt to represent himself on appeal after the opening brief was filed).

[2] In *State v. Hampton*, 208 Ariz. 241, 244 n.2, ¶ 7, 92 P.3d 871, 874 n.2 (2004), after noting that the Supreme Court stated that a criminal defendant does not have a federal right to proceed without counsel on direct appeal in *Martinez v. Court of Appeal of California*, 528 U.S. 152, 162 (2000), our supreme court stated that "[w]e have not been confronted with a case after *Martinez* in which a defendant nonetheless seeks to do so and this case presents no occasion for us to address that issue."

The *Grazier* rule is a common sense approach to the issue and minimizes the disruption of the appellate process. If, for example, Appellant had timely requested to act as his own lawyer after appellate counsel was appointed, this court, to comport with the rules of criminal procedure, would have had to suspend the appeal, and revest the trial court with jurisdiction so that it could hold a hearing with Appellant present to determine whether his request to waive counsel was made knowingly, intelligently and voluntarily. *See* Ariz. R. Crim. P. 6.1(c); s*ee, e.g.*, *Smith v. State*, 739 S.W.2d 92, 93 (Tex. Ct. App. 1987). If the court found that the request was informed and voluntary, we would have had to resume jurisdiction and issue a new briefing schedule after giving Appellant time to secure and review the record. To engage in such a process after the opening brief has been filed would "compromise the execution of an orderly and timely appeals process." *Rafay*, 222 P.3d at 90, ¶ 16.

Here, unlike *Stevens*, Appellant did not advise the trial court that he wanted to personally prosecute his appeal. He did not challenge the appointment of appellate counsel or substitute appellate counsel and request to represent himself. He did not specifically tell this court that he wanted to represent himself without the aid of counsel until after the opening brief was

filed.[3] As a result, Appellant waived his opportunity to represent himself on appeal.

/s/

MAURICE PORTLEY, Presiding Judge

[3] Appellant filed a Motion for Judicial Notice in this court on May 13, 2013, and asked us to take judicial notice of certain documents. In addition to correspondence with his appellate lawyer, he included a copy of a letter dated February 20, 2012, "Re: State v. Merrick, CR 2010-005367-001 Appeal," with the salutation "Dear Clerk." The letter is not addressed, but advises the "clerk" that he has asked his appellate lawyer to withdraw and asks for an extension of time to file a brief. If the letter was sent, there is no record of the letter being received by either the Clerk of the Court for the Maricopa County Superior Court or the Clerk of the Court for the Arizona Court of Appeals.