

**IN THE SUPREME COURT OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

KURT RANDALL MADSEN,

Petitioner.

No. 81450-3

En Banc

Filed March 25, 2010

J.M. JOHNSON, J.—This case involves a criminal defendant’s “right to appear and defend in person, or by counsel,” which is expressly protected by Washington Constitution article I, section 22. Kurt Madsen was first represented in a criminal proceeding by counsel appointed for him. Unhappy with counsel, Madsen moved to proceed pro se on three occasions, citing and quoting the relevant Washington constitutional provision. The trial court deferred ruling on the first two motions and instead appointed new counsel.

Madsen's third motion was formally denied the day before scheduled jury selection. We reverse the Court of Appeals and hold that the trial court abused its discretion by denying Madsen the right of self-representation.

### Facts and Procedural History

On September 2, 2004, Madsen placed three telephone calls to Deborah Stuart in violation of a no-contact order. Between the first and second call Stuart notified the police, and Madsen was later arrested and charged with three counts of felony violation of a court order under former RCW 26.50.110(1), (5) (2000).

At a court proceeding on January 24, 2006, Madsen's privately retained counsel withdrew and Madsen personally moved to proceed pro se. When the trial court inquired why Madsen wished to represent himself, Madsen replied that he believed he "could resolve the whole issue." Verbatim Report of Proceedings (VRP) (Jan. 24, 2006) at 5. The court deferred on ruling on the pro se request, instead appointing Madsen new counsel and stating, "After you have a chance to talk with them [new counsel], if you still want to proceed pro se, I'm more than happy to hear the motion." *Id.*

On March 7, 2006, the trial court held a hearing to consider Madsen's motion to proceed pro se or in the alternative to terminate his counsel's representation. VRP (Mar. 7, 2006) at 3. Madsen stated several reasons why he did not want to be represented by his then-counsel and concluded, "I think that I'd be better off representing myself . . . . Under Article I [Section] 22 I have a right to represent myself." *Id.* at 8. Madsen also tried to argue several substantive points and interrupted the court on several occasions.

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." *Id.* at 12. The court asked Madsen's counsel if he had any concerns regarding Madsen's competency, and counsel responded affirmatively. Madsen then said to the court, "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." *Id.* at 13.

The trial court responded that if Madsen wanted to proceed pro se after new counsel was appointed, the court would "entertain the motion." *Id.* at 19. The court also stated that it wanted someone to find out whether Madsen

was competent. Madsen objected to appointment of new counsel and volunteered to take an “IQ test” or a “psychological exam[,] [w]hatever you need.” *Id.* at 18-19. No competency hearing or exam was ever ordered. At a hearing on March 9, Madsen’s new appointed counsel informed the court she had no concerns regarding Madsen. The court made no further comments regarding Madsen’s competency.

On May 2, 2006, Madsen renewed his motion to proceed pro se. The trial court replied that it did not think Madsen was prepared to interview and select jury members or become sufficiently familiar with trial procedures in time for trial. The court then asked Madsen whether he still wished to represent himself, and Madsen replied, “at this point I am forced, almost forced into doing that, so I would say yes.” VRP (May 2, 3, 4, 8, 2006) at 87. The court then stated, “I am going to deny your motion to proceed pro se. I don’t feel you are prepared.” *Id.* at 89.

On May 3, at the prosecutor’s urging, the trial court clarified its grounds for denying Madsen’s motion. The court stated it had denied Madsen’s pro se motion after noting that Madsen had not been to law school, did not know how to select a jury, and that the court had noticed Madsen

rolling his eyes and interpreted such as Madsen “not relish[ing] the idea” of representing himself. *Id.* at 138. The court again asked if Madsen wished to represent himself. Madsen refused to answer, stating that the judge had earlier told him that “the only decisions you have at this point is whether to plead guilty or not guilty.” *Id.* at 125, 138-39. The court then noted that Madsen’s motion was made when the jury was about to be selected and adjourned the hearing.

The trial court entered a written order on May 4, 2006, denying Madsen’s pro se motion. The order stated that during the May 2 hearing, Madsen had been “extremely disruptive,” “repeatedly addressed the court at inopportune times,” and “consistently showed an inability to follow or respect the court’s directions.” Clerk’s Papers (CP) at 21. The court found that Madsen “at first was equivocal” in his pro se request, that Madsen was concerned about his attorney’s preparation for trial, and that the “court engaged in a colloquy [sic] with the defendant to ensure that the defendant understood the risks and consequences of self-representation.” *Id.* The written order noted that trial was set to commence the next day, but that “regardless of whether defendant’s request to proceed pro se is in his best

interests, the Court finds that defendant's request was untimely, and granting the request would obstruct the orderly administration of justice." CP at 22. The first witness for trial was actually called on May 8, 2006.

Madsen was convicted and received an 18 month sentence on August 9, 2006. The Court of Appeals upheld Madsen's conviction. *State v. Madsen*, noted at 143 Wn. App. 1028, 2008 WL 625282. Madsen petitioned this court, and we granted review.<sup>1</sup>

### Analysis

Criminal defendants have an explicit right to self-representation under the Washington Constitution and an implicit right under the Sixth Amendment to the United States Constitution. Wash. Const. art. I, § 22 ("the accused shall have the right to appear and defend in person"); *Faretta v. California*, 422 U.S. 806, 819, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). This right is so fundamental that it is afforded despite its potentially detrimental impact on both the defendant and the administration of justice. *Faretta*, 422 U.S. at 834; *State v. Vermillion*, 112 Wn. App. 844, 51 P.3d 188 (2002). "The unjustified denial of this [pro se] right *requires* reversal." *State v. Stenson*,

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<sup>1</sup> Because we find error in the trial court's denial of Madsen's motion to proceed pro se, we need not address other claims raised by Madsen.

132 Wn.2d 668, 737, 940 P.2d 1239 (1997) (emphasis added).

However, both the United States Supreme Court and this court have held that courts are required 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)). As a request for pro se status is a waiver of the constitutional right to counsel, appellate courts have regularly and properly reviewed denials of requests for pro se status under an abuse of discretion standard. *E.g.*, *State v. Hemenway*, 122 Wn. App. 787, 792, 95 P.3d 408 (2004). Discretion is abused if a decision is manifestly unreasonable or “rests on facts unsupported in the record or was reached by applying the wrong legal standard.” *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003).

The right to proceed pro se is neither absolute nor self-executing. *State v. Woods*, 143 Wn.2d 561, 586, 23 P.3d 1046 (2001). When a defendant requests pro se status, the trial court must determine whether the request is unequivocal and timely. *Stenson*, 132 Wn.2d at 737. Absent a finding that the request was equivocal or untimely, the court must then determine if the

defendant's request is voluntary, knowing, and intelligent, usually by colloquy.<sup>2</sup> *Faretta*, 422 U.S. at 835; *State v. Stegall*, 124 Wn.2d 719, 881 P.2d 979 (1994). Even if a request is unequivocal, timely, voluntary, knowing, and intelligent, a court may defer ruling if the court is reasonably unprepared to immediately respond to the request. Again, the court shall indulge in “‘every reasonable presumption’ against a defendant’s waiver of his or her right to counsel.” *Turay*, 139 Wn.2d at 396 (quoting *Brewer*, 430 U.S. at 404).

This presumption does not give a court carte blanche to deny a motion to proceed pro se. The grounds that allow a court to deny a defendant the right to self-representation are limited to a finding that the defendant’s request is equivocal, untimely, involuntary, or made without a general understanding of the consequences. Such a finding must be based on some identifiable fact; the presumption in *Turay* does not go so far as to eliminate the need for any basis for denying a motion for pro se status. Were it otherwise, the presumption could make the right itself illusory.

A court may not deny a motion for self-representation based on

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<sup>2</sup> A colloquy is unnecessary if there are independent, identifiable facts that show whether the request is voluntary, knowing, and intelligent.

grounds that self-representation would be detrimental to the defendant's ability to present his case or concerns that courtroom proceedings will be less efficient and orderly than if the defendant were represented by counsel. Similarly, concern regarding a defendant's competency alone is insufficient; if the court doubts the defendant's competency, the necessary course is to order a competency review. *In re Fleming*, 142 Wn.2d 853, 863, 16 P.3d 610 (2001); RCW 10.77.060(1)(a).

Madsen made three separate motions to proceed pro se, one each in January, March, and May 2006. Though the trial court deferred its decision on Madsen's first two motions, we examine each motion independently to determine if the requirements for pro se status were met. If so, then deferring ruling on the motion is as erroneous as a denial.

*a. January 24, 2006*

Madsen's motion for pro se status on January 24, 2006, was unequivocal, timely, voluntary, knowing, and intelligent. Thus, had Madsen's motion been denied, the trial court would have committed reversible error. Madsen clearly stated that he sought pro se status and never wavered from that position. As the case had not yet been set for trial, the only conclusion

that can be drawn is that Madsen's motion was both unequivocal and timely.

The trial court's colloquy to determine whether Madsen's motion was voluntary, knowing, and intelligent was limited to asking why Madsen wanted to represent himself, and Madsen answered that he thought he could resolve the case on his own. We need not decide whether this answer is sufficient to show that Madsen made a voluntary, knowing, and intelligent waiver of his right to counsel. Madsen gave a complete answer to the court's question. The court failed to inquire further or identify facts suggesting that Madsen's request was legally deficient. As stated above, the presumption in *Turay* must be coupled with some factual basis; the court cannot stack the deck against a defendant by not conducting a proper colloquy to determine whether the requirements for waiver are sufficiently met. As the court failed to ask further questions and there is no evidence to the contrary, the only permissible conclusion is that Madsen's request was voluntary, knowing, and intelligent.

However, the trial court did not err by deferring Madsen's motion. As the Court of Appeals properly noted, a trial court must be allowed the flexibility and discretionary authority to properly manage its own affairs.

*Madsen*, 2008 WL 625282, at \* 5. The record reflects that the trial court had no notice of Madsen's desire to request pro se status prior to Madsen's saying so in the midst of his counsel's motion to withdraw. The court may reasonably have felt unprepared to immediately consider a request for pro se status. The trial court was within the bounds of proper discretion to delay ruling on the matter until it could properly prepare to rule on the issue.

*b. March 7, 2006*

Madsen's second request for pro se status was unequivocal, timely, voluntary, knowing, and intelligent, and the trial court had advance notice of Madsen's request. The trial court therefore abused its discretion by failing to grant Madsen pro se status after this request.

Madsen *explicitly* and repeatedly cited article I, section 22 of the Washington State Constitution—the provision protecting Madsen's right to represent himself. Madsen never wavered from his demand for self-representation. Unlike his January motion, the court had clear notice; the hearing was explicitly set to consider Madsen's motion to proceed pro se or, alternatively, to fire his attorney.

The Court of Appeals identifies two reasons why Madsen's request

was equivocal. First, it was coupled with an alternative remedy to fire Madsen's then counsel. Second, there had been court appearances after both the January and March requests where Madsen did not raise his pro se request. Both of these reasons rely on improper legal reasoning and thus reliance on such is an abuse of discretion.

We have previously stated that an unequivocal request to proceed pro se is valid even if combined with an alternative request for new counsel. *See Stenson*, 132 Wn.2d at 741. The argument that Madsen's request was equivocal because it was coupled with an alternative request is fallacious and ignores this court's precedent. Madsen twice invoked and cited, by article and section, his state constitutional right to represent himself. There was no equivocation. Madsen's inclusion of an alternative remedy is irrelevant to whether Madsen's request was unequivocal.

The Court of Appeals also held that Madsen's motion was equivocal because Madsen waited over a month to renew his first motion, and Madsen did not subsequently renew his request for a period of time. *Madsen*, 2008 WL 625282, at \*6. This is not the correct test. There is no requirement that a request to proceed pro se be made at every opportunity. Further, a trial

court's finding of equivocation may not be justified by referencing future events then unknown to the trial court. Such prophetic vision is impossible for the trial court.<sup>3</sup> The trial court told Madsen on both January 24 and March 7 that it was deferring its ruling on Madsen's motion until Madsen consulted with new counsel. Madsen cannot be punished for doing exactly as the court required.

Madsen's request was timely. The trial court clearly thought there was sufficient time for new counsel to be appointed and become familiar with the case. In such a situation, the trial court should find that a defendant's request for pro se status is also timely unless there are specific facts that provide grounds for a contrary ruling.

Here, however, the trial court did not find Madsen's March 7 motion untimely as of March 7, but instead treated the motion as deferred and renewed on May 2, the day before jury selection. The trial court then held that the motion occurred the day before the scheduled jury selection and was untimely. The court erred by assessing the timeliness of all three pro se requests on the basis of the final motion renewal on May 2. As the Court of

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<sup>3</sup> The Court of Appeals succumbed to the historian's fallacy by relying on then-future events to justify the trial court's denial of Madsen's request.

Appeals on another occasion has properly identified, timeliness is determined on a continuum:

If the demand for self-representation is made (1) *well before the trial or hearing and unaccompanied by a motion for a continuance, the right of self representation exists as a matter of law*; (2) as the trial or hearing is about to commence, or shortly before, the existence of the right depends on the facts of the particular case with a measure of discretion reposing in the trial court in the matter; and (3) during the trial or hearing, the right to proceed pro se rests largely in the informed discretion of the trial court.

*State v. Barker*, 75 Wn. App. 236, 241, 881 P.2d 1051 (1994) (emphasis added). This continuum standard was cited but improperly applied by the Court of Appeals. *Madsen*, 2008 WL 625282, at \*5. Where a court is put on notice of a defendant's desire to proceed pro se but nevertheless delays ruling on the motion, fairness requires the timeliness of the request must be measured from the date of the initial request. *State v. Breedlove*, 79 Wn. App. 101, 109, 900 P.2d 586 (1995). Madsen clearly indicated on January 24 and March 7 that he desired to proceed pro se. The Court of Appeals distinguished *Breedlove* by noting that "Madsen allowed new counsel to represent him for substantial periods of time" and that "Madsen's persistent disruptions impaired the orderly administration of justice." *Madsen*, 2008

WL 625282, at \*7. These distinctions are insufficient. Although the trial court's duties of maintaining the courtroom and the orderly administration of justice are extremely important, the right to represent oneself is a fundamental right explicitly enshrined in the Washington Constitution and implicitly contained in the United States Constitution. The value of respecting this right outweighs any resulting difficulty in the administration of justice.<sup>4</sup>

Closely related to timeliness is the concern that a defendant will invoke the right to self-representation to obstruct or delay the administration of justice. The Court of Appeals held that Madsen was generally disruptive, particularly during the May hearing. It must be remembered, however, that a criminal defendant's right to pro se status cannot be denied simply because affording the right will be a burden on the efficient administration of justice. *Faretta*, 422 U.S. at 834; *Vermillion*, 112 Wn. App. at 850-51. Though Madsen did interrupt the trial court on several occasions, Madsen was trying to address substantive issues that the record shows he clearly thought were unresolved and were not addressed by the court. A court may deny pro se

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<sup>4</sup> After pro se status is granted, the court retains power to impose sanctions for improper courtroom behavior. The court may also appoint standby counsel or allow hybrid representation and even terminate pro se status if a defendant is sufficiently disruptive or if delay becomes the chief motive.

status if the defendant is trying to postpone the administration of justice. Madsen never requested a continuance. A court may not deny pro se status merely because the defendant is unfamiliar with legal rules or because the defendant is obnoxious. Courts must not sacrifice constitutional rights on the altar of efficiency.

The record suggests that one reason the trial court deferred ruling on Madsen's March 7 motion was concern over competency. The trial court asked Madsen's counsel if he had concerns regarding Madsen's competency. After counsel replied in the affirmative, the court immediately decided to defer ruling on the motion. Once Madsen had new counsel appointed, the court inquired as to whether this counsel had such concerns. Counsel replied that she did not, and the court voiced no further competency concerns.

Incompetency may be a legitimate basis to find a request for self-representation equivocal, involuntary, unknowing, or unintelligent. However, simply deferring ruling is incorrect as a matter of law. If the trial court was concerned with Madsen's competency, it should have ordered a competency hearing. *Fleming*, 142 Wn.2d at 863 (“once there is a reason to doubt a defendant's competency, the court must follow the statute to determine his or

her competency to stand trial” (quoting *City of Seattle v. Gordon*, 39 Wn. App. 437, 441, 693 P.2d 741 (1985)); RCW 10.77.060(1)(a). Appointing new counsel to evaluate competency is not proper because lawyers are not mental health experts. Madsen’s motion should have been granted.

*c. May 2, 2006*

Because we find that Madsen’s motion to proceed pro se was improperly denied on March 7, 2006, we need not determine whether the trial court’s denial of Madsen’s May 2, 2006, motion was further error.

Conclusion

We hold the trial court’s denial of Madsen’s motion for pro se status was error. Madsen was entitled as a matter of law to an order allowing him to defend in person as guaranteed by the Washington Constitution. We reverse the Court of Appeals and remand for further proceedings.

AUTHOR:

Justice James M. Johnson

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WE CONCUR:

Chief Justice Barbara A. Madsen

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Justice Gerry L. Alexander

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Justice Richard B. Sanders

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Justice Debra L. Stephens, result

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Justice Tom Chambers

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