2018 IL App (5th) 150166-U

NO. 5-15-0166

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Massac County.
	)	
v.	)	No. 14-CF-113
	)	
MONTY ENGLEHART,	)	Honorable
	)	James R. Williamson,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE OVERSTREET delivered the judgment of the court.
Justices Goldenhersh and Moore concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court abused its discretion in summarily denying the defendant's request to proceed *pro se*.

¶ 2 A jury found the defendant, Monty Englehart, guilty of the offense of escape in violation of section 31-6(c) of the Criminal Code of 2012 (Code) (720 ILCS 5/31-6(c) (West 2012)). On direct appeal from his conviction, the defendant argues that we must reverse his conviction because the circuit court summarily denied him his constitutional right to represent himself. For the following reasons, we reverse and remand for a new trial.

¶ 3 BACKGROUND

¶ 4 The State charged the defendant with being in the lawful custody of a peace officer for the alleged commission of a felony offense and intentionally escaping from the officer's custody. Under section 31-6(c) of the Code, escape under these circumstances is a Class 2 felony. *Id*.

¶ 5 On October 31, 2014, at his first appearance, the defendant appeared *pro se*, and the circuit court advised him that he had a right to a court-appointed counsel, could hire a lawyer, or could represent himself. The defendant indicated that he did not have the funds to hire a lawyer; therefore, the circuit court appointed the public defender to represent him. In addition, during the court appearance, the following took place:

> "[The defendant]: I was going to say, Your Honor, before it even goes that far, I forgot what it's called when you're temporarily representing yourself. I don't know all that.
>
> THE COURT: *Pro se.*
>
> * * *
>
> THE COURT: But you're not representing yourself now. I've appointed [the public defender].
>
> [The defendant]: Oh *** shoot.
>
> THE COURT: So you've got to—if you want to talk to [the prosecutor], you have to do that through [the public defender].

[The defendant]: I was going to say, this could probably be ended today if I could have, like, ten minutes with [the prosecutor]. I can probably end this today if she was willing to talk with me.

THE COURT: Well, before we do that, you would have to ask me to withdraw [the public defender] as your lawyer. Then [the prosecutor] would have to be in a position where she wants to talk to you. ***

What do you have to say, ma'am? Do you not want to talk to him?

[The prosecutor]: Not yet, Your Honor.

THE COURT: Okay. Well, you've got your lawyer. You have [the public defender]. You can work with [the public defender], and she can be your go-between, your lawyer."

¶ 6 On February 6, 2015, the parties appeared in court for a pretrial hearing. At the outset, when the court asked the public defender whether she was ready for trial, she responded as follows:

"No, Your Honor. I'm making an oral motion to withdraw as counsel for [the defendant]. The attorney/client relationship has completely broken down. He refuses to talk to me about the case. And because of that, I need to withdraw and have another attorney appointed to represent him."

¶ 7 The court asked the prosecutor if she had anything to say, and she responded: "[I]t's a pattern. He's gotten rid of attorney after attorney. It's a matter of him delaying, just delaying the Court." The court denied the motion to withdraw. The court then granted the defendant permission to address the court, and he stated as follows:

> "I understand that this would look like it's a pattern. I did not in any way request that [the public defender] file any motion to withdraw. I never once. The only time that I refused to even speak to [the public defender] was after two-and-a-half months of asking her to come and see me, and she did not."

¶ 8 The defendant told the court that he had reported the public defender to the Attorney Registration and Disciplinary Commission (ARDC) and that he was concerned that his trial was to start in two weeks, but his attorney had not filed any motions in his defense. He complained about certain statements made by the prosecutor during the grand jury proceeding and that his attorney had not filed any motions with respect to the grand jury proceeding. He asked the court to "please take five minutes, and look at the Grand Jury transcripts and your own court record sheets right there." He told the judge to "see it for yourself," that the prosecutor "lied twice" before the grand jury. At the conclusion of the defendant's statement to the court, the circuit court again stated that it was denying defense counsel's motion to withdraw and proceeded with the pretrial hearing.

¶ 9 Defense counsel stated that she did not know whether she would have any witnesses because she needed to speak with the defendant but he would not communicate with her. She stated that she had gone over the discovery materials with the defendant and had made other preparations for the trial. She again mentioned the defendant's letter to the ARDC and stated, "I understand that he doesn't want to work with me and that he wants to have another attorney." The defendant interjected three times with brief

comments as his attorney spoke about discovery. Each time the trial court told the defendant, "Let her talk now."

¶ 10 The court confirmed the trial date and began explaining how it intended on conducting *voir dire.* Near the conclusion of the pretrial conference the defendant again interjected, "Your Honor?" The circuit court responded to the defendant's interjection with, "Yes." The defendant then stated, "Please forgive me. I mean, I mean no disrespect to you. I just don't know how this can go forward when the prosecutor lied to the grand jury." The defendant again complained that his "lawyer has not filed a single motion, even though she knows that." The court told the defendant that if he was convicted, he could file an appeal and "that might be an appellate issue," but that there was no motion before it with respect to the grand jury and that they were going to proceed with the trial. When the circuit court concluded the pretrial conference, the defendant stated, "What a kangaroo court going on. *** A fucking joke." Nothing in the record indicates that the circuit court considered the defendant's interjections or actions at the pretrial conference to be serious and obstructionist misconduct.

¶ 11 On February 23, 2015, the parties appeared in court for the jury trial. At the outset, prior to jury selection, the public defender renewed her motion to withdraw as the defendant's counsel. The public defender began explaining that she had made repeated efforts to talk with the defendant, but he would not speak to her. The defendant interrupted, "You have no problem lying, do you?" The court told the defendant to "let her talk." The public defender continued to explain that she had not been able to discuss trial strategy or whether or not the defendant wanted to testify at his trial.

¶ 12 The defendant asked permission to respond, and the court granted him permission to respond "[b]riefly." The defendant then stated: "I asked [the public defender] to come and see me and discuss some motions in my pretrial. She said, I will see you next week. I never saw her again until three days prior to trial. Three days prior to today. She tried two times to come and see me, and I refused to speak with her." The defendant again complained that the prosecutor lied to the grand jury and that the public defender had not filed any motions other than her oral motion to withdraw.

¶ 13 The court denied the public defender's second oral motion to withdraw and proceeded to address pretrial matters. After the court ruled on two pretrial motions filed by the State, the public defender again renewed her motion to withdraw, which the trial court summarily denied.

¶ 14 As the court discussed witnesses, the defendant again interjected, "Your Honor?" The court responded, "Yes, sir." The court then allowed the defendant to raise an issue about a witness and allowed the prosecutor to respond. The court ruled on the defendant's objection, stating that the witness could testify and telling the defendant, "You can have your lawyer cross examine him."

¶ 15 As the pretrial conference progressed, the defendant again interjected, "Your Honor, I have one last thing I would like to address with, if it's okay." The court again allowed the defendant to interject in the proceedings. The defendant raised arguments directed at the validity of the indictment. The public defender then interjected, "This is part of the problem, because [the defendant] believes that if he has read something in a book, that he knows what that is, as far as the legal implications." The public defender

stated that she was trying to represent the defendant the best of her ability, adding, "And I know that he believes he can do it by himself, but I don't think that that would probably be very good for him in this case." At that point the defendant stated, "*Your Honor, I would like to represent myself.*" (Emphasis added.) The court immediately responded, "That will be denied."

¶ 16 The court also added that it was denying the defendant's *pro se* oral motion to dismiss the indictment. The defendant asked the court for permission to finish what he was saying about the indictment, stating that he would be "brief," and adding, "I'm sorry." The circuit court allowed the defendant to make additional arguments concerning the charges. When the defendant concluded, the circuit court addressed the merits of the defendant's argument in a back-and-forth exchange with the defendant. The defendant questioned the court concerning how he could be convicted of escape when he had not yet been convicted of the underlying felony for which he was being held in custody at the time of the escape. The court concluded the discussion by stating, "I'm not going to address that. The Bill of Indictment is here. I have read it more than once. Several times. There has been no motion to dismiss because it is fatally defective and it doesn't allege the vital—it comports with the statute. So I am—we are going to proceed on this Bill of Indictment, Class 2 felony."

¶ 17 Later, when discussing trial procedure, the defendant again interjected, "your Honor, I understand that I also have the right to question witnesses, too." The court stated: "No, No. She is your lawyer. You are not representing yourself. She is your lawyer. She will ask the questions. *** You have the right to assist, of course, in your

defense, but you write down any questions that you think she needs to ask, and then she will make the decision whether she should ask it or not." The defendant responded, "*Let it be said that she is my attorney under protest.*" (Emphasis added.)

¶ 18 Again, nothing in the record indicates that the circuit court considered the defendant's conduct during the conference before trial to be serious and obstructionist misconduct. Immediately following the pretrial conference, jury selection proceeded without incident.

¶ 19 The next day, the jury trial began, and during the State's case-in-chief, in between witnesses, the defendant interrupted the proceeding as follows:

> "[The defendant]: Your Honor, may I represent myself, please?
>
> THE COURT: No don't—
>
> [The defendant]: I don't mean any disrespect, but I'm asking, please.
>
> THE COURT: No. We're going on with the testimony. We've been—I've addressed this issue. [The public defender] is your lawyer. She's questioning the witnesses, and just work with her and we're going to get this witness sworn, now this will be our last."

¶ 20 At the conclusion of the State's case-in-chief, defense counsel told the court that the defendant believed that she was not doing an effective job representing him and that he wanted to represent himself. With permission from the court, the defendant addressed the court and criticized defense counsel's performance during the State's case-in-chief. The court, however, felt that the public defender had been effective in questioning the

State's witnesses. Therefore, the court stated, "And so I'm going—not to allow you to represent yourself. [The public defender] will remain representing you in this case."

¶ 21 The jury found the defendant guilty of escape, and the circuit court sentenced him to seven years of imprisonment. The defendant did not file a posttrial motion. He appeals his conviction and sentence, arguing that the circuit court improperly denied him his constitutional right to represent himself at the trial.

¶ 22 ANALYSIS

¶ 23 The only issue the defendant raises on appeal concerns his constitutional right to self-representation. He acknowledges that he did not preserve this issue in the proceedings below because he did not raise the issue in a posttrial motion. However, he requests us to review the issue under the plain error rule.

¶ 24 "[T]he purpose of the plain error rule is to guard against the possibility that an innocent person may have been convicted due to some error which is obvious from the record, but not properly preserved [citation] and to protect and to preserve the integrity and the reputation of the judicial process [citation]." (Internal quotation marks omitted.) *People v. Williams*, 193 Ill. 2d 306, 348 (2000). In *People v. Hunt*, 2016 IL App (1st) 132979, ¶ 15, the court held that a defendant had forfeited his claim that he was denied his constitutional right to represent himself when he failed to include the argument in a posttrial motion. However, the court also held that the issue was one involving "a potential structural error, one that affects the entirety of the trial and requires automatic reversal if found." *Id*. The court, therefore, reviewed the error under the plain error rule.

Id. Likewise, in the present case, we will consider the defendant's argument under the plain error rule.

¶ 25 On review, a trial court's decision with respect to a defendant's request to represent himself will be reversed only if the court abused its discretion. *People v. Burton*, 184 Ill. 2d 1, 25 (1998). An abuse of discretion occurs when the court's ruling is arbitrary and without a logical basis. *People v. Fisher*, 407 Ill. App. 3d 585, 589 (2011).

¶ 26 The sixth amendment to the United States Constitution grants a defendant a constitutional right to represent himself. U.S. Const., amend. VI; *Faretta v. California*, 422 U.S. 806, 835 (1975). This constitutional right applies to state court proceedings through the due process clause of the fourteenth amendment. *Faretta*, 422 U.S. at 818.

¶ 27 In order to represent himself, a criminal defendant must knowingly and intelligently relinquish his right to counsel. *Id*. at 835. A defendant's waiver of his right to counsel must be clear and unequivocal, not ambiguous. *Burton*, 184 Ill. 2d at 21. In order to proceed *pro se*, the defendant must articulately and unmistakably demand to proceed *pro se*. *Id*. The purpose of requiring that a criminal defendant make an unequivocal request to waive counsel is to: "(1) prevent the defendant from appealing the denial of his right to self-representation or the denial of his right to counsel, and (2) prevent the defendant from manipulating or abusing the system by going back and forth between his request for counsel and his wish to proceed *pro se*." *People v. Mayo*, 198 Ill. 2d 530, 538 (2002). "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." *People v. Baez*, 241 Ill. 2d 44, 116 (2011).

¶ 28 Illinois Supreme Court Rule 401(a) (eff. July 1, 1984) sets out inquiries that a circuit court must make before accepting a defendant's waiver of his right to counsel to ensure that the defendant's waiver is an intelligent and knowing waiver. In the present case, the circuit court summarily denied the defendant's request without conducting any inquiry under Illinois Supreme Court Rule 401(a) to determine whether the defendant was making a knowing and intelligent waiver of his right to counsel. We agree with the defendant's argument that "[i]f a court has a duty to inquire whether a defendant's request to represent himself is freely, knowingly and intelligently made before accepting the request" then the court "has a correlative duty to make such an inquiry before rejecting a defendant's request."

¶ 29 For example, in *Faretta*, a defendant charged with grand theft in a California court clearly and unequivocally declared that he wanted to represent himself and did not want counsel. *Faretta*, 422 U.S. at 835. The record in that case showed that the defendant "was literate, competent, and understanding, and that he was voluntarily exercising his informed free will." *Id*. The trial court, however, warned the defendant that it was a mistake, denied the defendant's request, and required the defendant to conduct his defense through an appointed counsel. *Id*. at 808-10. The defendant appealed his subsequent conviction. *Id*. at 811-12. On appeal, the Court emphasized that the sixth amendment "grants to the accused personally the right to make his defense." *Id*. at 819. The Court reversed the defendant's conviction, stating as follows, "In forcing [the defendant], under these circumstances, to accept against his will a state-appointed public

defender, the California courts deprived him of his constitutional right to conduct his own defense." *Id.* at 836.

¶ 30 Here, the defendant argues that he made an unequivocal request to represent himself, but the circuit court summarily denied his request. The defendant, therefore, requests that we reverse his conviction and remand for a new trial. We agree with the defendant that the record establishes that he made a clear and unequivocal request to proceed *pro se*. The court, therefore, should have admonished the defendant under Rule 401(a) and should have allowed him to proceed *pro se* if it found that the defendant was making an intelligent and knowing waiver of his right to counsel. The circuit court's failure to do so requires us to reverse the conviction and remand for a new trial.

¶ 31 In defense of the circuit court's summary denial of the defendant's request for self-representation, the State does not dispute that the defendant made a clear and unequivocal request to represent himself. Instead, the State argues that the circuit court properly denied the defendant's request because the request was untimely. In addition, the State argues that the circuit court's denial of the request was not an abuse of discretion because the defendant had been disruptive throughout the pretrial proceedings and because the defendant had an "apparent pattern of dispensing with attorneys in order to delay proceedings brought against him." The circuit court did not articulate either of these grounds as the basis for denying the defendant's request. In addition, the record before us does not support these grounds as a basis for denying the defendant's request.

¶ 32 In arguing that the defendant's request to represent himself was untimely, the State cites *People v. Burton*, 184 Ill. 2d 1 (1998), and *People v. Woodruff*, 85 Ill. App. 3d 654

(1980). These cases do not support the State's argument in support of the circuit court's ruling.

¶ 33 In *Burton*, the defendant claimed that he was denied his right to proceed *pro se* during sentencing. *Burton*, 184 Ill. 2d at 20. The supreme court had to determine whether the defendant "truly desire[d] to represent himself and ha[d] definitively invoked his right of self-representation." *Id*. at 22. The supreme court rejected the defendant's argument that the trial court denied him his right to represent himself, holding that the defendant failed to "clearly and unequivocally invoke his right to represent himself." *Id*. at 24.

¶ 34 In the present case, the State's argument focuses on a statement the *Burton* court made in *dicta*. In its general discussion of the constitutional right to self-representation, the supreme court observed that "[a] number of courts have held 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." *Id*. This vague observation, however, does not set forth any specific rule, holding, or analysis that we can apply in this case. The holding in *Burton* concerned the defendant's failure to make a clear and unequivocal request. Here, the State does not dispute that the defendant made a clear and unequivocal request. *Burton*, therefore, does not support the circuit court's summary denial of the defendant's request to proceed *pro se* in this case.

¶ 35 In *Woodruff*, a convicted defendant argued that he was denied his sixth amendment right to self-representation because the trial court failed to advise him of his right. *Woodruff*, 85 Ill. App. 3d at 655. Like *Burton*, in that case, the court held that the defendant "never expressed a desire to represent himself." *Id*. at 659. Although the

defendant expressed dissatisfaction with his court-appointed counsel, he never showed "a manifestation of a desire to defend *pro se*." *Id*. Instead, "[h]is statements clearly indicated that he wished to be represented by counsel, albeit counsel different than that appointed by the trial court." *Id*. Again, this holding does not apply here where, as we stated, the defendant made a clear and unequivocal request to proceed *pro se*. The *Woodruff* court stated that "no error occurs when a trial court fails to advise a defendant of a right to represent himself *unless* that defendant has clearly and unequivocally expressed a desire to reject the assistance of counsel and to proceed to present his defense *pro se*." (Emphasis added.) *Id*. at 660.

¶ 36 The *Woodruff* court also stated as follows: "The manifestation of [the desire to defend *pro se*] must also be timely made. A defendant cannot await the eve of trial and then, *hoping for a continuance*, announce that he has decided to rely upon his skills rather than counsel's in presenting his defense. Such machinations cannot be used to thwart the administration of justice." (Emphasis added.) *Id*. See also *People v. Rasho*, 398 Ill. App. 3d 1035, 1042 (2010) ("defendant's request to proceed *pro se* on the day of trial was not timely and *was accompanied by an implicit motion for a continuance*" (emphasis added)). In the present case, however, the defendant did not express any desire to continue the trial and did not request any additional time to prepare. Without a request for a continuance or additional time to prepare, there is no basis to conclude that the defendant's request made before the trial began was untimely.

¶ 37 For example, in *People v. Ward*, 208 Ill. App. 3d 1073, 1084 (1991), the court agreed that the lateness of a defendant's request to proceed *pro se* was a possible ground

for denying the request. "[T]he request might come so late in the proceedings that to grant it would be disruptive of the orderly schedule of proceedings." *Id*. The *Ward* court, however, qualified this statement by adding, "We caution *** that when a request to proceed *pro se* is made and there is no request for additional time to prepare, a motion to proceed *pro se* should generally be viewed as timely as long as it is made before trial." *Id*. We agree.

¶ 38 In the present case, the defendant's request to proceed *pro se* came before jury selection began and was not accompanied with a request to continue the trial or for additional time to prepare. In addition, in denying the defendant's request, the circuit court did not find that the request was a delay tactic, was an attempt to thwart justice, or was otherwise untimely. Accordingly, based on the record before us, we cannot affirm the trial court's denial of the defendant's constitutional right to proceed *pro se* on the ground that the request was untimely; nothing in the record establishes timeliness as grounds for denying the request.

¶ 39 The State also argues, alternatively, that the trial court's denial of the defendant's request was proper because the defendant had been "disruptive throughout the pretrial proceedings, continually cutting off his defense counsel to address the trial court himself and interjecting his own thoughts and complaints into the proceeding." Again, the circuit court did not make any findings that the defendant engaged in disruptive behavior that would justify the denial of his constitutional right to proceed *pro se*.

¶ 40 In *Ward*, the court stated that "a trial judge may terminate self-representation by a defendant who engages in serious and obstructionist misconduct." *Ward*, 208 Ill. App. 3d

at 1084. The court added, "While this authority would be exercised only after a defendant has begun to represent himself, in *exceptional situations* *** 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*." (Emphasis in original.) *Id*. In the present case, the record does not reveal an exceptional situation that would justify the circuit court summarily denying the defendant's pretrial request to proceed *pro se*.

¶ 41 The defendant did interject in the pretrial proceedings, but he made many of his interjections after the court specifically granted him permission to do so. The circuit court entertained the defendant's interjections, addressed most of them on their legal merits, engaged in back-and-forth discussions with the defendant on several of the contentions that the defendant raised *pro se*, and ruled on the defendant's *pro se* motions. The actions of the circuit court contradict the State's argument that the defendant was engaged in serious and obstructionist misconduct. In addition, as the defendant notes in his brief, many of his interjections during pretrial were efforts to call the court's attention to what he perceived to be deficiencies of the public defender's performance which were the basis for his request to proceed *pro se*.

¶ 42 The court may only prevent a defendant from representing himself when he engages in "serious and obstructionist misconduct." *Faretta*, 422 U.S. at 834 n.46. There is no basis for us to conclude that the defendant engaged in serious disruption when the circuit court repeatedly granted the defendant permission to address the court and never indicated that the defendant was unreasonably disrupting the proceeding. The record in this case falls short of establishing an exceptional situation in which the defendant's

pretrial behavior was grounds for forfeiture of his constitutional right to self-representation at trial. Therefore, we cannot affirm the circuit court's summary denial of the defendant's constitutional right on this ground.

¶ 43 The State also suggested in the lower court proceedings, and on appeal, that the defendant's request to represent himself was properly denied because he had engaged in a pattern of dispensing with attorney after attorney. However, nothing in the record supports this assertion. The defendant had only one attorney throughout the proceedings in this case, and the record contains nothing with respect to the defendant's choices of counsel in any other proceedings.

¶ 44 It is undisputed that the defendant made a clear and unequivocal request to represent himself. The court, therefore, should have advised him pursuant to Rule 401(a) concerning the waiver of the right to counsel, determined whether the defendant had the capacity to make an intelligent and knowing waiver of his right to counsel, and accepted his decision to proceed *pro se* if it determined that his decision was freely, knowingly, and intelligently made. *Baez*, 241 Ill. 2d at 116; *Ward*, 208 Ill. App. 3d at 1082. The court was not permitted to decide whether the defendant's decision was "wise." *People v. Lego*, 168 Ill. 2d 561, 562 (1995); *Ward*, 208 Ill. App. 3d at 1082. The circuit court, however, summarily denied the defendant's request without any inquiry, and nothing in the record established grounds for the summary denial. Under these circumstances, the circuit court's decision was an abuse of discretion, and we are required to reverse the conviction and remand for a new trial. See *People v. Fisher*, 407 Ill. App. 3d 585, 590-91 (2011).

¶ 45 CONCLUSION

¶ 46 For the foregoing reasons, we reverse the judgment of the circuit court and remand for a new trial.

¶ 47 Reversed and remanded.