

SUPREME COURT OF ARIZONA

STATE OF ARIZONA, ) Arizona Supreme Court  
 ) No. CR-12-0452-PR  
 Appellee, )  
 ) Court of Appeals  
 v. ) Division One  
 ) No. 1 CA-CR 11-0549  
 ANTHONY MERRICK, )  
 ) Maricopa County  
 Appellant. ) Superior Court  
 ) No. CR2010-005367-001  
 ) **FILED 04/24/2013**

---

O R D E R

On April 23, 2013, the Court considered the Petition for Review filed by Anthony Merrick. The Court denies review of issues 1 and 2 in the petition, but grants review on issue 3 – Merrick’s claim that the court of appeals erred in refusing his request to file a pro se appellate brief, thereby depriving him of his constitutional right to self-representation on appeal.

Under federal law, there is no constitutional right to self-representation in a criminal case appeal. *Martinez v. Court of Appeal of Cal.*, 528 U.S. 152, 164 (2000). But Article 2, § 24 of the Arizona Constitution, which has no federal constitutional counterpart, provides: “In criminal prosecutions, the accused shall have the right to appear and defend in person, . . . and the right to appeal in all cases.” Under that provision, a defendant “has and [may] exercise his right to appeal in his own behalf,” and this right is “of equal

stature with the right of counsel." *State v. Stevens*, 107 Ariz. 565, 567, 490 P.2d 571, 573 (1971) (internal quotation marks omitted); see also *State v. Rafay*, 222 P.3d 86, 91 (Wash. 2009) (holding that identical state constitutional provision "guarantees a criminal defendant's right of self-representation on appeal").

Although a criminal defendant has no right to hybrid representation, *State v. Roscoe*, 184 Ariz. 484, 498, 910 P.2d 635, 649 (1996), that apparently is not what Merrick seeks. Rather, he seeks to represent himself on appeal and argues that denial of his right to do so prejudiced him because appellate counsel's choice of issues on appeal waives other possible issues he sought to raise and binds him in further proceedings. See *State v. Herrera*, 183 Ariz. 642, 647, 905 P.2d 1377, 1382 (App. 1995).

"As with the right of self-representation at trial, the right of self-representation on appeal is neither self-executing nor absolute," *Rafay*, 222 P.3d at 90, and thus "is not without limits or qualifications," *id.* at 91. A defendant who is represented by counsel on appeal may not sit by while the appeal is processed and then, after counsel's brief is prepared and filed, claim a violation of his right to self-representation. "[T]he timing of the defendant's request may be so tardy as to

compromise the execution of an orderly and timely appeals process." *Id.* at 90.

Here, appointed counsel for Merrick filed his opening brief on March 13, 2012. Merrick allegedly attempted to contact his appellate counsel several times to request that she withdraw and allow him to file his own brief, in which he intended to raise additional issues. But Merrick first moved in the court of appeals on March 20 for leave to file a supplemental brief or, in the alternative, to strike the opening brief and allow him to file another brief. The court of appeals denied that motion and Merrick's subsequent motion for reconsideration based on *Martinez*, without expressly addressing Article 2, § 24, and without considering whether Merrick's request for self-representation was untimely or otherwise waived.

Therefore, the court of appeals' orders of March 22, April 4, and April 13, 2012, are vacated, and the case is remanded to that court for consideration of any issues regarding timeliness and waiver of Merrick's request for self-representation. If it finds that Merrick's request is timely and properly made, the court of appeals will determine what steps to take regarding the briefs already filed by Merrick's counsel, any new or supplemental brief Merrick is permitted to file, and the court's memorandum decision filed October 18, 2012. Finally, Merrick's

Arizona Supreme Court

No. CR-12-0452-PR

Page 4

Motion for Judicial Notice is denied, without prejudice to his presenting that motion and related documents for consideration by the court of appeals in the first instance.

DATED this \_\_\_\_\_ day of April, 2013.

---

Ann A. Scott Timmer  
Duty Justice

TO:

Joseph T. Maziarz

Myles Braccio

Anthony James Merrick III, P892967, Maricopa County Jail,  
4th Avenue Jail

Ruth Willingham