No. 81450-3

FAIRHURST, J. (concurring) – I agree with the majority that Kurt Randall Madsen was effectively denied his right to proceed pro se. I write separately because the majority unwisely erodes the requirement that a waiver of counsel be knowing, voluntary, and intelligent.

Criminal defendants have the right to represent themselves at trial. Wash. Const. art. I, § 22; U.S. Const. amend. VI; *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). This right stands in opposition to a defendant's right to the assistance of counsel. *State v. DeWeese*, 117 Wn.2d 369, 376, 816 P.2d 1 (1991). One cannot proceed pro se without waiving the right to assistance of counsel. *City of Bellevue v. Acrey*, 103 Wn.2d 203, 209, 691 P.2d 957 (1984). It is therefore out of caution that the law requires courts to "'indulge in every reasonable presumption' against a defendant's waiver of his or her 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)).

In order to prevent "capricious waivers of counsel" and "manipulative

vacillations by defendants," a defendant's request to proceed pro se must be unequivocal. *DeWeese*, 117 Wn.2d at 376. The right to represent oneself is not absolute, and the request to proceed pro se must also be timely. *Id.* at 377. Additionally, the law requires that a defendant's waiver of the right to counsel be knowing, voluntary, and intelligent. *Acrey*, 103 Wn.2d at 208-09.

I agree with the majority's conclusion that Madsen's requests on both January 24, 2006 and March 7, 2006 were timely and unequivocal. However, I disagree with the majority's conclusion that Madsen made a knowing, voluntary, and intelligent waiver of counsel.

In order to show that a waiver is knowing, voluntary, and intelligent, the record at a minimum "must reflect that the defendant understood the seriousness of the charge, the possible maximum penalty involved, and the existence of the technical procedural rules governing the presentation of his defense." *DeWeese*, 117 Wn.2d at 378. The preferred method of establishing that the defendant understands the risks of proceeding pro se is by a colloquy on the record. *Id.*

Here, the trial court never engaged in a colloquy on the record that informed Madsen of the nature of the charges, the severity of the penalties, or the existence of technical procedures. Nor does the record reflect that Madsen understood the risks of proceeding pro se. Despite this, the majority finds that Madsen made a knowing,

intelligent, and voluntary waiver.[1] Majority at 10. The majority bases this conclusion on the fact that "the court failed to ask further questions and there is no evidence to the contrary." *Id.* The majority's logic effectively flips the *Turay* presumption against a waiver of counsel and is a radical change from the existing standard.

The majority justifies its decision by recognizing that a trial court "cannot stack the deck against a defendant by not conducting a proper colloquy." *Id.* The majority does well to identify that a court has a duty to engage in a colloquy. If a court could refuse to undertake a colloquy, the court could effectively strip defendants of the right to self-representation by ensuring that a record is insufficient to show a knowing, voluntary, and intelligent waiver. However, removing the requirement that the record establish that the defendant understands the risks of proceeding pro se is the wrong way to address this problem.

I would conclude that if a defendant makes a timely and unequivocal request to proceed pro se, then a court errs when it fails to engage in a colloquy where the record does not otherwise establish that the defendant understands the charges, penalties, and procedures. A court's failure to engage in a colloquy would not be

[1]The majority refers to Madsen's *request* as being knowing, voluntary, and intelligent. Majority at 10. However, a request need only be timely and unequivocal. In order to avoid confusing the *request* to proceed pro se with the *waiver* of the right to counsel, a better practice would be to refer to the *waiver* as knowing, voluntary, and intelligent.

error if the court attempted to engage in one and that attempt was thwarted by the defendant. A court would still have discretion to defer ruling on the motion to proceed pro se and consequently defer engaging in the colloquy, if such a deferral is justified.

Here, because Madsen's request was timely and unequivocal, and the record does not otherwise establish that Madsen understood the risks of proceeding pro se, the trial court had an obligation to engage in a colloquy. The court never undertook a proper colloquy. Therefore, the court erred unless Madsen prevented the court from engaging in a colloquy, or the court properly deferred ruling on the issue.

The State asserts that the trial court's attempts to engage in a colloquy were thwarted by Madsen. It is undoubtedly true that trial courts will often face great difficulties when dealing with pro se defendants. While the record makes it sufficiently clear that Madsen's interjections presented obstacles for the trial court, I would not find that Madsen prevented the trial court from engaging in a colloquy. Each case must be judged on its own facts and particular circumstances, and I can conceive of no single incantation that would resolve in every situation the question of whether an attempt to engage in a colloquy has been frustrated by the defendant. However, I would be more sympathetic to the State's argument if the record reflected that the trial court had warned Madsen that a failure to engage in the

colloquy would prevent Madsen from representing himself. On this record, I do not find the State's argument persuasive.

The remaining question in this case is whether the trial court's deferrals on January 24, 2006 and March 7, 2006 were proper. We have recognized that trial courts have discretion in managing their calendars. *State ex rel. Sperry v. Superior Court*, 41 Wn.2d 670, 671, 251 P.2d 164 (1952). Similarly, a trial court's decision to grant or deny a continuance falls within its sound discretion. *State v. Downing*, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004). A trial court abuses its discretion when its decision is based on untenable grounds or made for untenable reasons. *Id.*

I agree with the majority that Madsen's request was properly deferred on January 24, 2006 because the trial court did not have prior notice of the request. I also agree with the majority that Madsen's request on March 7, 2006 was not so unexpected as to warrant deferral. However, I would find that further analysis is required to hold the trial court in error.

I conclude that a court's discretionary decision to defer ruling on a motion to proceed pro se should be upheld if the deferral was based on tenable grounds and tenable reasons.[2] The trial court stated that it was deferring Madsen's motion to

[2]The majority opinion is less than clear about when a court may defer ruling on defendant's motion to proceed pro se. The majority opens by stating that "a court may defer ruling if the court is reasonably unprepared to immediately respond to the request." Majority at 8. However, the majority then categorically states that if all the requirements for proceeding pro se

proceed pro se to find out "number one, whether he's competent . . . [a]nd, number two, whether or not he's going to get along with new counsel and not want to represent himself." Report of Proceedings (Mar. 7, 2006) at 17. Neither of these reasons is tenable.

If the court was concerned about Madsen's competency, it should have ordered a competency hearing under RCW 10.77.060. If "there is a reason to doubt [a defendant's] competency," RCW 10.77.060(1)(a)-(b) prescribes procedures by which the defendant shall be examined. RCW 10.77.060(1)(a) does not anticipate lawyers acting in place of mental health professionals. Because the trial court did not order a competency review, Madsen's competence cannot be an appropriate basis to defer ruling on his pro se motion.

Similarly, deferral cannot be justified as giving Madsen another chance to visit with counsel and possibly change his mind. While I hesitate to rule that such a reason could never justify deferral, it was an inappropriate reason to defer ruling at the March 7, 2006 hearing. The trial court had already required Madsen to meet with new counsel after the January 24, 2006 hearing. Because Madsen rejected his

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are met, "then deferring ruling on the motion is as erroneous as a denial." Majority at 9. Ultimately, the majority finds that Madsen's request on January 24, 2006 was timely and unequivocal, and his waiver was knowing, voluntary, and intelligent. Majority at 9-10. Despite finding all of the requirements met, the majority concludes that it was not error to defer ruling on Madsen's motion because the trial court had no prior notice of Madsen's pro se request. Majority at 10.

first assigned counsel and had again requested to proceed pro se, requiring Madsen to go through the same process again is not a tenable reason for deferral. Accordingly, the trial court's deferral was in error.

Because the trial court did not engage in a colloquy with Madsen, and because the deferral was not justified by tenable reasons, Madsen was denied the opportunity to establish that his waiver was knowing, voluntary, and intelligent. Therefore, the trial court effectively deprived Madsen of his right to proceed pro se. Consequently, I would reverse the Court of Appeals and remand for a new trial.

AUTHOR:
Justice Mary E. Fairhurst

WE CONCUR:

Justice Susan Owens

Justice Charles W. Johnson