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2015 IL App (3d) 120980-U

Order filed January 21, 2015

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2015

PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of the 12th Judicial Circuit,
Plaintiff-Appellee,)	Will County, Illinois,
)	
v.)	Appeal No. 3-12-0980
)	Circuit No. 09-CF-2029
JESSE A. BONDS,)	
)	The Honorable
Defendant-Appellant.)	Carla Policandriotes,
)	Judge, Presiding.

PRESIDING JUSTICE McDADE delivered the judgment of the court.
Justices Carter and Schmidt concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court abused its discretion in not allowing Bonds to proceed *pro se* after his first request which was unambiguous, knowing, and intelligent. Structural errors are not subject to harmless error review.

¶ 2 Jesse Bonds, the defendant, was charged with two counts of first-degree murder of Marcus Johnson. His first trial resulted in a hung jury. After his second trial in May of 2012, Bonds was convicted of first-degree murder and sentenced to 83 years imprisonment. He

appeals the trial court's denial of his four timely requests to waive counsel and proceed *pro se* that he had made over the course of months prior to his second trial.

¶ 3

FACTS

¶ 4

On January 12, 2012, Bonds sent a handwritten letter to the trial judge asking to represent himself with the public defender's assistance. At a hearing on January 27, the trial court acknowledged the letter. The court queried the structure of Bonds proposed self representation with assistance. It then made several inquires about Bonds' educational background and directly requested him to give "[a]ny reason that [he] think[s] that he has the ability to represent [his] own interests." Bonds believed he needed to represent himself because his attorney's legal abilities would not lead to his acquittal as evidenced, according to Bonds, by the previous hung jury. He further stated that he wanted to testify himself and to call certain witnesses that the court appointed attorney did not allow. The trial court identified much of his complaint about counsel as trial strategy. In denying his *pro se* request, the trial court stated that Bonds "was not entitled to hybrid representation" and "he has absolutely no special education to allow himself [sic] to properly represent his own interests."

¶ 5

On February 6, Bonds sent a second letter to the trial court requesting to represent himself. It was denied. The court noted that Bonds' request lacked a pleading with a caption and that he was incorrect to state that he had a right to proceed *pro se*. It further stated that Bonds still failed to provide a substantial basis for wanting to proceed *pro se* and that "[t]here is no such thing as [a] matter of right to proceed *pro se*."

¶ 6

On April 27, Bonds filed a notice of motion and a motion to waive counsel. In the motion, Bonds noted that he was "charged with two counts of first degree murder," which were "Class X felonies," and that he understood the "maximum and minimum sentences" applicable.

Bonds stated that he has a "high school diploma," and also pled that he was aware that he had the right to counsel appointed by the court.

¶ 7 During the hearing on the motion, the trial court questioned Bonds about his knowledge of the charges against him and the minimum and maximum sentences they carried. Bonds answered the court's question incorrectly. When he asked for the correct answers, the court directed him to his attorney. The court then stated that Bonds failed to show "an understanding of the nature of the charges against [him] and the minimum and maximum sentencing." The court then generally inquired to reconfirm the trial date. Bonds stated that if he was allowed to represent himself, he "would ask for a *** 30-day continuance to make sure everything is in order." In denying Bonds' third request to defend *pro se*, the court held that his request was an attempt to delay the prosecution.

¶ 8 The trial was scheduled to commence on April 30. However, on that same day prior to jury selection and trial commencement, the State was granted a continuance to review tapes of telephone calls placed by Bonds in the Will County Detention Center between Bonds and defense witness Demetrius Smith. At the status hearing on May 2 regarding the taped conversations, the trial court barred Bonds from making telephone calls to persons other than his attorneys "to protect him from himself."

¶ 9 On May 7, Bonds filed a motion to reconsider defendant's right to waive counsel and proceed *pro se*. In the motion, Bonds said that he was ready and willing to proceed to trial. Bonds noted that murder "technically doesn't have a specific class" and generally carries a punishment of between 20 and 60 years; although "when a firearm is used in the commission of a murder, a minimum of 25 years is added to the sentence."

¶ 10 On May 8, the trial court denied Bonds' final motion to waive counsel and proceed *pro se*. The trial court denied the motion during a hearing regarding the admissibility of the taped telephone conversations between Bonds and Smith. In ruling that the taped conversations were admissible, the trial court stated that "a large portion of the communication, whether it's in the English language or otherwise, is inaudible" but that Bonds "communication with this individual is an attempt to influence testimony and they contain substantial statements as relates to the defendant's mental state of culpability and certainly contain statements against interest." Regarding the denial of his right to defend *pro se*, the court held that granting leave:

“[W]ould require me to vacate the prior order I entered that prohibits [Bonds] from having any additional telephone communication with anyone other than his lawyers or any representatives from the Public's Defender's Office. I will not allow continued presentation of potential testimony that is perjury. I will not allow Mr. Bonds to obstruct justice in this courtroom. And to allow him to represent himself would then give him more access in order to create testimony or otherwise manipulate the court and this judicial system, and I'm not going to do it.

The case law is certainly clear – I'm sure Mr. Bonds is not familiar with this. It's very, very clear whenever there is a finding by a court that a defendant is in his own detriment, his conduct is charged to him and not to his lawyers and not the court. It is the court's responsibility to maintain integrity in the presentation of cases.

Based on the findings that I have made and my obligations,
you will be continued to be represented by [the Public Defender].”

¶ 11 The trial court also granted the State's motion to introduce the tapes between Bonds and Smith as "statements against penal interest" because the tapes showed that Bonds was trying to "influence testimony." The case proceeded to trial the same day.

¶ 12 The jury found Bonds guilty of first degree murder based on his use of a firearm in the murder. At sentencing, in aggravation the State offered that Bonds had a prior conviction from 2002 for aggravated battery with a firearm and was on mandatory supervised release when the murder occurred. Addressing that conviction, the trial court noted that Bonds was "lucky" he did not kill anyone and that the court was "certain" he received a shorter sentence because the judge at the time believed that Bonds "can recover from this kind of conduct." The trial court sentenced Bonds to 83 years in the Department of Corrections.

¶ 13 ANALYSIS

¶ 14 Bonds argues that all four of his attempts to exercise his constitutional right to represent himself were denied in error. The State responds that though the court may have erred in denying Bonds' *pro se* requests, the error is nullified by the trial court's finding in denying Bonds' fourth request that he was attempting to influence testimony and encourage perjury.

¶ 15 We review a trial court's decision regarding a defendant's self-representation request for abuse of discretion. *People v. Fritz*, 225 Ill. App. 3d 624, 626-627 (1992). A defendant has a constitutional right to self-representation. See *Faretta v. California*, 422 U.S. 806, 834 (1975). "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. Rasha*, 398 Ill. App. 3d 1035, 1041 (2010); see also *Faretta*, 422 U.S.

835. "Violations of the right to counsel of choice are structural errors not subject to harmless-error review****" *People v. Baez*, 241 Ill. 2d 44, 105, (2011) (citing *United States v. Gonzalez-Lopez*, 548 U.S. 140, 147–48 (2006)). Thus, a defendant's right to counsel exists independently of whether he received a fair trial. *Id.* at 146.

¶ 16 Here Bonds' first request to proceed *pro se* also asked for assistance of counsel due to his professed unfamiliarity with law. The trial court noted that he did not have the right to a hybrid trial—alternating between representing himself and being represented by counsel. See *People v. Smith*, 249 Ill. App. 3d 460, 470 (1993). A person who chooses to represent himself must be prepared to actually do so because the right to self-representation does not carry with it the right to legal assistance. See *People v. Redd*, 173 Ill. 2d 1, 38 (1996).

¶ 17 Bonds' request and additional testimony during the hearing, however, show that he was not seeking a "hybrid" trial, but was merely making a request, which he was entitled to make, for standby counsel. *People v. Gibson*, 136 Ill. 2d 362, 379 (1990) (noting that a defendant who intends to proceed *pro se* may request standby counsel). Whether or not that request is granted rests within the discretion of the trial court.

¶ 18 In responding to the first request, the court also questioned Bonds about his educational background and inquired about the depth of his legal knowledge, skills, and abilities. A defendant's technical and legal ability to represent himself has no bearing on his competency to choose self-representation. See *Godinez v. Moran*, 509 U.S. 389, 400 (1993); *Faretta*, 422 U.S. at 836. A defendant need not possess the skill and experience of a lawyer to competently and intelligently choose self-representation, but should be made aware of the dangers and disadvantages of such representation if he invokes the right. *People v. Kidd*, 178 Ill. 2d 92, 104 (1997); *People v. Lego* 168 Ill. 2d 561, 563-64 (citing *People v. Silagy*, 101 Ill. 2d 147, 179-89

(1984)). The court erred by finding that due to Bonds' professed legal ineptitude and limited education he "[had] absolutely no special education to be allowed to properly represent his own interests."

¶ 19 Under Illinois Supreme Court Rule 401(a) (eff. July 1, 1983), all that is required of the court after the defendant has made a knowing request to proceed *pro se* is:

***[I]nforming 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 subject 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."

¶ 20 "Although a court may consider a defendant's decision to represent himself unwise, if his decision is freely, knowingly, and intelligently made, it must be accepted." *Baez*, 241 Ill. 2d at 116. As set out in *People v. Vanderwerff*, 57 Ill.App.3d 44, 49-50 (1978), the criteria commonly utilized by courts to make the determination of whether the accused has the requisite capacity to effectuate an intelligent waiver of his right to appointed counsel are "the defendant's age [citation], level of education [citation], mental capacity [citation] and prior involvement, if any, in legal proceedings [citation]." "These inquire [concern] *waiver*; they ha[ve] nothing to do with inquiring into the defendant's *ability to conduct his own defense*." (Emphases in original.) *People v. Ward*, 208 Ill. App. 3d 1073, 1083 (1991). The trial court's inquiries assessed Bonds'

ability to present the case and not his competence to elect the waiver. This was an abuse of discretion.

¶ 21 The trial court further erred by incorrectly requiring Bonds, as a condition of self-representation, to articulate why he thought "he had the ability to represent his own interests." Such a requirement does not exist when the court is determining whether to grant a request for self-representation. *People v. Haynes*, 174 Ill. 2d 204, 244-245 (1996). A trial court may not refuse a knowing and voluntary waiver of counsel on the ground that the defendant lacks a "proper reason" to represent himself – "[t]o the contrary, a court must honor a defendant's knowing and intelligent election to proceed *pro se*, even if the court considers the decision unwise." *Id.*

¶ 22 The trial court committed a structural error in not allowing Bonds to proceed *pro se* after his first (or any subsequent) request. We need not address the additional proceedings and subsequent erroneous denials of Bonds' second, third, and fourth *pro se* request.

¶ 23 The State argues, however, that the trial court's error in denying Bonds' *pro se* request is overcome by the court's later finding that Bonds had acted in a manner designed to undermine the judicial system by attempting to influence testimony and encourage perjury. It asserts that the application of harmless error is warranted. It notes such application in this case would not ask whether the trial outcome would be different as such a question is irrelevant to issues concerning structural error. The State argues that we should assess whether the error was harmless because Bonds' behavior would have caused his right to self-representation to be forfeited.

¶ 24 The right to self-representation is not absolute. A defendant can forfeit this right if he "deliberately engages in serious and obstructionist misconduct." *Faretta*, 422 U.S. at 834 n. 46.

A defendant who abuses the right to counsel "in an attempt to delay trial and the effective administration of justice may [also] forfeit his right to counsel of choice." *People v. Howard*, 376 Ill. App. 3d 322, 335 (2007). Moreover, a "defendant's behavior in the course of seeking to obtain self-representation may in itself be disruptive and thereby justify denying his motion to proceed *pro se*." *People v. Woodson*, 2011 IL App (4th) 100223, ¶24 (quoting *People v. Ward*, 208 Ill. App. 3d 1073, 1084 (1991)).

¶ 25 We find persuasive the proposition in *People v. Carson*, 104 P.3d 837 (Cal. 2005), that a defendant's out of court misconduct can be the basis for denying or terminating a defendant's right to self-representation. In that case, the trial court granted the defendant's *pro se* request but later revoked it when it reviewed cumulatively the misconduct of the defendant. Many of the acts including an attempt to suborn false testimony had occurred prior to the allowance of leave to proceed *pro se*. The final act that resulted in the revocation of that leave was the defendant's receipt of information he was not privy to prior to trial.

¶ 26 The California Supreme Court held, contrary to the lower court's interpretation of *Faretta v. California*, 422 U.S. 806 (1975), that "the defendant's acts need not result in a disruption of the trial" to warrant immediate termination of *pro se* representation but the "likely effect of the misconduct should be the primary consideration." *Id.* at 842. The court noted that such acts need not rise to a level of complete forfeiture and that misconduct that was more removed from trial proceedings or less likely to affect the fairness of the trial may not justify complete withdrawal of a defendant's right to self-representation. *Id.* The *Carson* court further discussed that if the trial court is finding forfeiture, it must provide documentation with evidence reasonably supporting a finding of obstructive behavior that would seriously threaten the integrity of the trial. *Id.*

¶ 27 In the instant case, the trial court noted at the hearing on May 5, 2012, that Bonds' actions during the course of the proceedings prior to trial involved a "continued presentation of potential testimony that is perjury." The court discussed how the recordings of Bonds' communications with subpoenaed witness, Demetrius Smith, showed his "mental state of culpability and certainly contain[ed] statements against interest." If we were to accept the State's assertion of harmless error due to forfeiture, such actions could have led to Bonds forfeiture of his right to self-representation. However, the trial court's acknowledgment of its inability to completely comprehend the recorded conversation after having listened to it once in open court is evidence of the possibility that there was no attempt to corrupt court proceedings but the court's further abuse of discretion showcased by its multiple erroneous denials of Bonds *pro se* request. Moreover, our review of the conversation does not show Bonds eliciting conduct that would be obstructive. We understand them as the actions of a person, if allowed to represent himself, trying to develop his case by identifying potential witnesses.

¶ 28 The conversation between Bonds and Smith specifically referenced by the State involves Bonds requiring Smith to contact people to meet with his lawyer to provide a statement of their account of the night of Marcus Johnson's murder. The referenced need to get money, for his then attorney, from various people and the assertion that those who do not help will reap a penalty when Bonds is released seem to be the only coercive statements.

¶ 29 Even so, the trial court erred in denying the defendant's *pro se* request before it was made aware of these purported acts of misconduct and we reject the State's request to extend its understanding of the harmless error analysis. A defendant's right to counsel of choice exists independently of whether he received a fair trial. "Since the right of self-representation is a right that when exercised usually increases the likelihood of a trial outcome unfavorable to the

defendant, its denial is not amenable to 'harmless error' analysis. The right is either respected or denied; its deprivation cannot be harmless.” *McKaskle v. Wiggins*, 465 U.S. 168, 178 (1984). The State has not provided and our research has not produced any case law where our Supreme Court has made the interpretation of harmless error review the State suggests.

¶ 30 We need not reach Bonds’ second argument regarding the trial court's alleged abuse of discretion. Because the trial court's error in denying Bonds' first *pro se* request is structural, this case is remanded for a new trial.

¶ 31 CONCLUSION

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

¶ 33 Reversed and remanded for new trial.