

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	No. 66377-1-I
Respondent,	)	
	)	DIVISION ONE
v.	)	
	)	UNPUBLISHED OPINION
RASHID ALI HASSAN,	)	
	)	
Appellant.	)	FILED: July 16, 2012

Grosse, J. — To invoke the right to self-representation, a defendant in a criminal case must affirmatively and unequivocally express the intent to proceed pro se. Because Rashid Hassan did not affirmatively and unequivocally express such intent in this case, and because his answers to questions cast doubt on whether he understood the rights he would waive by proceeding pro se, the trial court did not abuse its discretion in ruling that he could not proceed pro se. We therefore affirm.

FACTS

The State charged Hassan with possession with intent to deliver cocaine. Prior to trial, Hassan moved to discharge his appointed counsel because she would not request a “mistrial,” she was “dishonest,” and she was “disagreeing with [him] about everything.” The court denied the motion.

Four weeks later, Hassan again moved to discharge his counsel. The following colloquy ensued:

DEFENDANT HASSAN: Yes, your Honor. I am having a conflict with my attorney. We’re not speaking at the moment. We haven’t

spoke – every time we speak she’s hostile towards me, and I am – **I need a new attorney**, your Honor: We’re not agreeing anything. We’re arguing. She’s always hostile, and **I need a new attorney**, your Honor.

....

THE COURT: What was the basis of the same motion on August 3rd?

....

MS. MORDEKHOVA: Your Honor, there was one motion before the presiding judge on August 3<sup>rd</sup>, and I think there was another motion to discharge me by Mr. Hassan before . . . . **So there were two motions. I believe the basis was either [the] same or very close to what Mr. Hassan articulated just now . . . .**

....

THE COURT: All right. I’m going to deny the motion . . . .

DEFENDANT HASSAN: Your Honor, this is against my constitutional rights. We’re not speaking. I’m not talking to her. **I rather go pro se**, your Honor.

THE COURT: You have the right to do that.

DEFENDANT HASSAN: I’m not talking to her, your Honor. We’re not speaking. She’s hostile towards me. I’m not speaking to her. No communication, period.

THE COURT: Well, you’re not communicating with her. If you want to represent yourself --

DEFENDANT HASSAN: **Yes, I rather --**

THE COURT: You have of the right to do so. I’ll have to ask you some questions, however. Do you understand that you do have the constitutional right to a lawyer?

DEFENDANT HASSAN: This is not a constitutional right. She’s entire against me, your Honor.

THE COURT: Do you understand that you have the constitutional

right to a lawyer?

DEFENDANT HASSAN: Not to her, your Honor, not her. Not her. Not her. Not this kind of attorney. It's against my constitutional rights.

THE COURT: You're not answering my question, sir. Do you understand that you have a constitutional right to a lawyer who can be provided to you at no expense to you?

DEFENDANT HASSAN: I don't, not like her.

THE COURT: Then I won't allow you to proceed pro se. Thank you.<sup>[1]</sup>

In its written order denying the motion, the court stated that Hassan's request to proceed pro se "is denied [because] he does not understand that he has a right to a lawyer."

On the first day of trial, the prosecutor asked the court to engage Hassan in an additional colloquy to make "the best possible clearest record."

THE COURT: Okay. Do you want to -- are you asking still to represent yourself or not?

THE DEFENDANT: I have in the past. Me and my attorney, we were having differences in terms of strategy, of court strategy. Witnesses. I have witnesses that -- that will -- that were present at the time of my arrest . . . . I don't see how I'm going to have chance for my case to be, you know, fair trial. To have fair trial. So . . .

THE COURT: Okay. But you are not asking to represent yourself, to be your own lawyer; is that correct?

THE DEFENDANT: Your Honor, I have in the past and, you know, and it's -- it would be hard, I know. It's, you know -- but also I like -- you know, I would like a fair trial where my own witnesses are present. That's what I'm asking for the Court.

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<sup>1</sup> (Emphasis added.)

THE COURT: Okay. So it sounds like there may be a difference of opinion between you and defense counsel regarding trial strategy; is that right?

THE DEFENDANT: Yeah.

....

THE COURT: Okay. All right. There's not a motion before the Court to -- for you to request pro se. So I won't address this issue

....

The case proceeded to trial and the court found Hassan guilty of the lesser included offense of possession of cocaine. The day before sentencing, Hassan again moved to discharge his counsel. He said he was pleased with the court's verdict but was still upset with counsel. He asked that sentencing be continued so that he could hire a private attorney. The court ruled that if Hassan wished to substitute counsel, the new attorney would have to appear before sentencing. No private counsel ever appeared and the court imposed sentence. Hassan appeals.

#### ANALYSIS

The sole issue on appeal is whether the trial court abused its discretion in refusing to allow Hassan to proceed pro se following his statements at the September 8 hearing.<sup>2</sup> There was no abuse of discretion.

The United States Constitution, amendments VI and XIV, and the Washington Constitution, article I, section 22 (amend. 10), guarantee a criminal

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<sup>2</sup> Denials of requests for pro se status are reviewed for abuse of discretion. State v. Madsen, 168 Wn.2d 496, 504, 229 P.3d 714 (2010).

defendant the right to self-representation.<sup>3</sup> But the right 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.”<sup>4</sup> Although a court must honor a properly made request for self-representation, a court must also indulge in “every reasonable presumption” against a defendant’s waiver of the right to counsel.<sup>5</sup> A request to proceed pro se that indicates dissatisfaction with appointed counsel may indicate the request is equivocal.<sup>6</sup>

Viewed in the context of the record as a whole, Hassan’s statement at the September 8 hearing was not an affirmative and unequivocal request to represent himself. The statement was made after several previous attempts to discharge his counsel. Immediately prior to the statement, Hassan again expressed dissatisfaction with his lawyer and repeatedly requested a new one. Only when the court indicated it would not appoint new counsel did Hassan express interest in self-representation. Significantly, Hassan did not make an

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<sup>3</sup> See Faretta v. California, 422 U.S. 806, 819, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); Madsen, 168 Wn.2d at 503.

<sup>4</sup> State v. Modica, 136 Wn. App. 434, 441, 149 P.3d 446 (2006), aff’d, 164 Wn.2d 83, 186 P.3d 1062 (2008). The requirement that the request be unequivocal prevents a defendant “from making capricious waivers of counsel and . . . protect[s] trial courts from manipulative vacillations by defendants regarding representation.” State v. Stenson, 132 Wn.2d 668, 740, 940 P.2d 1239 (1997).

<sup>5</sup> Madsen, 168 Wn.2d at 504 (quoting In re Det. of Turay, 139 Wn.2d 379, 396, 986 P.2d 790 (1999)).

<sup>6</sup> Stenson, 132 Wn.2d at 740-41; Woods, 143 Wn.2d at 586–87.

affirmative and unequivocal demand to represent himself. Instead, he expressed a preference over his current counsel, stating “I [would] *rather* go pro se.”<sup>7</sup> When the court stated that he had a right to proceed pro se, Hassan simply responded with criticisms of his counsel.

Similarly, when the court repeatedly attempted to determine whether Hassan understood the right he would waive by proceeding pro se, he spoke only of his dissatisfaction with counsel. While a request to proceed pro se is not necessarily equivocal because it is presented as an alternative to substitution of counsel, equivocation may be present when, as here, the record and the defendant’s conversations with the court are dominated by a desire for new counsel.<sup>8</sup>

Given the wording and circumstances of Hassan’s “request” to represent himself, and considering all reasonable presumptions against a waiver of the right to counsel, we cannot say the court abused its discretion.<sup>9</sup>

Hassan’s comparison of this case to State v. Madsen,<sup>10</sup> is unpersuasive. Madsen expressly “moved to proceed pro se” when his lawyer withdrew.<sup>11</sup> The

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<sup>7</sup> (Emphasis added.)

<sup>8</sup> See Stenson, 132 Wn.2d at 742 (In concluding that request to proceed pro se was equivocal, the court noted that “almost all of the conversation between the trial judge and the Defendant concerned his wish for different counsel.”).

<sup>9</sup> Although the court gave a different reason for precluding Hassan from proceeding pro se, we may affirm its decision on any ground supported by the record. State v. Michielli, 132 Wn.2d 229, 242-43, 937 P.2d 587 (1997).

<sup>10</sup> 168 Wn.2d 496, 504, 229 P.3d 714 (2010).

<sup>11</sup> Madsen, 168 Wn.2d at 501.

trial court deferred ruling on the motion and appointed new counsel. When the court took up the motion at a subsequent hearing, Madsen stated, “I think that I’d be better off representing myself . . . . Under Article I[, Section] 22 I have a right to represent myself.”<sup>12</sup> Madsen also tried to argue several substantive points. The trial court expressed concern that Madsen’s true motive was to fire counsel, not necessarily to proceed pro se, and suggested an intermediate step of assigning new counsel. Madsen replied, “I’d rather represent myself.”<sup>13</sup> He also said, “I am gonna revert to my constitutional rights, Washington State constitutional rights, Article 1, Subsection 22, I have a right to represent myself and that’s what I’m going to move forward with doing.”<sup>14</sup> The trial court responded that if Madsen wanted to proceed pro se after new counsel was appointed, it would entertain the motion. The State Supreme Court held that the trial court erred in denying Madsen’s second request to proceed pro se, noting that “Madsen *explicitly* and repeatedly cited article I, section 22 of the Washington State Constitution—the provision protecting Madsen’s right to represent himself.”<sup>15</sup>

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<sup>12</sup> Madsen, 168 Wn.2d at 501.

<sup>13</sup> Madsen, 168 Wn.2d at 501.

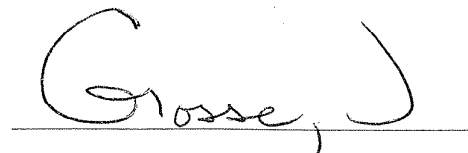
<sup>14</sup> Madsen, 168 Wn.2d at 501.

<sup>15</sup> Madsen, 168 Wn.2d at 506-07. In addition, in holding that the trial court should have engaged in a full colloquy to determine whether Madsen’s waiver of counsel was knowing and voluntary, the Madsen court noted that “Madsen gave a complete answer to the court’s question” as to why he wanted to represent himself. Therefore, more questions were warranted. Here, by contrast, Hassan never answered the court’s question as to whether he understood that he had a constitutional right to counsel.

Nothing remotely resembling Madsen's clear and repeated invocation of his right to self-representation occurred in this case. Rather, this case is more like State v. Stenson,<sup>16</sup> where the defendant's equivocal request to proceed pro se revolved around his wish for different counsel.

Even if Hassan had made an unequivocal request to proceed pro se, we would still uphold the trial court's decision. An unequivocal request to proceed pro se may be rejected if the defendant's waiver of the right to counsel is not voluntary, knowing, and intelligent.<sup>17</sup> A request may be denied if it is "made without a general understanding of the consequences," but the denial "must be based on some identifiable fact."<sup>18</sup> Here, Hassan's answers to clear, repeated questions concerning his right to counsel suggested that he did not fully understand the right and was therefore not knowingly and intelligently waiving it. The court did not abuse its discretion for this reason as well.

Affirmed.

A handwritten signature in cursive script, reading "Grosse, J.", is written above a horizontal line.

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<sup>16</sup> 132 Wn.2d 668, 940 P.2d 1239 (1997).

<sup>17</sup> Madsen, 168 Wn.2d at 504; State v. DeWeese, 117 Wn.2d 369, 377, 816 P.2d 1 (1991).

<sup>18</sup> Madsen, 168 Wn.2d at 505.



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~~Specimen, A.C.T.~~

~~Jan, J.~~