IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	No. 65648-1-I
Respondent,	)	
	)	DIVISION ONE
v.	)	
	)	
DERRICK HILLS,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: January 23, 2012
	)	

Becker, J. — After the trial court denied his motion for substitute counsel, Derrick Hills repeatedly expressed his desire to proceed pro se. Because Hills unequivocally asserted his right to self-representation and knowingly and voluntarily waived his right to counsel, the trial court did not abuse its discretion in permitting Hills to proceed pro se. We also conclude that the trial court properly exercised its discretion when it refused Hills's request for an exceptional mitigated sentence. We therefore affirm his conviction for one count of possession of cocaine with intent to deliver.

FACTS

On February 3, 2010, Seattle Police officers arrested Derrick Hills after observing him engage in what appeared to be three drug transactions in the

Belltown area of Seattle. During the arrest, officers recovered two small rocks of suspected cocaine and a small amount of cash. Officers field-tested the rocks and then sent them to the crime laboratory, which determined that the substance was 3.9 milligrams (.0039 gram) of cocaine.

The State charged Hills with one count of possession of cocaine. At case setting hearings on March 8 and March 15, 2010, Hills expressed his dissatisfaction with appointed counsel. After the trial court denied his motion for new counsel, Hills moved to proceed pro se. After a lengthy colloquy, the trial court concluded that Hills had knowingly, intelligently, and voluntarily waived his right to counsel.

When the parties appeared for trial on May 4, 2010, the trial court conducted another lengthy colloquy. Hills refused the court's offer to appoint counsel and acknowledged that he would "proceed on my own."

At trial, Seattle police officers testified that they had observed Hills approach three individuals and exchange what appeared to be drugs for money. In reference to the small amount of cocaine recovered during Hills's arrest, the officers indicated that they had seen similar "crumbs" sold on the street and that it was not unusual for people to buy such small amounts of cocaine.

The jury found Hills guilty as charged. The court denied his request for an exceptional mitigated sentence based on the small amount of drugs and imposed a low-end standard range sentence.

DECISION

Hills contends that the trial court deprived him of his right to counsel and due process when it permitted him to proceed pro se without an unequivocal request. He argues that because he repeatedly asked for new counsel, his requests to proceed pro se were conditional and equivocal and he did not validly waive his right to counsel. The record fails to support these contentions.

March 8, 2010

Hills began the first case setting hearing on March 8, 2010, by advising the court that he wanted "to be reappointed." He explained that he had repeatedly and unsuccessfully tried to speak with his appointed counsel and that it was "not in my best interest or fairness to receive any kind of legal thing with her." After learning that Hills had been represented for only two weeks and had refused to see his appointed counsel earlier that day, the trial court denied the motion to substitute counsel and continued the hearing for a week to allow Hills to speak with counsel.

Apparently objecting to the court's decision, Hills said that he was ready for trial and asked, "What about me being -- I would like to go." The court responded:

> Sir, if what you're saying is you want to represent yourself, you have a constitutional right to do that, but I'm not going to hear your motion today. I want you to talk with [your attorney], and then I have a fairly large number of questions I need to ask you to make

> sure that's what you're really asking to do. So let's -- let's set that aside for the minute, but we'll see you in one week.
>
> March 15, 2010

At the beginning of the next hearing on March 15, 2010, Hills indicated that he was moving to proceed pro se:

> THE COURT: Tell me why you want to go pro se.
> MR. HILLS: I feel that because due to her scheduling and me being represented fairly and getting a fair trial and being held up, I see it in my best interest, I guess, if I can't be reappointed to represent myself. I don't know law or nothing. I'm not that good, but I see that I --
> THE COURT: Well, even if you had to go pro se and we set your trial today, within speedy trial, your speedy trial expiration looks to be May 14th. So you'd have a trial in early May. Going pro se isn't going to make it any sooner.
> MR. HILLS: Well, and it would start from the 22nd?
> . . . .
> THE COURT: It started from the last hearing you had. So your expiration is 5/14. So going pro se I don't think is going to speed it up.
> MR. HILLS: Okay. Like I say, it's probably in the best and for my fairness, I still will probably have to be reappointed or go pro se. I don't have a problem with that. I do want to be able to say something in my own case and my own defense if I have to, and not being not able to. But also would like to be represented fairly to have a fair trial. And I feel I would not receive that.

At this point, appointed counsel informed the court that she and a supervisor had visited Hills separately during the previous week, and Hills had told the supervisor he wanted to proceed pro se.

The court then conducted a lengthy colloquy in which it discussed with Hills his lack of knowledge about the law and the rules of evidence, the nature of

the crime, the potential punishment, and the court's inability to assist him during the trial. When Hills asked whether "I [can] be pro se with side counsel," the court advised him that "we appoint standby counsel," but that did not relieve Hills of the obligation to select the jury, question the witnesses, prepare jury instructions, and present closing argument. When Hills responded "Okay," the court told him that she thought it was a "terrible decision," that pro se defendants usually do not do very well in the courtroom or when presenting a viable defense, and that she strongly encouraged him to work with his attorney.

> MR. HILLS: Yeah. But I don't feel that it's in my best interest. I don't feel I'm going to receive a fair trial that way.
>
> THE COURT: So in light of the penalty you might suffer if you are found guilty, and the fact that you don't know anything about trying a case and the difficulties of representing yourself, is it still your desire to be pro se in this case?
>
> MR. HILLS: I feel I'm at a bind (sic) not having a choice to go ahead with pro se.
>
> THE COURT: I find that the defendant has knowingly and voluntarily waived right to counsel. I will permit him to represent himself. So is it your desire, sir, to set your case for trial today?
>
> MR. HILLS: Yes.

The court then set the case for trial on May 3, 2010. The court permitted appointed counsel to withdraw based on Hills's lack of trust.

April 23, 2010

At the omnibus hearing on April 23, 2010, Hills served the State with a motion to suppress, which the court reserved for the start of trial. Hills also scheduled a bail reduction hearing for the following week.

May 4, 2010

The parties appeared for trial on May 4, 2010. The trial judge, who was not the same judge who had conducted the earlier hearings, asked Hills about his decision to proceed pro se. Hills explained that it was all a "mix up" because he was just trying to "get relief" from his appointed counsel who he believed would be unable to arrange a "fair trial." He claimed that all he wanted was another counsel for "better" representation and that "they left me to go pro se." Hills also complained that he had been offered the same appointed counsel as "my side counsel."

The court explained to Hills that he did not have a right to select a specific court-appointed counsel but offered to appoint new counsel. Hills declined the offer because he "would have to surrender my rights to a continuance."

The court then told Hills that she was not attempting to talk him out of proceeding pro se but just wanted "to go through these questions to satisfy myself that you really are choosing to do this on your own. Okay?" Hills responded, "Okay." After reviewing in detail with Hills the nature of the charge, the potential punishment, and his knowledge of the criminal trial process, the court inquired:

> THE COURT: All right. Just, again, wanted to make sure that you know and -- which causes me some concern about you proceeding on your own without counsel. And I know that you want to get this done and you want to get it over with but, Mr. Hills, at the same time, the penalty is so serious and severe which is why having an attorney can assist you in forcing the State to put on its

> evidence. And if you haven't studied law and you're not familiar with the rules of procedure and the rules of evidence, the likelihood of you being successful may not be great.
>
> MR. HILLS: I understand.
>
> THE COURT: And when we -- all right. So do you still want to proceed on your own?
>
> MR. HILLS: Proceed on my own.

When the court asked Hills whether there was "anyone who's coerced you or trying to force you into doing this without an attorney," Hills replied, "No, ma'am. No, your Honor."

The case then proceeded to trial.

The State and federal constitutions guarantee a criminal defendant both a right to counsel and the right to self-representation. State v. Madsen, 168 Wn.2d 496, 229 P.3d 714 (2010). But the right to self-representation is not self-executing, and "a criminal defendant who desires to waive the right to counsel and proceed pro se must make an affirmative demand, and the demand must be unequivocal in the context of the record as a whole." State v. Modica, 136 Wn. App. 434, 441, 149 P.3d 446 (2006), aff'd, 164 Wn.2d 83, 186 P.3d 1062 (2008). A court must indulge in "every reasonable presumption" against a defendant's waiver of the right to counsel. In re Det. of Turay, 139 Wn.2d 379, 396, 986 P.2d 790 (1999) (quoting Brewer v. Williams, 430 U.S. 387, 404, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977)), cert. denied, 531 U.S. 1125 (2001). We review the trial court's decision to grant the defendant's motion to proceed pro se for an abuse of discretion. Modica, 136 Wn. App. at 442.

Here, the record shows that Hills's requests to proceed pro se remained

clear and unequivocal through all of the pretrial hearings. From the very first hearing, Hills expressed his frustration with appointed counsel and his doubts about her ability to represent his "best interest" or ensure a fair trial. But he never identified any specific deficiencies or conflicts that would have required the court to investigate the need for new counsel, and Hills does not allege that the trial court abused its discretion in denying his motion to substitute counsel. A general loss of confidence or trust, without more, is not a legitimate reason to substitute new counsel. State v. Stenson, 132 Wn.2d 668, 734, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998); see also State v. DeWeese, 117 Wn.2d 369, 376, 816 P.2d 1 (1991) (when indigent defendant fails to provide court with legitimate reasons for substitute counsel, court may require defendant to either continue with current counsel or proceed pro se).

Moreover, contrary to Hills's assertions, his request to proceed pro se was not equivocal merely because he combined it with an alternative request to have new counsel "reappointed." See Madsen, 168 Wn.2d at 507. Hills repeatedly asserted his desire to proceed pro se after participating in two extensive colloquies, during which the trial judges questioned him about his understanding of the charge, the potential punishment, and his lack of familiarity with criminal procedure. Although Hills was well aware of the possibility of standby counsel, he did not request standby counsel after the court allowed his original appointed counsel to withdraw. The "bind" that Hills described was the

result of his own unwavering insistence, for no legitimate reason, that he would not accept appointed counsel and his refusal to accept any continuance of the trial date.

Viewed in light of the foregoing circumstances, Hills's steadfast assertion of his desire to proceed pro se was unequivocal and accompanied by a knowing, intelligent, and voluntary waiver of his right to counsel.

Hills's comparison of this case to State v. Stenson is unpersuasive. In Stenson, the defendant orally moved to proceed pro se after the trial court denied his motion to substitute counsel. The defendant then followed up with a written request for new counsel. Our Supreme Court agreed that the request to proceed pro se was equivocal in light of the following circumstances:

> Here, almost all of the conversation between the trial judge and the Defendant concerned his wish for different counsel. He repeatedly discussed which new counsel should be assigned. He explained he had contacted a number of attorneys and had asked for permission to talk with his newly-selected counsel. He told the trial court he did not want to represent himself but that the court and his counsel had forced him to do that. More importantly, the Defendant did not refute the trial court's final conclusion that he "really [did] not want to proceed without counsel."

Stenson, 132 Wn.2d at 742 (alteration in original). The defendant's affirmative efforts in Stenson to obtain new counsel differ fundamentally from Hills's repeated and unambiguous requests to proceed pro se, which were coupled only with general complaints about appointed counsel.

Hills's reliance on United States v. Kienenberger, 13 F.3d 1354, 1356 (9th

Cir. 1994), is equally misplaced. In Kienenberger, the defendant's requests to be "counsel of record" were always coupled with his insistence that the court appoint "advisory" or "standby" counsel to assist him on procedural matters. Hills's requests to proceed pro se were never conditioned in this manner.

Hills next contends that the sentencing court failed to exercise its discretion when it denied his request for an exceptional sentence downward based on the small amount of cocaine he possessed at the time of arrest. See State v. Alexander, 125 Wn.2d 717, 723, 888 P.2d 1169 (1995) (an "extraordinarily small amount" of a controlled substance and a defendant's "low level of involvement" in committing the crime may each constitute a substantial and compelling reason justifying a departure from the standard range). He argues that the court wanted to impose an exceptional mitigated sentence but mistakenly believed that it lacked the authority based on a misunderstanding of the law. Our review of the sentencing court's decision is "limited to circumstances where the court has refused to exercise discretion at all or has relied on an impermissible basis for refusing to impose an exceptional sentence below the standard range." State v. Garcia-Martinez, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997), review denied, 136 Wn.2d 1002 (1998).

Citing State v. Alexander, Hills requested an exceptional sentence below the standard range of 60 to 120 months. In Alexander, the defendant acted only as a facilitator for the sale of .03 gram of cocaine by someone else. Our

Supreme Court held that an "extraordinarily small amount" of a controlled substance and a defendant's "low level of involvement" in committing the crime could each constitute a substantial and compelling reason justifying a departure from the standard range. Alexander, 125 Wn.2d at 727-29. The court expressly noted, however, that it was not determining whether the defendant's possession of .03 gram of cocaine was in fact "an extraordinarily small amount" because the trial court's finding to that effect was unchallenged on appeal. Alexander, 125 Wn.2d at 728 n.18. The State opposed Hills's request, noting that even though he possessed a small amount of cocaine at the time of his arrest, the circumstances surrounding his participation in the offense distinguished it from the defendant's actions in Alexander.

During the course of its denial of Hills's request, the sentencing court acknowledged that Hills possessed only a "small" amount of cocaine at the time of his arrest, but stressed the existence of the "three transactions" that had preceded Hills's arrest. The court concluded that

> I absolutely feel that I can't and I don't have the power to do anything else but stay within the standard range, so the sentence I'm imposing today is the low end of the standard range.

Based on these comments, Hills contends that the court mistakenly believed it could not impose an exceptional sentence as a matter of law. He asserts the court may have confused the grounds for an exceptional sentence discussed in Alexander or erroneously considered the amount of cocaine that

Hills might have delivered immediately before his arrest. But when viewed in context, the court's comments fail to support such speculation.

Prior to imposing sentence, in a veiled reference to the long standard-range sentence that Hills faced, the court expressed some concerns about the State's charging decision, limitations that the Sentencing Reform Act of 1981 imposes on judicial sentencing discretion, and the general difficulties in imposing sentences in drug cases. The court then expressly recognized that Alexander supported the existence of some exceptions, "but the facts of that case are not like this, which is why I'm struggling." The court acknowledged the small amount of cocaine that Hills possessed, but explained:

> the evidence by the officers indicated that they observed three transactions before there was a decision to arrest you. That was the testimony that went unrebutted. And the State chose to charge you in the way that they did.

When the decision is viewed in context, there is no indication that the court had any misunderstandings about its legal authority to impose an exceptional sentence or that it misunderstood the grounds for an exceptional sentence in Alexander. Rather, the court reviewed the facts of the offense, including the unrebutted evidence of several apparent drug transactions immediately prior to Hills's arrest and testimony that the street sale of small amounts of drugs was not uncommon. The court then concluded that those facts did not differentiate Hills's offense from other crimes in the same statutory category. A sentencing court has exercised its discretion where it has

considered the facts and concluded that no basis exists to impose a sentence outside the standard range. Garcia-Martinez, 88 Wn. App. at 330.

Affirmed.

Becker, J.

WE CONCUR:

Appelwick, J.

Cox, J.