

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	No. 66872-2-1
Respondent,)	
)	DIVISION ONE
v.)	
)	
JOSHUA MARLO KNOX,)	UNPUBLISHED OPINION
)	
Appellant.)	FILED: January 14, 2013
_____)	

Becker, J. – Joshua Knox appeals his convictions for one count of controlled substances homicide and one count of delivery of a controlled substance. The State concedes that the conviction for delivery should have merged with the conviction for controlled substances homicide and that there was no basis for a community custody condition prohibiting Knox from possessing alcohol or frequenting establishments where alcohol is the chief commodity for sale. But we reject Knox’s claim that the trial court caused reversible error by misadvising him about the maximum sentence he faced; because Knox did not waive his right to counsel, the trial court was not required to engage in a colloquy with him about the consequences of doing so. We accept the State’s concessions and remand for proceedings consistent with this opinion. We affirm in all other respects.

FACTS

On December 10, 2009, Joshua Knox purchased heroin and gave some to an acquaintance, Bridgette Johns. Knox and Johns went to Knox's house, used the heroin and fell asleep. Johns awoke twice during the night and complained that she did not feel well, but Knox advised her to go back to sleep. The next morning, Knox found Johns foaming at the mouth and nonresponsive. He called 911, but Johns was pronounced dead shortly thereafter. A forensic toxicologist testified that a heroin overdose was the cause of Johns' death.

Knox was charged with one count of controlled substances homicide and one count of delivery of a controlled substance. On the morning of trial, Knox moved to fire his attorney and proceed either with a public defender or pro se. Knox admitted he had previously been represented by a public defender but had chosen to retain his own counsel. The trial court denied Knox's request to be rescreened for a public defender and gave Knox the choice of proceeding with retained counsel or representing himself. To assist Knox in making the decision, the trial court discussed with Knox his ability to represent himself as well as the penalties Knox faced if convicted. In the course of the colloquy, the trial court asked the prosecutor to state the maximum sentence and standard range for both counts. The prosecutor incorrectly replied that the maximum sentence was 10 years on each count, when in fact the maximum sentence was 20 years due to Knox's prior drug convictions, pursuant to RCW 69.50.408. The prosecutor correctly stated the standard range for both counts. When the trial court asked

Knox if he still wanted to represent himself, Knox replied that he didn't "feel comfortable with these decisions" but agreed that he'd "rather not do it on [his] own." He chose to proceed with retained counsel. Following a bench trial, Knox was convicted on both counts. As a condition of community custody, Knox was ordered to "not possess or consume alcohol and . . . not frequent establishments where alcohol is the chief commodity for sale." Knox timely appeals.

DECISION

Knox argues that the trial court committed reversible error by misadvising him of the maximum sentence he faced if convicted. But because Knox did not want to represent himself, the trial court was not obligated to discuss with him the perils of doing so, and any misinformation regarding the applicable penalties was inconsequential.

Both the United States Constitution and the Washington Constitution guarantee a criminal defendant the right to self-representation. See Faretta v. California, 422 U.S. 806, 819, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); State v. Madsen, 168 Wn.2d 496, 503, 229 P.3d 714 (2010). But in order to exercise this right, it is incumbent upon the defendant to request it; the court is not required to advise or suggest it. State v. Fritz, 21 Wn. App. 354, 359, 585 P.2d 173 (1978), review denied, 92 Wn.2d 1002 (1979). "The right to proceed pro se is neither absolute nor self-executing." Madsen, 168 Wn.2d at 504. A demand to proceed pro se must be affirmative and unequivocal. Fritz, 21 Wn. App. at

359. The preferred procedure for making this determination is for the trial court to conduct a colloquy with the defendant on the record, discussing the seriousness of the charge, the possible maximum penalty involved, and the existence of technical procedural rules governing the presentation of a defense. 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 trial court should indulge every reasonable presumption against finding that a defendant has waived the right to counsel. State v. Chavis, 31 Wn. App. 784, 789, 644 P.2d 1202 (1982).

It was clear that Knox did not want to represent himself. Knox's request for "a court-appointed attorney or the right to represent myself" came in the context of expressing dissatisfaction with his attorney. After the trial court discussed with Knox his educational history, his knowledge of criminal law and procedure, and whether he felt comfortable questioning witnesses, Knox admitted he did not want to proceed pro se and reiterated his request for a public defender. When the trial court informed Knox that was not an option, Knox agreed he wanted to continue being represented by his attorney. Because Knox withdrew his request to represent himself, the trial court was not required to engage in any particular type of colloquy to allow Knox to proceed with counsel. Knox's argument fails.

Knox's two remaining assignments of error are both conceded by the State. Knox argues that convicting him for both controlled substances homicide

and delivery of a controlled substance constituted double jeopardy. A defendant may face multiple charges arising from the same conduct, but double jeopardy forbids entering multiple punishments for the same offense imposed in the same proceeding. State v. Womac, 160 Wn.2d 643, 650-51, 160 P.3d 40 (2007). The State concedes that the two convictions merge and that the lesser conviction should be vacated. We accept the State's concession as well taken and remand for the trial court to strike the delivery conviction and to recalculate Knox's offender score accordingly.

Knox also challenges the sentencing court's order that he not possess alcohol or frequent "establishments where alcohol is the chief commodity for sale." A court may impose only a sentence that is authorized by statute. State v. Barnett, 139 Wn.2d 462, 464, 987 P.2d 626 (1999). Knox argues, and the State concedes, that the sentencing court did not have the authority to impose this condition unless it constituted a "crime-related prohibition." RCW 9.94A.703(3)(f). A crime-related prohibition is an order that prohibits "conduct that directly relates to the circumstances of the crime for which the offender has been convicted." RCW 9.94A.030(10). Because there is no evidence in the record that alcohol was involved in Johns' death, the condition prohibiting Knox from possessing alcohol and from frequenting establishments where alcohol is the chief commodity for sale must be stricken on remand.¹ In light of our

¹ Knox concedes that he may be prohibited from consuming alcohol pursuant to former RCW 9.94A.700(5)(d) (2009), and we do not disturb this portion of the condition on appeal.

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resolution, we need not address Knox's argument that such a condition is unconstitutionally vague.

Affirmed in part and remanded.

Becker, J.

WE CONCUR:

Leach, C. J.

Grosse, J.

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