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2013 IL App (3d) 110539-U

Order filed May 13, 2013

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2013

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of the 10th Judicial Circuit, Peoria County, Illinois,
Plaintiff-Appellee,)	
v.)	Appeal No. 3-11-0539
)	Circuit No. 10-CF-66
CLARENCE THOMAS,)	
Defendant-Appellant.)	Honorable Stephen Kouri and James E. Shadid, Judges, Presiding.

JUSTICE CARTER delivered the judgment of the court.
Justices Lytton and McDade concurred in the judgment.

ORDER

- ¶ 1 *Held:* In a case in which the defendant invoked his right to self-representation on the day trial was set to begin, the circuit court denied the defendant's request. On appeal, the appellate court reversed and remanded for a new trial, holding that the circuit court erred when it denied the defendant's request to proceed *pro se*.
- ¶ 2 The defendant, Clarence Thomas, was convicted of first degree murder (720 ILCS 5/9-1(a)(2) (West 2010)) and was sentenced to a term of natural life imprisonment. On appeal, the defendant argues that the circuit court erred when it: (1) refused to allow him to proceed *pro se* at

trial; and (2) denied trial counsel's request for a psychiatric examination of the defendant to determine whether he was sane at the time of the murder. We reverse and remand.

¶ 3

FACTS

¶ 4 In early 2010, the defendant was charged by indictment with four counts of first degree murder (720 ILCS 5/9-1(a)(1), (2) (West 2010)) in connection with the January 19, 2010, stabbing death of his wife, Martha Thomas. Counts I and II were dismissed before trial. Count III alleged that the defendant repeatedly stabbed the victim with the knowledge that such acts created a strong probability of death or great bodily harm. Count IV repeated the allegations contained in count III, but also added that the murder was accompanied by exceptionally brutal behavior indicative of wanton cruelty.

¶ 5 On March 11, 2010, the circuit court appointed the public defender to represent the defendant and set the case for a jury trial to be held on April 19, 2010. On April 1, 2010, the defendant was granted a continuance, and the court set the new trial date for July 12, 2010. On June 28, 2010, the defendant was granted another continuance, and the court set the new trial date for October 18, 2010. On October 8, 2010, the defendant was granted another continuance, and the court set the new trial date for January 18, 2011.

¶ 6 At a scheduling hearing on January 7, 2011, trial counsel sought a continuance to research a potential request to have the defendant evaluated for insanity at the time of the offense. The circuit court continued the matter until January 13, 2011. At that hearing, trial counsel again requested the continuance for two reasons. First, trial counsel asked for the continuance to give him time to interview several witnesses that the defendant wanted him to talk to regarding certain elements of the defense. Second, trial counsel asked the court to appoint a psychiatrist to

evaluate the defendant for insanity at the time of the offense. In support of that request, trial counsel stated that his discussions with the defendant revealed that the defendant may not have any memory of the incident. Trial counsel stated that he had been pursuing a reasonable doubt defense theory but recently came up with the idea of pursuing an insanity defense. During the court's inquiry into the continuance request, trial counsel stated that he had no indication that the defendant had any history of mental illness.

¶ 7 The circuit court ruled that there was no basis for trial counsel's motion for a continuance. Accordingly, the court denied trial counsel's motion and kept the January 18, 2011, trial date.

¶ 8 On January 18, 2011, prior to the start of the jury trial, the defendant told the circuit court that trial counsel had not visited the defendant until the week prior to trial, despite the fact that the defendant had been incarcerated for almost one year. The defendant then told the court that he "would like to file for ineffective counsel and would like to represent myself with co-counsel." The defendant also told the court that he needed time to prepare a defense. After attempting to clarify what exactly the defendant was asking for, the court responded, "[e]ither I'll have somebody represent you and that person will make, after consultation with you, decisions about trial strategy, or you'll represent yourself, but I don't see the need to have somebody stand by." The defendant stated that he wished to represent himself.

¶ 9 When asked by the court if he was ready to try the case, trial counsel stated, "Um, as far as what the State -- what I anticipate the State's evidence to be. I thoroughly reviewed the discovery, and I believe that I would be prepared to cross examine the witnesses." Trial counsel added that he had not interviewed the additional witnesses that the defendant wanted him to interview. However, trial counsel also stated that he did not believe that those witnesses would

have any information useful to the defense. When asked by the court if the interviewing of those witnesses would impact trial strategy, trial counsel stated:

"Only in the sense that possibly my client indicates it would go to his state of mind and therefore perhaps bolster my argument to have him seen by a psychiatrist for sanity at the time of the offense, but I know that's something the Court has already ruled on and said that's not going to happen as far as an evaluation."

¶ 10 When the court told the defendant that it might grant the defendant's request to represent himself, but not if the request was meant only to delay the case, the defendant stated, "[n]o, it's not just going to be -- I just want to prepare my case and prepare a proper defense for myself, your Honor."

¶ 11 The court asked for an offer of proof as to what the defendant's three additional witnesses would testify or what would have been different had trial counsel spent more time with the defendant. It was determined that two of the witnesses were under subpoena and the third, identified as having the name of "Emel," was allegedly a family friend who worked at CityLink Transit Center in Peoria. With regard to the first two witnesses, the defendant stated that he could not recall to what they would testify because he left his paperwork at the jail. The defendant also reiterated that he was not prepared for trial. In response, the court stated:

"Well, I understand what you're saying, but you haven't given me anything that indicates any basis to continue it.

The names of the witnesses that are listed in the police reports I assume have been available since day one. You can't tell me what it is they're going to say

that would indicate how they might assist in the defense.

[Trial counsel] has indicated to me that the discovery may indicate a self-defense. The People would not be caught by surprise, if that were to come up, and that is something that doesn't necessarily have to be noticed if it comes up at trial if it's been part of the discovery it should be noticed. But if surprise is the elements [*sic*] here...

[Trial counsel] maybe didn't spend the time with you that you think he should have. But under the circumstances, [trial counsel], are you prepared to try the case even if the defense ultimately has to work towards a self-defense theory?"

Trial counsel responded:

"I believe that I can be, yeah, Judge. I believe there could be an alternate theory here, either just straight reasonable doubt or alternatively self-defense.

However, self-defense, given what I see in the discovery, was not something that I had ultimately prepared to go towards; be very difficult to claim."

¶ 12 After further discussion, the court again asked the defendant if he wanted to represent himself. The defendant responded in the affirmative and again noted that he was not prepared for trial, to which the court responded, "[w]ell with that in mind then I'll just leave [trial counsel] in place to represent you. If you're not prepared to try the case and the case is starting today then certainly I don't want you to be at a disadvantage."

¶ 13 The defendant also attempted to explain to the court that he wanted trial counsel to pursue a self-defense theory based on alleged income tax fraud by his wife (the victim) and a "conspiracy on my wife's behalf that they try to cause injury to me." Trial counsel told the court

that he was aware of the defendant's allegations in this regard. The court told the defendant that it would have the defendant's paperwork delivered to him, and the court decided to leave the case set for trial in the afternoon.

¶ 14 On that first day of trial, the State presented three witnesses, who were also cross-examined by trial counsel. When the case was called the next day, the court noted that the defendant had communicated with trial counsel throughout the first day of the trial. The defendant told the court that he did not receive his paperwork on the first day of trial, even though it had been sent over from the jail. The defendant did not request to represent himself, and the trial resumed.

¶ 15 Two more witnesses testified for the State and were cross-examined by trial counsel before a break was taken. During this break, the defendant again requested that he be able to proceed *pro se* because trial counsel was not asking questions that he wanted trial counsel to ask. After telling the defendant that trial counsel was not required to ask the defendant's questions, the court allowed trial counsel to address the matter. Trial counsel stated that the defendant wanted him to ask questions related to "the income tax issue." However, trial counsel did not want to pursue that issue because he felt that doing so would establish motive for the State. After further discussion, the court stated that the defendant's complaints were regarding matters of trial strategy and ruled that the trial would resume with trial counsel still representing the defendant.

¶ 16 Five more witnesses testified for the State, three of which were cross-examined by trial counsel. During the subsequent lunch break, while the court discussed with the defendant and the attorneys whether the defendant would testify, the defendant stated:

"Your Honor, I just want to put on the record that I did want to testify prior

to what has basically transpired within the courtroom within the last couple of days.

I don't have anything to basically back up my testimony now because the information that I did - I did have is not being used in the courtroom. So at this time I choose not to testify, your Honor. I'm just going to let the court, state's attorney, my attorney just proceed with your proceedings and I just go from there."

¶ 17 When the trial resumed, the State presented one more witness, for whom trial counsel had no questions. After the State rested, the court and the attorneys had a discussion outside the presence of the jury, during which trial counsel stated he was not going to call the witnesses the defendant wanted him to call because he believed their testimony would be harmful to the defendant. The defendant stated that he was not going to testify, and the defense rested without presenting any evidence.

¶ 18 At the conclusion of the trial, the jury found the defendant guilty on both counts.

¶ 19 Trial counsel filed several posttrial motions but also informed the court that the defendant had filed a complaint about the representation with the Attorney Registration and Disciplinary Commission. The defendant was appointed new counsel, who filed an amended posttrial motion, alleging, *inter alia*, that the circuit court erred when it denied the defendant's request to proceed *pro se* at trial and trial counsel's request to have the defendant evaluated for insanity at the time of the offense. The motion also alleged that trial counsel was ineffective.

¶ 20 At the hearing on that posttrial motion, trial counsel testified, *inter alia*, that he met with the defendant at the Peoria county jail about one week before the trial in January 2011 for about three hours. He did not recall visiting the defendant at the jail prior to that time. Trial counsel

did state that his notes indicated he discussed the case with the defendant on two occasions in 2010 on dates on which the case was up for a scheduling conference or review. Trial counsel stated that those two meetings lasted approximately 30 minutes each and that he could not recall if he had spoken with the defendant at any other point prior to the January 2011 jail visit. During the defendant's testimony, he confirmed that trial counsel did not come to see him until approximately one week before the trial started. He also stated that the two meetings they had prior to that time did not last anywhere near 30 minutes each. After the hearing, the court denied the motion.

¶ 21 At sentencing, the circuit court sentenced the defendant to natural life in prison on count IV. After the court denied the defendant's motion to reconsider sentence, the defendant appealed.

¶ 22 ANALYSIS

¶ 23 The defendant's first argument on appeal is that the circuit court erred when it refused to allow him to proceed *pro se* at trial.

¶ 24 Both the United States and the Illinois Constitutions accord a defendant the right to represent himself or herself at trial. U.S. Const., amend. VI; Ill. Const. 1970, art. I., § 8. The importance of a defendant's Sixth Amendment right to self-representation cannot be understated. See *Faretta v. California*, 422 U.S. 806, 821-34 (1975) (tracing the right's roots back through English legal history). Even if the decision to proceed *pro se* is unwise, the right must still be respected. *Faretta*, 422 U.S. at 834; *People v. Woodson*, 2011 IL App (4th) 100223, ¶ 23. A defendant's constitutional right to self-representation is as basic and fundamental as the right to be represented by counsel. *People v. Silagy*, 101 Ill. 2d 147, 179 (1984). The circuit court should enter into a colloquy with a defendant who wishes to proceed *pro se* in order to determine

whether the defendant has the capacity to make a knowing and intelligent waiver of his or her right to an attorney. *People v. Ward*, 208 Ill. App. 3d 1073, 1084-85 (1991). The right is either respected or denied, but the deprivation of the right to proceed *pro se* is not subject to harmless error analysis. *McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8 (1984).

¶ 25 "For a defendant to invoke the right of self-representation, he must knowingly and intelligently relinquish the right to counsel, and the waiver of counsel must be clear and unequivocal, not ambiguous." *People v. Rasho*, 398 Ill. App. 3d 1035, 1041 (2010). The context in which a defendant makes such a request is important, as "[c]ourts must 'indulge in every reasonable presumption against waiver' of the right to counsel." *People v. Burton*, 184 Ill. 2d 1, 22-23 (1998) (quoting *Brewer v. Williams*, 430 U.S. 387, 404 (1977)). A circuit court's ruling on whether to allow a defendant to represent himself will not be disturbed unless the court's ruling constituted an abuse of discretion. *Rasho*, 398 Ill. App. 3d at 1040-41.

¶ 26 With regard to this case, we initially note that the right to self-representation is not absolute. See *Faretta*, 422 U.S. at 834 n.46; *Woodson*, 2011 IL App (4th) 100223, ¶ 24. In *Burton*, our supreme court noted the importance of the timing of a defendant's request to proceed *pro se* and cited cases for the proposition that "a defendant's request is untimely where it is first made just before the commencement of trial, after trial begins, or after meaningful proceedings have begun." *Burton*, 184 Ill. 2d at 24; see also *Rasho*, 398 Ill. App. 3d at 1042 (holding that "[a] request made before trial commences is generally viewed as timely if it is not accompanied by a request for additional time to prepare"). While it is true in this case that the defendant did not request to proceed *pro se* for the first time until the day the trial was set to begin, the record indicates that other than two brief discussions on court dates in 2010, trial counsel did not meet

with the defendant regarding the case until one week before trial, despite the fact that the case had been pending for nearly one year. Under these circumstances, we see no reason to make a finding adverse to the defendant when the responsibility for the timing of his request to proceed *pro se* was beyond the defendant's control.

¶ 27 A defendant can also forfeit the right to self-representation if he or she "deliberately engages in serious and obstructionist misconduct." *Faretta*, 422 U.S. at 834 n.46. However, there is nothing in the record to suggest that the defendant engaged in that type of serious and obstructionist misconduct.

¶ 28 Moreover, the defendant's request for self-representation was denied without a determination of whether he was able to make a knowing and intelligent waiver of the right. See *People v. Fisher*, 407 Ill. App. 3d 585, 589-90 (2011). There was only a minimal dialogue between the circuit court and the defendant regarding his request. Under Illinois Supreme Court Rule 401(a) (eff. July 1, 1984):

"The court shall not permit a waiver of counsel by a person accused of an offense punishable by imprisonment without first, by addressing the defendant personally in open court, informing him of and determining that he understands the following:

- (1) the nature of the charge;
- (2) the minimum and maximum sentence prescribed by law, including, when applicable, the penalty to which the defendant may be subjected because of prior convictions or consecutive sentences; and
- (3) that he has a right to counsel and, if he is indigent, to have counsel

appointed for him by the court."

Although substantial and not strict compliance with Rule 401(a) is required for a defendant's waiver to be valid (*People v. Campbell*, 224 Ill. 2d 80, 84 (2006)), it is clear from the record in this case that the court did not substantially comply with Rule 401(a) after the defendant requested to proceed *pro se*. The court's failure to do so constituted error. See *Campbell*, 224 Ill. 2d at 87 (holding that once the defendant requested to proceed *pro se*, "he was entitled to be advised of his rights [under Supreme Court Rule 401(a)], and the trial court's failure to do so was error").

¶ 29 For the aforementioned reasons and under the circumstances of this case, we hold that the circuit court abused its discretion when it denied the defendant's request to proceed *pro se*. Accordingly, we reverse the court's judgment and remand the case for a new trial at which the defendant may elect, if he so chooses, to reassert his right to proceed *pro se*. If he does, then the court should address that request consistent with this court's order and the law applicable to the right to self-representation.

¶ 30 Our ruling on the first issue obviates the need to address the defendant's second argument.

¶ 31 CONCLUSION

¶ 32 The judgment of the circuit court of Peoria County is reversed and the cause is remanded for a new trial.

¶ 33 Reversed and remanded.