

No. 1-10-3301

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 08 CR 14169
)	
RAYMOND GALLARDO,)	Honorable
)	Colleen McSweeney Moore,
Defendant-Appellant.)	Judge Presiding.

JUSTICE PALMER delivered the judgment of the court.
Presiding Justice McBride and Justice Taylor concurred in the judgment.

ORDER

¶ 1 **Held:** Trial court did not abuse its discretion in ruling that defendant could not proceed *pro se* on his motion to withdraw his guilty plea; judgment affirmed.

¶ 2 Defendant Raymond Gallardo entered a negotiated plea of guilty to aggravated criminal sexual assault and was sentenced to nine years' imprisonment. He subsequently filed a *pro se* motion to vacate his guilty plea, and the court appointed counsel to represent him. The motion was later amended and denied, and defendant now appeals from that ruling. He contends that the trial court violated his constitutional right to self-representation when it denied his motion to proceed *pro se* on his motion to vacate his guilty plea and requests this court to remand his cause for new post-plea proceedings.

¶ 3 The record shows that defendant was arrested and charged with the aggravated criminal sexual assault of a 13-year-old girl on June 24, 2008. An assistant public defender of Cook County, Peter Kasparas, was appointed to represent him; however, defendant subsequently retained private counsel, Dennis Doherty, who filed an appearance on January 22, 2009. The public defender was then granted leave to withdraw as counsel.

¶ 4 On May 21, 2009, defendant entered a negotiated plea of guilty to aggravated criminal sexual assault. At that proceeding, the court admonished defendant in accordance with Supreme Court Rule 402 (eff. July 1, 1997), the State presented a factual basis for the plea, and defendant stipulated to the representations therein. The court found the factual basis sufficient and accepted defendant's plea before sentencing him to the agreed term of nine years' imprisonment. The court then admonished defendant of his appeal rights, and defendant indicated he understood them.

¶ 5 On June 16, 2009, defendant mailed to the circuit court a *pro se* motion to withdraw his guilty plea and vacate his sentence. He alleged that his plea was involuntary and a result of coercion by his counsel, who provided him with inadequate representation.

¶ 6 On August 7, 2009, defendant's private counsel informed the court that he could not represent defendant on his motion because there was a conflict of interest. When the court asked defendant if he could afford to hire an attorney on his motion, he indicated that he could not. The court then reappointed assistant public defender Kasparas, who informed the court that the issue raised by defendant might also involve him. At that point, the court asked defendant if he was going to hire private counsel, and defendant indicated that he would like to do so, but that he needed at least two months to accomplish this. The court continued the matter, stating that it would appoint a conflicts attorney from the public defender's office if defendant were unable to hire private counsel.

¶ 7 On September 16, 2009, defendant filed a *pro se* motion for appointment of counsel other than the public defender. He maintained that his present appointed counsel failed to represent

him in a meaningful and competent fashion, and that he would be substantially prejudiced by the continued representation of appointed counsel.

¶ 8 On October 7, 2009, assistant public defender Kasparas reminded the court that defendant had indicated on the last court date that he wanted to hire private counsel and the court gave him until this date to do so. Kasparas also informed the court that he had tried to talk to defendant, but that defendant refused to speak to him. Defendant interjected that all Kasparas had done was lie to him. The court told defendant, "[b]e quiet," to which he responded, "[a]ll he's done is lie to me," and the court repeated its admonition that he "[b]e quiet."

¶ 9 The following colloquy then took place between defendant and the trial court:

"THE COURT: Have you hired a private attorney, Mr. Gallardo?

THE DEFENDANT: I filed a motion, ma'am. I filed a motion.

THE COURT: [Defendant], my question is very simple.

THE DEFENDANT: No, I haven't.

THE COURT: Would you answer it, please?

THE DEFENDANT: No, I haven't.

THE COURT: I see that you have filed a motion, a *pro se* motion for appointment of new counsel.

I'm going to appoint a conflict attorney to represent you."

¶ 10 The court indicated that it would continue the matter to October 22, 2009, and defendant responded, "[y]our honor, I have files. Is there any way we can make it shorter or stretch that a little bit -- school files." The court asked defendant if he wanted a longer date, and he responded 60 more days because he has to sit in Statesville. The court explained to defendant that they would proceed on the motion he filed and continued the matter to October 30, 2009. On that date, assistant public defender Lynne Wilson, who was assigned to the legal resource division, appeared on defendant's behalf, and the court granted her a continuance.

¶ 11 On February 19, 2010, Wilson informed the court that she had some issues she wished to discuss with defendant, and the court granted her another continuance. On April 23, 2010, Wilson requested a further continuance and informed the court that she would file an amended motion by the next court date. She explained that defendant had made some allegations that required affidavits, and the matter was continued.

¶ 12 On June 25, 2010, Wilson informed the court that defendant would like to proceed *pro se*. When the court asked defendant if he would like to represent himself, he responded, "[y]es, your honor. I had this attorney for eight months, and she wouldn't do what I asked." The court passed the matter, and when the proceedings reconvened, the court asked defendant if it was correct that he wished to proceed *pro se* on his motion. He responded, "[y]es," and the following colloquy ensued:

"THE COURT: How old are you?

[DEFENDANT]: Excuse me?

THE COURT: What is your age?

[DEFENDANT]: Thirty-six.

THE COURT: What is your educational background?

[DEFENDANT]: Second year high school.

THE COURT: You never graduated from high school?

[DEFENDANT]: No.

THE COURT: So you didn't go to college?

[DEFENDANT]: No.

THE COURT: Apparently you didn't go to law school either, correct?

[DEFENDANT]: Correct.

THE COURT: Have you ever previously represented yourself in a criminal case?

[DEFENDANT]: My first time in court.

THE COURT: So the answer to my question is no?

[DEFENDANT]: Excuse me?

THE COURT: So the answer to my question is no?

[DEFENDANT]: Yes.

THE COURT: Have you ever represented yourself in any kind of legal proceeding?

[DEFENDANT]: No, I haven't

THE COURT: And do you understand that I do not have any authority over the Illinois Department of Corrections [where you are currently staying]?

[DEFENDANT]: So what are you trying to say? I don't understand.

THE COURT: What I'm trying to say is that I can't order them to give you, for example, time in the law library, do you understand that?

[DEFENDANT]: Okay.

THE COURT: [Defendant], try to listen to the questions I ask you and answer the question.

My question to you is, do you understand, which calls for an answer of yes or no.

[DEFENDANT]: I said yes.

THE COURT: Not okay.

[DEFENDANT]: You said okay.

THE COURT: Well, yes is your answer?

[DEFENDANT]: Yes is my answer."

¶ 13 The court then asked defendant if he understood what an attorney representing him would

do with his case, and he indicated that he understood the duties of an appointed attorney. The court also asked defendant if he understood that the court could not advocate or help him, and he indicated that he understood this, as well. When the court asked defendant if he was ready to proceed on his motion, he responded, "[n]ot today, your Honor. I'm willing to go *pro se*, you know, do some investigation myself." In response to the court's query as to how he was going to do that, defendant stated, "[m]y attorney refuses to do stuff. The most is she has been here by my side, and has done nothing for me. How can I have an attorney like this? I requested my discovery, [she] refuses to give it to me." The court responded that if defendant was an attorney he would understand that pursuant to the Supreme Court Rules, his attorney cannot give him the discovery materials. Defendant then stated that he had requested it from his private counsel, and that he should have given it to him.

¶ 14 The court told defendant that he had a problem listening as it had just explained that his counsel was prohibited from giving him discovery, and defendant then told the court that he understood. Defendant, however, further stated that his counsel should have informed him that she was unable to give him the discovery documents, that he requested copies of the court transcripts and the copies he got from his counsel were different from those he had read, that his counsel refused to have the transcripts fixed, and when he spoke last time, the court told him to "shut up and be quiet." The court responded that it never used those words, and perhaps told him that his attorney speaks on his behalf and everything said is taken down by the court reporter. The court then stated, "[y]ou know what, I don't think you're intelligent enough to proceed yourself. Your motion to proceed *pro se* is denied." Appointed counsel Wilson then filed an amended petition, as well as a Supreme Court Rule 604(d) (eff. July 1, 2006) certificate.

¶ 15 In the amended petition, Wilson alleged on defendant's behalf that former counsel's representation fell below an objective standard of reasonableness. She maintained that former counsel failed to consult defendant on all major decisions to be made in the case, to keep him

sufficiently informed, to personally prepare him for trial, to communicate with him, and to visit him to discuss the case and the direct consequences of pleading guilty. She further alleged that former counsel only spoke with defendant on the day of the guilty plea, that counsel informed defendant that pleading guilty to 9 years' imprisonment was his only option since he would otherwise be facing 15 years, that defendant felt tricked, threatened and coerced, that he was actually innocent, and had counsel communicated with him, he would not have pled guilty and would have gone to trial.

¶ 16 On July 26, 2010, the court asked the parties if they were ready to proceed on the amended motion to vacate, and defendant interjected that he was not ready and "never granted her my right for her to file that motion. She filed that motion on her own." Counsel then told the court, for the record, that defendant wished to proceed *pro se*. The court noted that the law is that a defendant must "be competent enough to knowingly and intelligently waive his right to an attorney, and on the last date based on his answers that [defendant] gave to some of [its] questions, [it] found that not to be the case." Defendant responded that he would like another counsel appointed, and that current counsel had done nothing but lie to him. Defendant further stated that, "I cannot defend myself if she's not going to fight for me. If that's the case, I would like some time to go hire another attorney." The court then granted defendant a continuance to hire a private attorney.

¶ 17 Defendant subsequently did not hire private counsel, and a hearing was held on his motion where Wilson represented him. Following that hearing, the court denied the motion, to which defendant responded "[b]***. I want you to file a motion with the appellate court. This is f*** b***."

¶ 18 On appeal, defendant solely contends that the trial court denied him his constitutional right to self representation. He maintains that the court's finding that he was not "intelligent enough to proceed [him]self" was an improper basis for its denial because the court cannot deny

him his right to self-representation based on his lack of formal education and legal experience.

¶ 19 A criminal defendant has a constitutional right to represent himself (*Faretta v. California*, 422 U.S. 806, 833-36 (1975)); however, the waiver must be clear and unequivocal, not ambiguous (*People v. Baez*, 241 Ill. 2d 44, 116 (2011)). Whether a defendant made an intelligent waiver of the right to counsel depends on the particular facts and circumstances of each case, including the defendant's background, experience and conduct (*Baez*, 241 Ill. 2d at 116). In determining whether a defendant's request is clear and unequivocal, courts look at the overall context of the proceedings. *People v. Burton*, 184 Ill. 2d 1, 22 (1998). We review the trial court's decision for an abuse of discretion. *Baez*, 241 Ill. 2d at 116.

¶ 20 Here, the record shows that defendant was represented by private counsel when he first filed his *pro se* motion to withdraw his guilty plea. Counsel subsequently withdrew based on defendant's claim that he was ineffective, and on August 7, 2009, defendant was appointed new counsel. Defendant then indicated to the court that he wished to hire private counsel and asked for, and was granted, two months to do so. On September 16, 2009, defendant filed a written motion for appointment of counsel other than a public defender, and on October 7, 2009, the court appointed defendant a conflict attorney, Wilson, with no objection from defendant.

¶ 21 On February 19, 2010, Wilson informed the court that she was discussing some matters with defendant, and the matter was continued without a change in representation or objection by defendant. However, on June 25, 2010, Wilson informed the court that defendant told her that he wished to proceed *pro se*. When the court asked defendant if he wanted to do so, he indicated that he did, then stated that he was "*willing to go pro se, you know, do some investigation myself.*" (Emphasis added.) Upon further inquiry as to how he would do so, defendant responded that his "attorney refuses to do stuff. *** [H]as done nothing for [him]" and refused to give him discovery. Furthermore, on July 26, 2010, when Wilson again indicated to the court that defendant told her that he wished to proceed *pro se*, defendant stated to the court "I cannot

defend myself if [appointed counsel] is not going to fight for me. If that's the case, I would like some time to go hire another attorney." Defendant's conduct over a brief span of time clearly shows that he vacillated on the matter of representation and did not demonstrate an unequivocal invocation of his right to proceed *pro se*. *People v. Rohlfs*, 368 Ill. App. 3d 540, 544-45 (2006). His requests were episodic and chaotic (*People v. Shelton*, 401 Ill. App. 3d 564, 574 (2010)); and when he was questioned by the court, defendant did not express a definitive, clear and unequivocal choice to proceed *pro se*.

¶ 22 The purpose of requiring the defendant to make an unequivocal request to waive counsel is to prevent him from appealing the denial of the right to self-representation or the denial of his right to counsel and from manipulating or abusing the system by going back and forth between his request for counsel and his wish to proceed *pro se*. See *Baez*, 241 Ill. 2d at 116. This case is such an example where defendant, apparently frustrated with the pace and nature of the proceeding and attendant representation, sought new counsel but accepted appointed counsel, requested numerous continuances to seek private counsel and sporadically indicated to his counsel that he wished to proceed *pro se*. *Baez*, 241 Ill. 2d at 118; *People v. Span*, 2011 IL App (1st) 083037, ¶ 61.

¶ 23 A defendant waives his right to self-representation only where he articulately and unmistakably demands to proceed *pro se*. *Baez*, 241 Ill. 2d at 116. This clearly was not such a case where defendant reportedly told his appointed counsel that he would represent himself, but when questioned on the record, he vacillated, and did not articulate a clear and unequivocal request (*Rohlfs*, 368 Ill. App. 3d at 545). In fact, defendant wrote a *pro se* motion for appointment of counsel other than a public defender. In this respect, this case is inapposite to *People v. Sheley*, 2012 IL App (3d) 090933, cited by defendant, where, unlike here, the defendant had filed a well-written and logical motion to proceed *pro se*. Under these circumstances, we find no abuse of discretion by the court in not permitting defendant to proceed *pro se*.

¶ 24 Defendant, nonetheless, maintains in his reply brief that this case is similar to *People v. Fisher*, 407 Ill. App. 3d 585 (2011), where the trial court denied the defendant's right to proceed *pro se* based on its finding that the defendant had evinced an ignorance of the technical rules of law and thus clearly needed an attorney, regardless of whether he wanted one. We disagree. In *Fisher*, 407 Ill. App. 3d at 586, 590-91, there was a clear and unequivocal written request to proceed *pro se*, unlike here where defendant filed a written motion for appointment of counsel other than the public defender and requested multiple continuances to hire private counsel, thereby demonstrating that his request for self-representation was not unequivocal. See *Span*, ¶ 61; *Shelton*, 401 Ill. App. 3d at 574; *Rohlf's*, 368 Ill. App. 3d at 544-45.

¶ 25 Defendant further maintains that the trial court improperly denied him his right to self-representation where it found that he was not "intelligent enough." He maintains that the court essentially found that he lacked the formal education and legal experience to waive his right to representation which is an improper basis for denying him his right to self-representation. He further claims, without supporting authority, that the court's later clarification, that defendant did not knowingly and intelligently waive his right to counsel, does not render the court's decision proper. We find defendant's contention unpersuasive.

¶ 26 The record shows that the court questioned defendant as to his understanding of the court process and the role of an attorney. When defendant failed to listen and properly respond to the question posed, the court told him he was not intelligent enough to knowingly waive his right and denied his motion. The record, however, also discloses the court's previous efforts to ascertain defendant's wishes as to self-representation, his appreciation of the nature of the right he would abandon by doing so and the consequences of that decision. *Baez*, 241 Ill. 2d at 117. The record, as indicated, also shows defendant's continuous vacillation on whether he would proceed *pro se* or with counsel. Thus, when read in context, we find that the court's remarks do not reveal an improper basis for denying the motion, but rather, reflect the court's conclusion that defendant

did not have a realistic appreciation of his situation, as is evident in the colloquies held with him, and the ambivalence he demonstrated with regard to self-representation.

¶ 27 In reaching this conclusion, we have also examined *Indiana v. Edwards*, 554 U.S. 164 (2008); *Godinez v. Moran*, 509 U.S. 389 (1993); and *Faretta*, 422 U.S. 806, cited by defendant for his contention that a severe mental illness is required to deny a defendant the right to self-representation, and that a defendant's technical legal knowledge is not relevant to assessing whether he knowingly exercised his right to represent himself. We note that *Godinez* dealt with the competency standard for a defendant to stand trial, *Edwards* held that states can insist upon representation by counsel for those competent enough to stand trial but who suffer from a severe mental illness to the point where they are not competent to conduct trial proceedings by themselves, and *Faretta* held that the state may not force an attorney upon a defendant who insists on conducting his own defense when he voluntarily and intelligently elects to do so. Here, no issue was raised regarding a mental illness or the incapacity to conduct a trial, nor was counsel forced on defendant. Rather, he accepted and actively sought counsel. Accordingly, we find that these cases do not warrant a departure from our conclusion that there was no abuse of discretion in the court's decision that defendant could not proceed *pro se* on his motion to withdraw his guilty plea.

¶ 28 In light of the foregoing, we affirm the judgment of the circuit court of Cook County.

¶ 29 Affirmed.