63152-7

63152-7

NO. 63152-7-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

KIRK SAINTCALLE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

BRIEF OF APPELLANT

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2. The trial court violated Mr. Saintcalle's rights under article I, section 22, and the Sixth Amendment by improperly denying his motion to proceed pro se.

3. The prosecutor committed misconduct in closing argument by vouching for the State's witnesses and implying that the jury could not acquit unless it found the police-officer witnesses were lying.

4. The trial court erred in imposing a $100 fee for DNA collection, without considering whether it would impose a hardship on Mr. Saintcalle.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A person performing a search acts as a state agent if (1) police officers knew of and acquiesced in the intrusive conduct, and (2) the party performing the search intended to assist law enforcement efforts rather than furthering his or her own ends. Here, ambulance driver Marshall Lineberger prepared Mr.

Saintcalle for transport at the behest of Kent police officers, and when he pulled a baggie of cocaine out of Mr. Saintcalle's shoe he immediately handed it to the officers rather than taking it to the hospital. Was the ambulance driver acting as a state agent when he searched Mr. Saintcalle without a warrant?

2. A defendant's timely, unequivocal request to proceed pro se must be granted as a matter of law, and a defendant's lack of legal knowledge is not a proper basis for finding his waiver of counsel invalid. Here, Mr. Saintcalle moved to proceed pro se 17 days before trial, but the court found his waiver of counsel was invalid on the basis that he defined the standard of proof as "99.9%." When Mr. Saintcalle requested a continuance to learn more, the court found he was moving to proceed pro se for an improper purpose. Did the trial court err in denying Mr. Saintcalle's motion to proceed pro se?

3. A prosecutor commits misconduct when he or she vouches for the state's witnesses or implies that the jury may not acquit unless it finds the State's witnesses are lying. Here, the prosecutor repeatedly stated in closing arguments that her police-officer witnesses had "absolutely no motive to lie." Did the prosecutor commit misconduct?

4. Under the Sentencing Reform Act, "[a]ny sentence imposed under this chapter shall be determined in accordance with the law in effect when the current offense was committed." At the time Mr. Saintcalle committed his crime, the DNA-collection fee was discretionary, not mandatory, and could be waived upon a finding of undue hardship. Did the trial court err in concluding the DNA-collection fee was mandatory here, where Mr. Saintcalle committed his crime before the statute was amended, where he was convicted before the statute was amended, where his original sentencing hearing was scheduled before the statute was amended, and where Mr. Saintcalle was not advised that agreeing to continue the sentencing hearing would result in mandatory imposition of the DNA-collection fee?

C. STATEMENT OF THE CASE

On April 4, 2006, Kent police officers Butenschoen, Harvey, and Graff responded to a call indicating a possible burglary in progress at the Royal Firs apartment complex. 2 RP 8-11.[1] They did not find the burglar, but they saw appellant Kirk Saintcalle sitting

[1] There are three volumes of verbatim reports of proceedings in this case: 1 RP is the 3/28/08 hearing on Mr. Saintcalle's motion to proceed pro se; 2 RP includes pretrial motions and trial on April 14, 15, and 16, 2008; 3 RP includes the motion to continue the original sentencing hearing on June 6, 2008 and the actual sentencing hearing on February 3, 2009.

in the stairway. 2 RP 11. According to Officer Butenschoen, Mr. Saintcalle was lethargic and sweaty. Officer Butenschoen tried to talk to him, but Mr. Saintcalle did not respond. 2 RP 13.

Officer Butenschoen recognized Mr. Saintcalle from prior contacts and suspected that he "was high on something," so he decided to "involuntarily commit" him. 2 RP 14. He explained that under state law he has the authority as a police officer to request involuntary commitment. 2 RP 21. The officers called for the Kent Fire Department and an ambulance, who arrived "within minutes." 2 RP 14-16. Officers Butenschoen and Harvey then picked Mr. Saintcalle up and took him down the stairs to meet the ambulance. 2 RP 15. The officers placed Mr. Saintcalle on the ambulance gurney, possibly with assistance from the ambulance personnel. 2 RP 17. They did not arrest Mr. Saintcalle. 2 RP 19.

The officers remained at the scene, just "hanging out," while ambulance driver Marshall Lineberger strapped Mr. Saintcalle to the gurney. 2 RP 19, 32, 36. Mr. Lineberger works for American Medical Response ("AMR"), which has a contract with the city of Kent to respond to its 911 calls. 2 RP 25, 44. The police officers gave Mr. Lineberger paperwork to have Mr. Saintcalle involuntarily hospitalized. 2 RP 32, 44-45.

Mr. Lineberger was not responsible for checking Mr. Saintcalle's vital signs, performing a physical exam, or checking his pupils. His job was to load Mr. Saintcalle onto the gurney and into the ambulance, and to transport him to the hospital pursuant to the police officers' orders. 2 RP 34. While Mr. Lineberger was placing the restraints on Mr. Saintcalle, the police officers were standing by the gurney, on Mr. Saintcalle's left side. 2 RP 36. In preparing to transport Mr. Saintcalle for involuntary commitment, Mr. Lineberger was "acting at the behest of the police department." 2 RP 45, 48.

Mr. Lineberger noticed "a bag hanging out of" Mr. Saintcalle's left shoe, so "out of curiosity," he "pulled the bag out to see what that was." 2 RP 38, 46. The bag contained a "white rock-like substance." 2 RP 38. As soon as he pulled it out, he handed it over to the police. 2 RP 40, 42. Mr. Lineberger had the bag for only about 10 seconds before giving it to the officers. 2 RP 42.

Officer Graff placed the baggie into an evidence bag and sent it to the crime lab, where it tested positive for cocaine. 2 RP 117, 151. Mr. Saintcalle was charged with one count of possession of cocaine, in violation of RCW 69.50.4013.

Two and a half weeks before trial, on March 28, 2008, Mr. Saintcalle moved to proceed pro se. 1 RP 4. The trial court asked,

"why is it that you want to do that?" 1 RP 6. Mr. Saintcalle explained, "I believe I might be able to properly assist myself better." He noted that he had been "reading legal material." The court asked Mr. Saintcalle his age and educational level, and Mr. Saintcalle said he was 23 years old and had a high school education. Mr. Saintcalle stated that his desire to proceed pro se had nothing to do with a dissatisfaction with his particular lawyer. 1 RP 6.

The court asked Mr. Saintcalle whether he had any legal training. Mr. Saintcalle said he did not, but that he had been through other trials. 1 RP 6. When asked if he knew the rules of evidence, Mr. Saintcalle said that he did know "some of it" from having read books he purchased from another inmate. 1 RP 7.

The court then asked, "Do you realize how awkward and difficult that is for someone in your position to be addressing a jury as both the defendant and the lawyer?" Mr. Saintcalle responded, "Yes. I believe I can handle the situation, Sir." 1 RP 7.

The court next asked Mr. Saintcalle if he knew the elements of the crime the State had to prove, and Mr. Saintcalle responded, "basically that I knew I had the drugs in my possession." 1 RP 7.

The court asked if Mr. Saintcalle had ever represented himself before, and Mr. Saintcalle said he had not. 1 RP 8.

The court then quizzed Mr. Saintcalle about the standard of proof. Mr. Saintcalle stated, "99.9 percent, I believe." The court said, "No, that's not right." 1 RP 8.

The court warned:

> It would be very, very foolish of you to go in front of a jury and try to represent yourself when you don't have the legal training. I'm just, I'm, you know, it's not in your interest to do that. It really isn't.

1 RP 8.

Mr. Saintcalle then requested a continuance so he could "go learn some more stuff and go over some stuff." 1 RP 9. The court asked, "why is it that you're bringing this issue up now as opposed to before?" Mr. Saintcalle attempted to respond, saying, "Because before I wasn't really considering ... I just, it was going through my mind. I just ...." The court cut him off and stated:

> All right. Well, based on my colloquy with you, I don't think you're making a knowing and voluntary and intelligent waiver of your right to counsel and to go pro se. And I also find that what you're really doing is using this in order to delay the trial date and I'm not going to allow that, so I'm going to deny your motion to go pro se and deny any motion to continue the trial date.

1 RP 9.

Trial began on April 14, 2008. Mr. Saintcalle moved to suppress the evidence against him on the basis that it was obtained pursuant to an unconstitutional search and seizure. CP 5-9; 2 RP 8-65. The trial court denied the motion, ruling that ambulance driver Lineberger was not acting as a state agent when he pulled the baggie of cocaine out of Mr. Saintcalle's shoe. 2 RP 60-65; CP 45-47.

At trial, Officer Butenschoen, Officer Graff, Lineberger, and forensic scientist Raymond Kusumi testified. In closing argument, Mr. Saintcalle's attorney argued that the police officers targeted Mr. Saintcalle because they knew him from previous contacts, even though he did not look like the burglary suspect for whom they were supposed to be searching. 2 RP 162-3. Mr. Saintcalle also pointed out that the officers did not remember what Mr. Saintcalle was wearing or whether he said anything. 2 RP 163. Mr. Saintcalle noted the inconsistencies in testimony between the police officers and Mr. Lineberger. 2 RP 164-66. He pointed out that it would be unlikely for the police officers not to have seen the baggie in Mr. Saintcalle's shoe if it had been there all along, because they had been on the scene much longer than Mr. Lineberger. 2 RP 167. Mr. Saintcalle reminded the jury that the state did not attempt to

perform any fingerprint testing on the baggie, or look for any saliva or smoking devices to connect the drugs to Mr. Saintcalle. 2 RP 169. Mr. Saintcalle concluded that the prosecution's theory about the events of that night did not "make any sense," and that a more likely explanation was that the drugs had been planted. 2 RP 165-66, 168. Mr. Saintcalle closed by emphasizing the presumption of innocence and the burden of proof. 2 RP 170-71.

In rebuttal, the prosecutor stated, "Well, ladies and gentlemen, it appears that the defense's theory is that these Kent police officers are lying." 2 RP 175. She continued, "These officers have absolutely no motive to lie." 2 RP 175. After repeating the steps the officers took at the apartment complex, the prosecutor again stated, "They have absolutely no motive to lie." 2 RP 176.

The jury returned a verdict of guilty on April 17, 2008. Sentencing was set for June 6, 2008, but the parties agreed to a continuance because the State was prosecuting Mr. Saintcalle for another offense under another cause number. 3 RP 1-2. Sentencing finally occurred on February 3, 2009. 3 RP 1-8.

The court sentenced Mr. Saintcalle to 12 months plus one day of incarceration. 3 RP 5. It waived all costs and fees "that don't have to be ordered," but imposed a DNA-collection fee. Mr.

Saintcalle objected to the DNA-collection fee, stating, "I know that the offense date in this case predates when the mandatory DNA fee came into play." 3 RP 6. The court responded, "I'm assuming it applies as of the date of sentencing." 3 RP 6.

Mr. Saintcalle appeals. CP 57-58.

D. ARGUMENT

1. THE EVIDENCE SHOULD HAVE BEEN SUPPRESSED BECAUSE THE AMBULANCE DRIVER WAS ACTING AS A STATE AGENT WHEN HE PULLED THE BAGGIE OUT OF MR. SAINTCALLE'S SHOE AND HANDED IT TO THE POLICE OFFICERS.

Mr. Saintcalle moved to suppress the evidence against him as obtained pursuant to an unconstitutional search and seizure. The State did not dispute that it lacked authority of law to perform an evidentiary search on Mr. Saintcalle. Indeed, there was no warrant and Mr. Saintcalle was not under arrest. However, the State argued, and the trial court concluded, that the ambulance driver who pulled the baggie out of Mr. Saintcalle's shoe was not a state actor and therefore Mr. Saintcalle had no remedy for the privacy violation. This Court should reverse because the ambulance driver was acting as a state agent when he searched Mr. Saintcalle.

a. A person is a state actor if he or she functions as an agent or instrumentality of the state at the time of the search. The Fourth Amendment prohibits unreasonable searches and seizures. U.S. Const. amend. IV. Article I, section 7 provides, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Const. art. I, § 7. Article I, section 7 provides stronger privacy protections than the Fourth Amendment. Pasco v. Shaw, 161 Wn.2d 450, 458, 166 P.3d 1157 (2007).

Both provisions prohibit state actors from invading the private affairs of individuals without lawful authority. Id. at 460. Police officers are not the only state actors subject to these constitutional restrictions. The purpose of the provisions "is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials. The officials may be health, fire, or building inspectors." Michigan v. Tyler, 436 U.S. 499, 504, 98 S.Ct. 1942, 56 L.Ed.2d 486 (1978).

A person is a state actor if he or she functions as an agent or instrumentality of the government at the time of the search. Shaw, 161 Wn.2d at 460. In making this determination, courts consider (1) whether the government knew of and acquiesced in the intrusive conduct, and (2) whether the party performing the search

intended to assist law enforcement efforts or to further his or her own ends. Shaw, 161 Wn.2d at 460; United States v. Reed, 15 F.3d 928, 931 (9th Cir.1994). This Court reviews de novo the legal conclusion regarding whether an individual who performed a search was a private actor or a state agent. Reed, 15 F.3d at 930.

b. The ambulance driver who searched Mr. Saintcalle was a state actor, and the evidence he found should have been suppressed. In this case, Marshall Lineberger was clearly acting as a state agent. He was on the job as an ambulance driver with American Medical Response, a company that has a contract with the city of Kent to handle its emergency transports. 2 RP 25, 44. He was responding to a call from Kent police officers, along with Kent firefighters. He was preparing Mr. Saintcalle for involuntary commitment "at the behest of the police department."[2] 2 RP 45, 48. The Kent police officers were standing next to him as he worked, on the left side of the gurney. 2 RP 19, 32, 36.

Lineberger did not extract the baggie from Mr. Saintcalle's shoe for any private purpose – or even any medical purpose (another EMT was responsible for the medical exam). 2 RP 34. Contrast United States v. Chukwubike, 956 F.2d 209 (9th Cir. 1992)

[2] Thus McWatters, on which the trial court relied, is inapposite. State v. McWatters, 63 Wn. App. 911, 822 P.2d 787 (1992).

(doctor extracted heroin-laden balloons and tested their contents for medical reasons). After Lineberger pulled the baggie out, he did not show it to the EMT performing the medical exam and did not take it to the hospital to help doctors diagnose Mr. Saintcalle. Rather, he immediately handed the baggie over to police, who used it for a law-enforcement purpose. 2 RP 40, 42. Thus, Mr. Lineberger was acting as a state agent.

Reed, 15 F.3d 928 is on point. There, a hotel manager searched a guest's room while police officers stood in the doorway and listened to the manager describe what he found, including drugs. Id. at 930. The government prosecuted Reed for possession of drugs and guns found in the motel room, and the trial court denied a suppression motion on the basis that the motel manager was a private actor. Id.

The Court of Appeals reversed, holding that even though the police did not request or directly encourage the manager's search, they were present and acquiesced in it. Id. at 931. It mattered not that the motel manager testified it was his idea to enter the room and that he knew he was not an agent of the police department and thus could conduct the search. Id. at 931. Further, even though the State claimed the manager conducted the search for the private

reason of preventing illegal activity in the motel, and the manager himself testified he was "just snooping," neither of these motives were valid independent justifications for the search. Id. at 932.

Similarly here, the police officers were standing right by Lineberger when he searched Mr. Saintcalle, and Lineberger's "curiosity" is not a valid independent justification for the search of the shoe and the seizure of the baggie. And unlike in Reed, the searcher here was performing his job under contract with the city of Kent, after being summoned by the Kent police officers. Thus, if the motel manager in Reed was acting as a state agent, the ambulance driver here – who was acting at the behest of law enforcement – certainly was.

Other cases are also instructive. In Kuehn v. Renton School District, our supreme court condemned searches of student luggage performed absent individualized suspicion, even though the searches were performed by parents. Kuehn, 103 Wn.2d 594, 595, 694 P.2d 1078 (1985). The Court explained, "[i]t makes no difference whether the search was conducted by the band director, the principal, or the parents. When a private person is acting under the authority of the state, Fourth Amendment protections apply." Id. at 600. Similarly here, it makes no difference whether the

search was performed by the police officers, the fire department, or the ambulance driver. All were acting under the authority of the state in restraining Mr. Saintcalle for involuntary commitment, and constitutional protections apply.

In Shaw, the Court held that an ordinance providing for private inspectors to search apartments for code violations did not involve state action. The Court found it "significant" that "if a private inspector finds code violations, the ordinance does not require the inspector to turn his or her findings over to the city." Shaw, 161 Wn.2d at 460. But here, ambulance driver Lineberger did immediately turn the baggie over to police officers. This strongly indicates that Lineberger did not perform the search and seizure to further his own ends, but to assist law enforcement. Thus, unlike the private building inspectors in Shaw, Lineberger was a state actor.

Ludvik is also distinguishable. State v. Ludvik, 40 Wn. App. 257, 698 P.2d 1064 (1985). In that case, a neighbor of the defendant contacted police because he had seen suspicious activity inside the defendant's home. The defendant argued that the neighbor's observations constituted a search by a state actor, because by day the neighbor worked as a state game agent. Id. at

262. But this Court held that the neighbor's occupation was irrelevant, because he was not on the job at the time of the search. Id. at 262-63. In contrast, ambulance driver Lineberger was on the job when he searched Mr. Saintcalle's shoe and was acting in his official capacity at the time of the search. Thus, Lineberger was a state agent.

As the Supreme Court has recognized, "there is no diminution in a person's reasonable expectation of privacy nor in the protection of the Fourth Amendment simply because the official conducting the search wears the uniform of a firefighter rather than a policeman, or because his purpose is to ascertain the cause of a fire rather than to look for evidence of a crime." Tyler, 436 U.S. at 506. Similarly, there is no diminution in a person's reasonable expectation of privacy nor in the protection of the state and federal constitutions simply because the official conducting the search wears the uniform of an ambulance driver rather than a police officer, or because his purpose is to satisfy his "curiosity" rather than to look for evidence of crime. And as Mr. Saintcalle's trial attorney pointed out, if the prosecutor's position were the law, the State could simply circumvent the Constitution by subcontracting all its duties to private contractors. The Constitution is not so easily

evaded. Mr. Saintcalle's privacy was invaded without authority of law, and the evidence should have been suppressed.

2. THE TRIAL COURT VIOLATED MR. SAINTCALLE'S CONSTITUTIONAL RIGHT TO REPRESENT HIMSELF.

a. The state and federal constitutions guarantee criminal defendants the right to represent themselves. The Washington Constitution expressly guarantees the right of self-representation: "In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel . . . ." Const. art. I, § 22; State v. Breedlove, 79 Wn. App. 101, 105-06, 900 P.2d 586 (1995). "In this state, a defendant may conduct his entire defense without counsel if he so chooses." State v. Hardung, 161 Wash. 379, 383, 297 P. 167 (1931).

The Sixth Amendment to the United States Constitution implicitly provides the right to proceed pro se.[3] Faretta v. California, 422 U.S. 806, 814, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). The right is rooted in respect for autonomy. State v. DeWeese, 117 Wn.2d 369, 375, 816 P.2d 1 (1991). Although the Constitution includes safeguards – like the right to counsel – designed to protect

[3] The amendment provides, "In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense." U.S. Const. amend. VI.

the accused, "to deny the accused in the exercise of his free choice the right to dispense with some of these safeguards . . . is to imprison a man in his privileges and call it the Constitution." Faretta, 422 U.S. at 815 (internal citations omitted). Thus, "although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of that respect for the individual which is the lifeblood of the law." Id. at 834 (internal citations omitted).

> Even if the defendant [is] likely to lose the case anyway, he has the right--as he suffers whatever consequences there may be--to the knowledge that it was the claim that he put forward that was considered and rejected, and to the knowledge that in our free society, devoted to the ideal of individual worth, he was not deprived of his free will to make his own choice, in his hour of trial, to handle his own case.

Breedlove, 79 Wn. App. at 110-111 (internal citations omitted).

b. A timely, unequivocal request to proceed pro se must be granted as a matter of law. A defendant's request to proceed pro se must be (1) timely made and (2) stated unequivocally. State v. Woods, 143 Wn.2d 561, 586, 23 P.3d 1046 (2001). If the demand for self-representation is made well before the trial and unaccompanied by a motion for a continuance, the trial court must grant the request as a matter of law. State v. Barker, 75 Wn. App.

236, 241, 881 P.2d 1051 (1994). The trial court does not have the discretion to deny the request unless it is made just before or during trial. Id. Even if the request is made just before trial, the trial court may not deny the request unless (1) the motion is made for improper purposes, or (2) granting the request would obstruct the orderly administration of justice. Breedlove, 79 Wn. App. at 107-08. "When the lateness of the request and even the necessity of a continuance can be reasonably justified, the request should be granted." Id. at 110.

Once the accused makes a request to represent himself, the court must engage in a colloquy to determine whether the defendant is waiving his right to counsel knowingly, intelligently, and voluntarily. Faretta, 422 U.S. at 835; Breedlove, 79 Wn. App. at 111. In order to make this determination, the trial court must apprise the defendant of the nature of the charge, the possible penalties, and the disadvantages of self-representation. Woods, 143 Wn.2d at 587-88. Unless the court finds the waiver is invalid, it must grant a timely, unequivocal motion to proceed pro se. Barker, 75 Wn. App. at 241.

c. The trial court improperly denied Mr. Saintcalle's request to proceed pro se. Mr. Saintcalle's request to proceed pro se was

timely and unequivocal, and his waiver of counsel was knowing and voluntary. Accordingly, the trial court erred in denying the motion.

Mr. Saintcalle's request was clearly timely, as he moved to proceed pro se 17 days before trial. See State v. Vermillion, 112 Wn. App. 844, 848, 51 P.3d 188 (2002) (request timely when made six days before jury selection). And although Mr. Saintcalle requested a continuance, "[w]hen the lateness of the request and even the necessity of a continuance can be reasonably justified, the request should be granted." Breedlove, 79 Wn. App. at 110.

Mr. Saintcalle's request was also unequivocal. Throughout the colloquy, Mr. Saintcalle never wavered in his desire to represent himself, even though the court warned him it would not be in his best interest to do so. Mr. Saintcalle explained that he was not dissatisfied with his lawyer, but wanted to represent himself because he had read legal handbooks, had been through trials, and believed he could do a good job.

Mr. Saintcalle's request was certainly unequivocal compared to those held unequivocal in published decisions. Even in cases where the trial court denied defendants' requests for new counsel and limited their choices to current counsel or self-representation, appellate courts have held that the requests for self-representation

were unequivocal. See, e.g., Barker, 75 Wn. App. at 238 (conviction reversed for improper denial of request to proceed pro se, even though defendant's first choice was appointment of new counsel); DeWeese, 117 Wn.2d at 372 (grant of request to proceed pro se affirmed even though defendant's first choice was appointment of new counsel). Even a defendant's "remarks that he had no choice but to represent himself rather than remain with appointed counsel, and his claims on the record that he was forced to represent himself at trial, do not amount to equivocation or taint the validity of his Faretta waiver." Id. at 378. Mr. Saintcalle did not even make such claims, so if Mr. DeWeese's request to proceed pro se was unequivocal, Mr. Saintcalle's certainly was.

Because his request was timely and unequivocal, Mr. Saintcalle was entitled to proceed pro se as a matter of law unless the trial court determined, after a proper colloquy, that his waiver of counsel was not knowing, intelligent, and voluntary. Barker, 75 Wn. App. at 241; Faretta, 422 U.S. at 835; Breedlove, 79 Wn. App. at 111. Here, the trial court ruled that Mr. Saintcalle's waiver was invalid, but did so for an improper reason – that it would not be in Mr. Saintcalle's best interest to represent himself. 1 RP 7-9. "The right to self-representation does not require a showing of technical

knowledge. If a person is competent to stand trial, he is competent to represent himself." Vermillion, 112 Wn. App. at 848 (reversing conviction where trial court denied defendant's motion to proceed pro se on the basis that it would be in his best interests to have counsel).

Furthermore, there was no indication that Mr. Saintcalle was making his request for an improper purpose. The trial court concluded that Mr. Saintcalle moved to proceed pro se in order to delay the trial, but the record reveals that Mr. Saintcalle requested a continuance because the trial court insisted that he was not ready to represent himself well. 1 RP 4-9. Merely delaying the trial would not help Mr. Saintcalle, as he was in jail pending trial. Mr. Saintcalle moved to proceed pro se not for any improper purpose, but because he felt he could "properly assist [himself] better." 1 RP 6. The trial court erred in denying his request.

Mr. Saintcalle's case is similar to Breedlove. In that case, the defendant moved to proceed pro se 12 days before trial. Breedlove, 79 Wn. App. at 104. The defendant requested a continuance in order to have time to prepare his defense. Id. at 105. The trial court denied the requests, and the defendant was convicted after a jury trial. Id. This Court reversed, holding the trial

court abused its discretion in denying the defendant's motion to proceed pro se. This Court noted that even though the defendant moved to proceed pro se shortly before trial and even though he requested a continuance, the motion should have been granted because there was "no evidence in the record that the motion was interposed for the purpose of delay or harassment." Id. at 108.

The same is true here. Mr. Saintcalle made his request even earlier than the defendant in Breedlove, and, as in that case, there was no evidence that the motion was made for an improper purpose. The fact that Mr. Saintcalle requested a continuance may not be used to infer that he moved to proceed pro se in order to delay the trial. Breedlove, 79 Wn. App. at 109. Indeed, Mr. Saintcalle made clear the he moved for a continuance because the trial court convinced him that he needed more time to prepare. 1 RP 8-9; see Breedlove, 79 Wn. App. at 109 ("the motion for continuance may, just as well, evince his expressed desire to prepare the defense").

In sum, Mr. Saintcalle's request to proceed pro se was timely and unequivocal, and his waiver of counsel was knowing and voluntary. The trial court therefore erred in denying the motion.

d. Because he was improperly denied his right to represent himself, Mr. Saintcalle must be granted a new trial. The erroneous denial of a defendant's motion to proceed pro se requires reversal without any showing of prejudice. Breedlove, 79 Wn. App. at 110. Where a conviction is reversed for a violation of the right to self-representation, the case must be remanded for retrial. Vermillion, 112 Wn. App. at 848. Because Mr. Saintcalle was denied his constitutional right to proceed pro se, his conviction must be reversed and his case remanded for a new trial.

3. THE PROSECUTOR COMMITTED MISCONDUCT IN CLOSING ARGUMENT BY VOUCHING FOR HER WITNESSES AND IMPLYING THE JURY COULD NOT ACQUIT UNLESS IT FOUND THE POLICE OFFICERS WERE LYING.

a. Prosecutors commit misconduct when they vouch for their witnesses and argue that in order to acquit a defendant, the jury must find that the State's witnesses are lying. Every prosecutor is a quasi-judicial officer of the court, charged with the duty of ensuring that an accused receives a fair trial. State v. Jones, 144 Wn. App. 284, 290, 183 P.3d 307 (2008). A prosecutor commits misconduct if he or she bolsters a police witness's good character even if the record supports such argument. Jones, 144

Wn. App. at 293. A lawyer may not assert his or her personal opinion as to the credibility of a witness. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). It is misconduct for a prosecutor to argue that in order to acquit a defendant, the jury must find that the State's witnesses are either lying or mistaken. State v. Jackson, 150 Wn. App. 877, 888, 209 P.3d 553 (2009); State v. Fleming, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996).

Where a prosecutor commits misconduct, an appellate court will reverse and remand for a new trial if there is a substantial likelihood that the misconduct affected the jury's verdict. Jackson, 150 Wn. App. at 883. Even if a defendant does not object to improper remarks at trial, reversal is required if the remarks are so "flagrant and ill-intentioned" that they cause prejudice that a curative instruction could not have remedied. Jones, 144 Wn. App. at 290.

b. The prosecutor in this case committed misconduct by repeatedly stating that the police-officer witnesses had no motive to lie. Here, the prosecutor committed misconduct by repeatedly telling the jury "[t]hese officers have absolutely no motive to lie." 2 RP 175, 176. Even though the argument was in response to Mr.

Saintcalle's theory that someone planted the drugs on him, the statements were improper.

State v. Barrow is instructive. 60 Wn. App. 869, 809 P.2d 209 (1991). There, the defendant's theory was mistaken identity, and in closing argument he sought to undermine an officer's testimony by emphasizing her inexperience and her likely frustration with the case. Barrow, 60 Wn. App. at 871. The prosecutor in closing argument asserted that by giving testimony contradictory to the police officers' testimony, the defendant effectively called the officers liars. Id. at 874. The prosecutor also stated, "in order for you to find the defendant not guilty, you have to believe his testimony and you have to completely disbelieve the officers' testimony. You have to believe that the officers are lying." Id. at 874-75.

This Court held that the prosecutor's argument was misconduct, even though "[w]hen a defendant advances a theory exculpating him, the theory is not immunized from attack." Id. at 872, 875. Similarly here, although the prosecutor was allowed to attack Mr. Saintcalle's theory that someone planted drugs on him, the prosecutor's vouching and implication that the jury could not acquit unless the officers were lying constituted misconduct. See

State v. Casteneda-Perez, 61 Wn. App. 354, 362-63, 810 P.2d 74 (1991) ("it is misleading and unfair to make it appear that an acquittal requires the conclusion that the police officers are lying").

Furthermore, the statements constituted flagrant and ill-intentioned misconduct, given this Court's prior holdings that such argument is improper. Fleming, 83 Wn. App. at 214. There is a substantial likelihood that the misconduct affected the jury's verdict, because the jury probably believed it had to convict unless it found the officers were lying. Without these statements, there is a substantial likelihood the jury would have found reasonable doubt based on the fact that no one saw the baggie on Mr. Saintcalle until well after the officers originally encountered him. Accordingly, Mr. Saintcalle's conviction should be reversed and his case remanded for a new trial.

4. THE TRIAL COURT ERRED IN IMPOSING A MANDATORY DNA COLLECTION FEE, BECAUSE THE LAW IN EFFECT AT THE TIME OF MR. SAINTCALLE'S CRIME PROVIDED FOR A DISCRETIONARY FEE.

Under the Sentencing Reform Act ("SRA"), "[a]ny sentence imposed under this chapter shall be determined in accordance with the law in effect when the current offense was committed." RCW 9.94A.345. Legal financial obligations are imposed under the SRA

as part of an offender's sentence. RCW 9.94A.760; RCW 9.94A.030(28).

The law in effect when Mr. Saintcalle committed his crime provided for discretionary, not mandatory, DNA-collection fees:

> Every sentence imposed under chapter 9.94A RCW, for a felony specified in RCW 43.43.754 that is committed on or after July 1, 2002, must include a fee of one hundred dollars for collection of a biological sample as required under RCW 43.43.754, unless the court finds that imposing the fee would result in undue hardship on the offender. The fee is a court-ordered legal financial obligation as defined in RCW 9.94A.030, payable by the offender after payment of all other legal financial obligations included in the sentence has been completed.

RCW 43.43.7541 (2002). The law was later changed to make the DNA-collection fee mandatory, but this amendment did not go into effect until June 12, 2008. RCW 43.43.7541 (2008).

The amendment went into effect not only after Mr. Saintcalle's crime, but after his conviction and after his original sentencing date. When Mr. Saintcalle agreed to continue the sentencing hearing, he was not warned that this would result in mandatory imposition of a DNA-collection fee. 3 RP 1-2. When the sentencing hearing finally did occur, Mr. Saintcalle objected to mandatory imposition of the DNA-collection fee, stating, "I know that the offense date in this case predates when the mandatory

DNA fee came into play." 3 RP 6. The court responded, "I'm assuming it applies as of the date of sentencing." 3 RP 6.

The sentencing court was wrong. Under RCW 9.94A.345, the court should have looked to the law in offense at the time the crime was committed, and should have evaluated whether the DNA-collection fee would result in undue hardship on Mr. Saintcalle. RCW 43.43.7541 (2002). Given the fact that the court waived all discretionary costs and fees, it probably would have waived the DNA fee. 3 RP 6. This Court should remand this case for resentencing so the court may properly exercise its discretion and consider Mr. Saintcalle's indigence in determining whether to impose the DNA-collection fee.

E. CONCLUSION

For the reasons set forth above Mr. Saintcalle respectfully requests that this Court (1) reverse the conviction and remand for suppression of the evidence, or (2) reverse and remand for a new trial, or (3) reverse and remand for resentencing.

DATED this 7th day of December, 2009.

Respectfully submitted,

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Washington Appellate Project
Attorneys for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 63152-7-I
v.	)	
	)	
KIRK SAINTCALLE,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 7TH DAY OF DECEMBER, 2009, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] KIRK SAINTCALLE 859917 WASHINGTON CORRECTIONS CENTER PO BOX 900 SHELTON, WA 98584	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 7TH DAY OF DECEMBER, 2009.

X_____

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