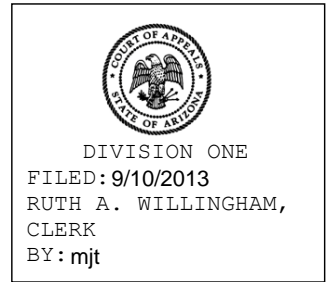


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



IN THE
COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) Court of Appeals
) Division One
Appellee,) No. 1 CA-CR 13-0306
)
v.) Maricopa County
) Superior Court
LASHAUNA COLEMAN,) No. CR2012-135642-001
)
Appellant.) DEPARTMENT M
)
) D E C I S I O N
) O R D E R
)
_____)

Chief Judge Diane M. Johnsen and Judges Kent E. Cattani and Jon W. Thompson have considered the "Notice of Intent to Proceed as a Pro Se Litigant," which appellant filed four months after initiating her appeal. For the reasons set forth below, we deny appellant's request because we conclude she has no right to represent herself on appeal and because her request is untimely.

In *Martinez v. Court of Appeal of California*, 528 U.S. 152, 120 S. Ct. 684 (2000), the United States Supreme Court held there is no federal constitutional right of self-representation on appeal. *Id.* at 154, 160, 120 S. Ct. at 687, 690. After noting that the right of self-representation set forth in *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525 (1975),

"extended only to a defendant's 'constitutional right to conduct his own defense,'" the Court said:

[W]e now address the different question whether the reasoning in support of that holding also applies when the defendant becomes an appellant and assumes the burden of persuading a reviewing court that the conviction should be reversed.

Martinez, 528 U.S. at 154, 120 S. Ct. at 687. The Court began by noting that the Sixth Amendment's guarantees "are presented strictly as rights that are available in preparation for trial and at the trial itself." *Id.* at 160, 120 S. Ct. at 690. The Court noted that unlike trial proceedings, in which there is a presumption of innocence throughout the process, the status of the defendant dramatically shifts on appeal. *Id.* at 162, 120 S. Ct. at 691.

The Court's focus on the distinction between self-representation at trial and on appeal rested in large part on the way the issue had been decided in *Faretta*. There, the question was whether a state could constitutionally hale a person into its criminal courts and force a lawyer upon him, even if the defendant insisted that he wanted to conduct his own defense. *Faretta*, 422 U.S. at 807, 95 S. Ct. at 2527. In contrast, on appeal, "it is ordinarily the defendant, rather than the state, who initiates the appellate process, seeking not

to fend off the efforts of the state's prosecutor but rather to overturn a finding of guilt made by a judge or a jury below." *Martinez*, 528 U.S. at 162-63, 120 S. Ct. at 691. "[A]ppellate proceedings are simply not a case of 'hal[ing] a person into its criminal courts.'" *Id.* at 163, 120 S. Ct. at 691 (quoting *Faretta*, 422 U.S. at 807, 95 S. Ct. at 2527).

As for the weighty interest in autonomy relied on in *Faretta*, the Court noted that "[t]he requirement of representation by trained counsel [on appeal] implies no disrespect for the individual inasmuch as it tends to benefit the appellant as well as the court." *Id.* at 163, 120 S. Ct. at 692. The Court reasoned that from "defendant" to "appellant," "the autonomy interests that survive a felony conviction are less compelling than those motivating the decision in *Faretta*. Yet the overriding state interest in the fair and efficient administration of justice remains as strong as it is at the trial level." *Id.*

Martinez noted that the decision did not preclude a state from recognizing a constitutional right to appellate self-representation under its own constitution, *id.*, and in a pre-*Martinez* decision, *State v. Stevens*, 107 Ariz. 565, 566, 490 P.2d 571, 572 (1971), the Arizona Supreme Court suggested in

dicta such a right.¹ More recently, however, in *State v. Hampton*, 208 Ariz. 241, 92 P.3d 871 (2004), the Arizona Supreme Court stated in a footnote:

The Supreme Court held in *Martinez v. Court of Appeal of California*, 528 U.S. 152, 162, 120 S.Ct. 684, 145 L.Ed.2d 597 (2000), that a criminal defendant has no federal constitutional right to proceed without counsel on direct appeal. We 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.

Id. at 244, n. 2, 92 P.3d at 874. This case presents that issue.

Article II, section 24 of the Arizona Constitution states:

In criminal prosecutions, the accused shall have the right to appear and defend in person, and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed, and the right to appeal in all cases. . . .

¹ In *Stevens*, after the defendant was sentenced and advised of his appeal rights, he sought to represent himself by filing his notice of appeal in *propria persona* and requesting that the transcripts and minutes be sent to him directly so he could "formulate his appeal." 107 Ariz. at 566, 490 P.2d at 572. The court gave him a number of extensions of time to file his brief and when he did not meet the deadlines, the appeal was ordered to be submitted for consideration on the record. *Id.*

We are not persuaded that by including a right of appeal in our constitution, the framers of the Arizona constitution must have intended to include the right of self-representation on appeal. In fact, if the framers intended to add this additional right, the framers presumably would have expressly said so in section 24. Like the Sixth Amendment's guarantee, the Article II, section 24 right to appear and defend in person is a right available in preparation for trial and the trial itself. There is nothing in section 24 to suggest the right to an appeal includes the right to represent oneself on appeal.

We note that the Washington Supreme Court recently interpreted its constitution to guarantee the right to self-representation on appeal. *State v. Rafay*, 222 P.3d 86, 87 (2009). Washington's constitutional provision is nearly identical to ours. Article I, section 22 of the Washington State Constitution states:

In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed, and the right to appeal in all cases. . . .

We find *Rafay* unpersuasive because the court in that case based its holding in large part on "the important concerns surrounding autonomy and the personally held right to defend - whether against a charge at trial or a conviction on appeal." 222 P.3d at 89, ¶ 12. On appeal, however, a defendant seeks not to "fend off the efforts of the State's prosecutor," *Martinez*, 528 U.S. at 162, 120 S. Ct. at 691, but rather, to persuade the appellate court for legal reasons, to overturn a finding of guilt. And as to the notion of a defendant's autonomy, unlike a citizen presumed innocent before a criminal trial, the rights to vote and to bear arms are typically denied to convicted felons. See *Richardson v. Ramirez*, 418 U.S. 24, 48, 94 S. Ct. 2655, 2668 (1974). Accordingly, we decline to follow *Rafay*.

If an Arizona appellant is unsatisfied with appellate counsel's representation, he or she may file a petition for post-conviction relief raising a claim of ineffective assistance of appellate counsel. This proceeding can be commenced within thirty days after the issuance of the mandate in the direct appeal. Ariz. R. Crim. P. 32.4.

Finally, even assuming our constitution affords a right of self-representation on appeal, appellant's request to represent herself is untimely. In *Rafay*, after finding a right of self-

representation, the court noted that "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." 222 P.3d at 90, ¶ 16.

Here, appellant did not advise the trial court that she wanted to personally prosecute her appeal. She requested the appointment of appellate counsel. She did not specifically tell this court that she wanted to represent herself without the aid of counsel until after her counsel received the record and requested an extension of time to file the opening brief. To grant appellant's request at this point, this court, to comport with the rules of criminal procedure, would have to suspend the appeal and revest jurisdiction with the trial court to permit that court to hold a hearing in appellant's presence to determine whether her request to waive counsel is made knowingly, intelligently and voluntarily. See Ariz. R. Crim. P. 6.1(c); see, 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 then would have to resume jurisdiction, order counsel to forward the record to the appellant, and issue a new briefing schedule after waiting for the record transmittal and giving Appellant time to review the record. To engage in such a

process at this point would "compromise the execution of an orderly and timely appeals process." *Rafay*, 222 P.3d at 90, ¶ 16. Accordingly, appellant's request to represent herself is untimely.

_____/S/_____
DIANE M. JOHNSEN
CHIEF JUDGE

CONCURRING:

_____/S/_____
KENT E. CATTANI, JUDGE

_____/S/_____
JON W. THOMPSON, JUDGE