

NOTICE
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2018 IL App (5th) 150361-U

NO. 5-15-0361

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Jackson County.
)	
v.)	No. 14-CF-454
)	
JERMAINE HALL,)	Honorable
)	William G. Schwartz,
Defendant-Appellant.)	Judge, presiding.

JUSTICE GOLDENHERSH delivered the judgment of the court.
Justices Moore and Overstreet concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant's convictions are vacated and the cause remanded where the trial court abused its discretion in denying defendant's clear and unequivocal requests to represent himself on the ground that it viewed defendant as incapable of adequately representing himself.

¶ 2 **BACKGROUND**

¶ 3 Defendant, Jermaine L. Hall, was arrested on October 20, 2014. The following day, the Jackson County State's Attorney's Office charged defendant with one count of aggravated battery of a peace officer (720 ILCS 5/12-3.05(d)(4)(i) (West 2012)), one count of unlawful possession of cannabis with the intent to deliver on school grounds (720 ILCS 550/5.2(b) (West 2012)), one count of unlawful possession of cannabis (720

ILCS 550/4(d) (West 2012)), and two counts of resisting a peace officer (720 ILCS 5/31-1(a) (West 2012)). Defendant posted bond and was released from custody on October 22, 2014. Defendant was taken back into custody on January 23, 2015, after being served with a warrant for failing to appear in court.

¶ 4 Attorney Timothy Ting (Ting), an assistant public defender, was initially appointed to represent defendant in October 2014. In February 2015, attorney David Lawler (Lawler) filed a motion for leave to substitute Ting as defendant's counsel. Lawler filed a motion to withdraw as defendant's counsel on March 27, 2015, asserting he and defendant had irreconcilable differences over the manner in which defendant's case should be handled. On April 15, 2015, defendant filed a *pro se* motion to dismiss the charges against him. In his motion, defendant asserted he was a "foreign state, executive international organization" and was immune from jurisdiction. Defendant further asserted he was an internationally protected person.

¶ 5 The trial court addressed Lawler's motion to withdraw as counsel and defendant's *pro se* motion to dismiss at a pretrial hearing held on April 28, 2015. In response to the court's question of what the problem was regarding Lawler's representation of defendant, defendant stated: "I just want to file a motion on my behalf. I want to represent myself." The court then asked defendant whether he had any schooling in the law, and stated it had serious doubts as to whether defendant was capable of representing himself. In response, defendant stated he was "very capable of representing" himself. Thereafter, the court characterized defendant's *pro se* motion to dismiss as "absolutely ridiculous" and clearly showed defendant was unable to represent himself. The court stated: "I don't think you

are capable of representing yourself, but I am not going to get into that at this given moment." The court granted Lawler's motion to withdraw as counsel and appointed Ting, defendant's initial counsel in this matter, to represent defendant.

¶ 6 Following the April 28, 2015, pretrial hearing, the trial court entered a second pretrial order which stated, in relevant part:

"The defendant informs the [c]ourt that he wants to represent himself and discharge attorney Lawler. The [c]ourt informs the defendant that the court has serious doubts as to whether the defendant is capable of representing himself. The defendant files a motion in [c]ourt which demonstrates the inability of the defendant to represent himself. The Office of the Public Defender is appointed to represent the defendant with the issue of representation to be readdressed."

¶ 7 At a pretrial hearing held on May 26, 2015, Ting informed the court that defendant refused to speak with him. Thereafter, at the same hearing, defendant stated: "As I said before, [Ting] is fired, your Honor." The following colloquy then took place:

"THE COURT: You asked for the appointment of an attorney.

DEFENDANT: I didn't ask for the appointment of an attorney. You appointed me an attorney.

THE COURT: All right. So what are you going to do about representation?

DEFENDANT: I'm going to represent myself.

THE COURT: All right.

* * *

THE COURT: Now [defendant], tell me how you're going to represent yourself when you don't understand what the law is.

DEFENDANT: I understand what the law is perfectly fine.

* * *

THE COURT: Okay. Tell me what a peremptory challenge is.

DEFENDANT: I don't have to answer none of that.

THE COURT: Well you're telling me you understand the law very well.

DEFENDANT: I understand.

THE COURT: All right."

¶ 8 A subsequent pretrial hearing was held on May 29, 2015, where defendant appeared with attorney Thomas Moyer (Moyer), an assistant public defender. At the hearing, the State informed the court that it had offered a plea deal to defendant and explained the terms of the deal. Defendant refused to discuss the plea offer with Moyer, stating: "He's not my lawyer." The court then asked defendant whether he wished to be present for his jury trial. In response, defendant repeatedly stated that he did not consent to a jury trial. The court informed defendant the trial would proceed in his absence.

¶ 9 A jury trial was held on June 1 and June 2, 2015, where Ting appeared on behalf of defendant. Again, Ting was the assistant public defender appointed to represent defendant in this matter. Prior to jury selection, Officer Rowald informed the court that defendant was not attending his trial. The court noted it had previously informed defendant that the trial would proceed in defendant's absence. Defendant did not attend his trial and was found guilty on all five counts.

¶ 10 A sentencing hearing was held on August 5, 2015, where the court heard testimony from defendant's mother, Annette Battie, and two friends of defendant, Derrell Benard and Robert McClendon. The three witnesses all testified in support of defendant and recommended that defendant be sentenced to probation. Defendant also testified on his own behalf, stating he had learned from his actions and wanted to be given a second chance. Defendant was sentenced to seven years in prison on the count of aggravated battery (720 ILCS 5/12-3.05(d)(4)(i) (West 2012)) and three years on the count of unlawful possession of cannabis with intent to deliver on school grounds (720 ILCS 550/5.2(b) (West 2012)), both sentences to be followed by two years of mandatory supervised release. Defendant was also sentenced to 364 days on a single count of resisting a peace officer (720 ILCS 5/31-1(a) (West 2012)). All the sentences were ordered to run concurrent, and defendant was given 195 days of presentence custody credit. No sentence was imposed for the count of unlawful possession of cannabis (720 ILCS 550/4(d) (West 2012)) or the other count of resisting a peace officer (720 ILCS 5/31-1(a) (West 2012)). Thereafter, defendant's motion to reduce sentence was denied.

¶ 11 This appeal followed.

¶ 12 ANALYSIS

¶ 13 Defendant raises two issues on appeal. First, defendant argues his convictions should be vacated and the cause remanded for a new trial because the trial court denied defendant's clear and unequivocal requests to represent himself. Defendant next argues his fines should have been offset by the \$5 *per diem* credit for time spent in custody prior to sentencing. We will address defendant's contentions in turn.

¶ 14

I. Self-Representation

¶ 15 Initially, we note that defendant failed to preserve his argument regarding self-representation for review because it was not properly raised in a posttrial motion. Accordingly, this issue is forfeited. *People v. Hunt*, 2016 IL App (1st) 132979, ¶ 15. However, defendant has requested plain-error review in his brief. The plain-error doctrine permits a reviewing court to consider an unpreserved error when: (1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error; or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). Our supreme court has equated the second prong of plain-error review with structural error. *People v. Thompson*, 238 Ill. 2d 598, 613 (2010). Moreover, our supreme court has found that structural errors include denial of self-representation at trial. *People v. Averett*, 237 Ill. 2d 1, 12 (2010). Accordingly, because defendant's argument involves a potential structural error, "one that affects the entirety of the trial and requires automatic reversal if found," we will consider defendant's argument. *Hunt*, 2016 IL App (1st) 132979, ¶ 15.

¶ 16 Turning to the merits, it is well settled that a defendant has a constitutional right to represent himself. *Faretta v. California*, 422 U.S. 806, 835 (1975). In order to represent himself, a defendant must knowingly and intelligently relinquish his right to counsel. *People v. Burton*, 184 Ill. 2d 1, 21 (1998). Determining whether a defendant has made a

knowing and intelligent waiver is a factual determination based on the circumstances of each case. *People v. Leeper*, 317 Ill. App. 3d 475, 480 (2000). This determination includes consideration of the background, experience, and conduct of the accused. *Id.* Although a court may consider the defendant's decision unwise, the defendant's knowing and intelligent decision to represent himself must be accepted. *People v. Baez*, 241 Ill. 2d 44, 116 (2011).

¶ 17 Furthermore, a defendant's waiver of counsel must be clear and unequivocal. *Id.* A defendant waives his right to self-representation unless he clearly and unmistakably demands to proceed *pro se*. *Burton*, 184 Ill. 2d at 22. To determine if a waiver is clear and unequivocal, the court must consider the overall context of the proceedings to see if the accused truly desires to represent himself or herself and if he or she has unequivocally invoked the right of self-representation. *Leeper*, 317 Ill. App. 3d at 480-81. The purpose of requiring a defendant to 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*." *Baez*, 241 Ill. 2d at 116 (quoting *People v. Mayo*, 198 Ill. 2d 530, 538 (2002)). "A defendant must explicitly inform the trial court he wants to proceed *pro se* because '[a]nything else is an effort to sandbag the court and the opposition, to seek an acquittal with an ace up the sleeve to be whipped out in the event of conviction.'" *Burton*, 184 Ill. 2d at 22 (quoting *Cain v. Peters*, 972 F.2d 748, 750 (7th Cir. 1992)).

¶ 18 If a defendant gives some indication that he wishes to proceed *pro se*, he may later acquiesce in representation by counsel by vacillating or abandoning an earlier request to proceed *pro se*. *Id.* at 23. The timing of a defendant's request to proceed *pro se* also has great significance. *Leeper*, 317 Ill. App. 3d at 481. Courts have held that a *pro se* "request is untimely where it is first made just before the commencement of trial, after trial begins, or after *meaningful proceedings* have begun." (Emphasis added.) *Burton*, 184 Ill. 2d at 24. After that time, a court has the discretion to deny a defendant's request. *Leeper*, 317 Ill. App. 3d at 481. Such discretion is necessary in order to prevent a defendant from frustrating the effective prosecution of his or her case. *Id.*

¶ 19 The trial court's decision on a defendant's request to represent himself will not be disturbed on review unless the court abused its discretion. *People v. Rohlf*s, 368 Ill. App. 3d 540, 545 (2006). An abuse of discretion will be found only where the trial court's decision is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court. *Baez*, 241 Ill. 2d at 106.

¶ 20 Here, the record shows that defendant made two separate unequivocal requests to represent himself prior to the commencement of meaningful proceedings. At the pretrial hearing held on April 28, 2015, which was more than a month before the commencement of trial, the trial court addressed defense counsel's motion to withdraw and defendant's *pro se* motion to dismiss. In response to the trial court's question of what defendant's problem was regarding his counsel's representation, defendant stated: "I just want to file a motion on my behalf. I want to represent myself." The court then asked defendant whether he had any schooling in the law and told defendant it had doubts as to whether

defendant was capable of representing himself. In response, defendant stated he was "very capable of representing" himself. Thereafter, the court entered a pretrial order in which it acknowledged defendant's request to represent himself. However, the court noted it had "serious doubts" concerning defendant's ability to represent himself and appointed the office of the public defender to represent defendant "with the issue of representation to be readdressed."

¶ 21 At the pretrial hearing held on May 26, 2015, defendant informed the court that his counsel was fired. The court then advised defendant that he had asked for the appointment of an attorney. In response, defendant stated: "I didn't ask for the appointment of an attorney. You appointed me an attorney." The court then asked defendant what he was going to do about representation, to which defendant responded: "I'm going to represent myself." The court replied: "All right." Thereafter, defendant did not attend his trial, where assistant public defender Ting appeared on defendant's behalf.

¶ 22 The facts of this case closely resemble a decision rendered by our colleagues in the Fourth District. In *People v. Woodson*, 2011 IL App (4th) 100223, ¶ 23, the trial court denied the defendant's request to proceed *pro se* because it believed the defendant lacked the legal knowledge and ability to represent himself. On appeal, the Fourth District held the trial court abused its discretion by denying the defendant's requests to proceed *pro se* because it applied an improper legal standard. *Id.* ¶ 26. Specifically, the Fourth District found that in denying the defendant's requests to proceed *pro se*, the trial court improperly focused exclusively and erroneously on the fact that the defendant lacked sufficient legal knowledge and expertise to represent himself. *Id.* ¶ 25. The Fourth

District concluded this "rationale for denying a defendant his right to self-representation has been repeatedly rejected." *Id.* at 23. Citing our supreme court's decision in *Baez*, the Fourth District noted: " '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.' " *Id.* (quoting *Baez*, 241 Ill. 2d at 116).

¶ 23 Similarly here, in denying defendant's two separate unequivocal requests to proceed *pro se*, the trial court improperly focused on defendant's ability to represent himself and the fact that defendant lacked legal knowledge and expertise. Although the trial court presented concern regarding defendant's ability to represent himself, this rationale for denying a defendant his right to self-representation has been repeatedly rejected by our supreme court. *Id.* ¶ 25. The record in this case shows defendant made two separate unequivocal requests to proceed *pro se* which were knowingly and intelligently made. These requests must be accepted by the trial court. See *Baez*, 241 Ill. 2d at 116 ("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."). For these reasons, we find the trial court abused its discretion in denying defendant's requests for self-representation.

¶ 24 The State argues that defendant's refusal to attend his trial and defendant's failure to object to the assistant public defender's continued representation of him amounted to an acquiescence of counsel's representation. The State contends this is especially true because defendant did not protest his representation at sentencing or in a posttrial motion.

In support of its argument, the State outlines how a defendant may acquiesce in representation by counsel:

"Even if a defendant gives some indication that he wants to proceed *pro se*, he may later acquiesce in representation by counsel. Under certain circumstances, defendant may acquiesce by vacillating or abandoning an earlier request to proceed *pro se*. [Citations.] In determining whether a defendant seeks to relinquish counsel, courts may look at the defendant's conduct following the defendant's request to represent himself. [Citations.] A defendant may forfeit self-representation by remaining silent at critical junctures of the proceedings." *Burton*, 184 Ill. 2d at 23-24.

¶ 25 Specifically, the State cites to *Raulerson v. Wainwright*, 732 F.2d 803 (11th Cir. 1984), as an example of forfeiture by acquiescence. In *Raulerson*, the court concluded that the defendant waived his right to self-representation when he voluntarily and abruptly left the courtroom during the *Faretta* inquiry, *i.e.*, when the court warned the defendant of the potential danger inherent in his decision to proceed *pro se*. *Id.* at 808.

¶ 26 After careful consideration, we find *Raulerson* distinguishable. In *Raulerson*, the defendant voluntarily walked out of the courtroom during the time that the court was advising the defendant about the potential dangers of his decision to proceed *pro se*, thereby leading the court to conclude the defendant failed to make an unequivocal and voluntary assertion of his right to self-representation. *Id.* Here, unlike *Raulerson*, defendant took no action which shows that he failed to make an unequivocal and voluntary assertion of his right to self-representation. Rather, defendant stated on two

separate occasions that he wanted to represent himself, insisted to the court that he was capable of representing himself, and repeatedly refused to consent to a jury trial. Despite defendant's clear requests, the trial court appointed defendant representation based on defendant's ability or lack thereof to represent himself. Again, this is precisely the rationale for denying a defendant his right to self-representation that has been repeatedly rejected by our supreme court. The mere fact that defendant did not attend his trial or protest his representation following the trial is not sufficient to establish acquiescence to the trial court's decision to not allow defendant to represent himself. For these reasons, we reject the State's argument.

¶ 27 II. \$5-per-day Presentence Custody Credit

¶ 28 Defendant also contends he is entitled to a \$5 *per diem* credit against his fines for each day he spent in presentence custody. Because we have concluded defendant is entitled to a new trial, we need not address this issue.

¶ 29 CONCLUSION

¶ 30 In sum, we find defendant's requests for self-representation constituted a clear and unequivocal invocation of his right to proceed *pro se*. The trial court abused its discretion in denying defendant's requests on the ground that it viewed defendant as incapable of adequately representing himself. This rationale for denying a defendant his right to self-representation has been repeatedly rejected by our supreme court. Moreover, defendant's decisions to not attend his trial or protest his representation following trial did not constitute acquiescence to the trial court's decision to not allow defendant to represent

himself. For these reasons, we vacate defendant's convictions and remand this cause for a new trial.

¶ 31 Reversed; convictions vacated; cause remanded for a new trial.