2015 IL App (1st) 131509-U

FIRST DIVISION
June 8, 2015

No. 1-13-1509

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. 97 CR 17161
	)	
JOHNER WILSON,	)	Honorable
	)	Thomas V. Gainer, Jr.,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Justices Cunningham and Connors concurred in the judgment.

O R D E R

¶ 1 *Held*: The circuit court's judgment affirmed where the court did not violate defendant's right to represent himself during the proceedings on his motion for DNA testing.

¶ 2 Defendant Johner Wilson appeals from an order of the circuit court of Cook County which, after granting his motion for DNA testing not available at trial and receiving the results which supported his conviction, granted the public defender leave to withdraw as counsel and

removed the case from its call. On appeal, defendant solely contends that the trial court violated his constitutional and statutory right to self-representation during the DNA test proceedings by inquiring into the reasonableness of counsel's performance, rather than determining whether his waiver of counsel was knowingly and intelligently made.

¶ 3 Following a 2000 jury trial, defendant was convicted of two counts of predatory criminal sexual assault of a child and sentenced to consecutive terms of 25 years' imprisonment. The evidence at trial showed that the 11-year-old victim became pregnant, aborted the fetus, and DNA testing established that defendant was consistent with being the father of that fetus. On direct appeal, this court allowed appellate counsel to withdraw pursuant to *Anders v. California*, 386 U.S. 738 (1967), and affirmed that judgment. *People v. Wilson*, No. 1-00-0933 (2002) (unpublished order under Supreme Court Rule 23).

¶ 4 While his direct appeal was pending, defendant filed a *pro se* petition for relief under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq*. (West 2000)), which was summarily dismissed by the circuit court, and affirmed by this court. *People v. Wilson*, No. 1-00-2793 (2002) (unpublished order under Supreme Court Rule 23). We also affirmed the circuit court's subsequent dismissals of defendant's 2007 *pro se* petition for a writ of *habeas corpus* (*People v. Wilson*, No. 1-08-0113 (2008)) and his 2009 *pro se* motion to vacate a void judgment (*People v. Wilson*, No. 1-10-1445 (2011)) (unpublished orders under Supreme Court Rule 23), after allowing appellate counsel to withdraw pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987) in both cases.

¶ 5 On April 25, 2011, defendant filed the instant *pro se* motion for forensic DNA testing that was not available at trial pursuant to section 116-3 of the Code of Criminal Procedure (Code) (725 ILCS 5/116-3 (West 2010)), claiming that such evidence would exonerate him. In

July 2011, the circuit court noted that defendant had to meet several statutory requirements to be eligible for additional DNA testing, and appointed the public defender of Cook County to represent him on his motion. On June 11, 2012, the circuit court entered an agreed order granting defendant's motion for DNA testing and establishing the testing protocol, with the Illinois State Police Forensic Science Center analyzing the DNA typing, and the Northeastern Illinois Regional Crime Laboratory interpreting that data to determine the paternity of the fetus. The court further ordered that the findings and reports from the laboratories be released only to the court, defendant's attorney of record, and the State's Attorney's Office.

¶ 6 At a status hearing on December 10, 2012, defense counsel presented a handwritten order she had prepared pursuant to defendant's instructions which stated that defendant's "pro se motion to proceed as a pro se litigant" and to allow the public defender to withdraw was entered and continued for defendant to be writ in. Counsel informed the court that defendant was unsatisfied with her representation and wanted to proceed *pro se*. She further stated that the parties were waiting for the paternity calculations to be completed, and that they could be available by the next court date. Counsel explained that once the test results were received, the only remaining action would be to obtain the records pursuant to Supreme Court Rule 417 (eff. March 1, 2001), and that she would subpoena those records. Counsel stated that, by operation of law, her legal duties had been executed, and therefore, there was no harm in allowing defendant to represent himself.

¶ 7 On February 11, 2013, counsel informed the court that the DNA test results had been received, and she filed a certificate of compliance with Supreme Court Rule 651(c) (eff. Feb. 6, 2013) averring that she had consulted with defendant, examined the records from all of defendant's prior court proceedings, reviewed the results of the DNA testing, and examined the

laboratory procedures pursuant to Rule 417. Counsel stated that she found no issues with the statistics or procedures, that there was nothing further she could do in the proceedings, and moved to withdraw, noting that defendant wanted to represent himself. The assistant State's Attorney (ASA) noted that the DNA testing defendant requested was completed and that there were no remaining issues, and asked the court to remove the case from its docket.

¶ 8 Defendant then asserted that defense counsel's "testimony" was "hearsay" and complained that he had not been given the laboratory reports to review in accordance with Rule 417 in order to "question her presentation." Defendant remarked that counsel did not have a masters of science degree, and that he did not believe that she was an expert forensic pathologist. The trial court asked defendant if he planned to hire an expert, and he replied that he was "hoping to ask" that an independent laboratory conduct the analysis, claiming that he had "issues" with the testing because proper protocols were not followed by the laboratories during his trial.

¶ 9 Defense counsel then interjected that she believed defendant was raising a "quasi-Krankel" issue claiming that she had not provided him with a reasonable level of legal representation, and if so, he would waive his right of confidentiality between them, and she had a right to defend herself. Counsel stated that she had sent defendant a letter explaining everything, and that the letter would be admissible if the court conducted a *Krankel* inquiry. Counsel also stated that she received and analyzed all of the discovery pursuant to Rule 417, that defendant was not entitled to see those reports because he was represented by counsel, and even if acting *pro se*, due to federal privacy laws, he could not see portions of the analyst's file which included names of other defendants and complaining witnesses in unrelated cases, nor could he see the Federal Bureau of Investigation's database frequency calculations.

¶ 10 The ASA then explained that the case should be removed from the court's call because the only matter before the court was defendant's motion for DNA testing under section 116-3, which was granted pursuant to an agreed order, the testing had been completed, the results had been reported, and there was no further issue or action pending before the court. The ASA stated that the new test results shows that the probability that defendant was the father of the victim's fetus was 99.9999%, and confirmed that those results were consistent with the DNA test results that were utilized at trial. He reiterated that defendant had received what he requested, and that there was nothing left to litigate.

¶ 11 Defendant then repeated his request for an independent laboratory to conduct the analysis, claiming that the protocols established by the Illinois State Crime Laboratory were not followed during his trial. He further argued that the current testing was handled by the same experts, who "used their own ipsy dipsy [*sic*] to come up with their analysis." Defendant asserted that he was merely requesting due process, equal protection and a fair adjudication of his issue. Defendant also claimed that he never received the letter from counsel explaining the test results, and counsel then pointed out that defendant had the letter in front of him, and she showed him the page numbers where she discussed the probability of paternity and the calculations.

¶ 12 The circuit court noted that counsel filed a certificate in compliance with Rule 651(c) and granted her leave to withdraw. The court then stated that defendant had requested retesting pursuant to section 116-3, the testing was completed, and defendant was given the results. The court announced that the case was off the call, and told defendant that he was free to file whatever pleadings he wished. Defendant then asked if he was allowed to appeal the court's decision, and the court replied that he could file a notice of appeal, adding "I don't know what you're appealing from. You got exactly what you want." Defendant stated that he wanted to see

the "actual lab bench work," and counsel explained the restrictions placed on the dissemination of these documents by federal law. After further colloquy, the court concluded the proceedings stating "I've ruled. Thank you."

¶ 13 On appeal, defendant solely contends that the trial court violated his constitutional and statutory right to self-representation by inquiring into the reasonableness of counsel's performance rather than determining whether his waiver of counsel was knowingly and intelligently made. Defendant claims that he told the court that he wanted to represent himself because defense counsel would not allow him to view the laboratory reports of the DNA testing, and that he wanted an independent laboratory to conduct that testing. He further claims that instead of conducting the proper inquiry for self-representation, the court turned its inquiry into the type held for *pro se* posttrial claims of ineffective assistance of counsel under *People v. Krankel*, 102 Ill. 2d 181 (1984). Defendant asks this court to find that he had a right to represent himself and that the trial court abused its discretion when it denied his request, and to remand his case for further proceedings under section 116-3 where he can represent himself, review the laboratory reports and Rule 417 discovery, and determine how he would like to proceed.

¶ 14 The State responds that defendant's claim is forfeited because he did not object during the section 116-3 proceedings and did not raise the issue in a written motion. Alternatively, the State argues that defendant's claim is without merit because he never clearly and unequivocally asked the court to allow him to represent himself, and any alleged request was untimely made after the proceedings were complete.

¶ 15 Defendant replies that the forfeiture rule does not apply here where no trial occurred and no posttrial motion was needed. He further argues that counsel explicitly made the request for

self-representation on his behalf, and that his request was not untimely because the parties were awaiting the test results when counsel made his request.

¶ 16 As a threshold matter, we agree with defendant that the forfeiture rule requiring a contemporaneous objection at trial and a written posttrial motion to preserve an issue for appeal does not apply in this case where this is not a direct appeal from a trial conviction. The forfeiture rule delineated in *People v. Enoch*, 122 Ill. 2d 176, 186 (1988), applies the written posttrial motion requirement following a verdict or finding of guilty codified in section 116-1 of the Code. 725 ILCS 5/116-1 (West 2010). In this case, defendant's motion for DNA testing not available at trial is governed by section 116-3 of the Code, which does not incorporate the written posttrial motion requirement from section 116-1. See 725 ILCS 5/116-3 (West 2010). Accordingly, we will consider defendant's claim.

¶ 17 Defendant has a constitutional right to represent himself, but in order to invoke that right, he must knowingly and intelligently waive his right to counsel. *People v. Baez*, 241 Ill. 2d 44, 115-16 (2011). "It is 'well settled' that waiver of counsel must be clear and unequivocal, not ambiguous." *Id*. at 116, citing *People v. Burton*, 184 Ill. 2d 1, 21 (1998). Defendant must "articulately and unmistakably demand[] to proceed *pro se*," and if he fails to do so, he waives his right to self-representation. (Internal quotation marks omitted.) *Id*., quoting *Burton*, 184 Ill. 2d at 22. One reason defendant is required to make an unequivocal request to waive counsel is to prevent him from appealing the denial of his right to self-representation. *Id*.

¶ 18 To determine whether defendant's request for self-representation was clear and unequivocal, courts may look at the overall context of the proceedings, including his conduct following his request to represent himself. *Burton*, 184 Ill. 2d at 22-24. Even if defendant indicates that he wants to proceed *pro se*, he may later abandon that request. *Id*. at 23. The timing

of defendant's request is therefore significant, and where a request is made after meaningful proceedings have begun, many courts have held that such request was untimely and denied defendant's request for self-representation. *Id.* at 24.

¶ 19 In this case, the record reveals that defendant did not make a timely, clear and unequivocal demand to proceed *pro se*, and thus, he waived his right to self-representation. The record shows that defendant filed his motion for the DNA testing in April 2011, his motion was granted in June 2012, and the testing process began with the aid of counsel. It was not until December 10, 2012, that defense counsel informed the court that defendant was dissatisfied with her representation and wished to proceed *pro se*. At this point in the proceedings, the parties were merely waiting to receive the test results and to obtain the records pursuant to Supreme Court Rule 417. By the time defendant appeared in court on February 11, 2013, the test results had been received and revealed that the probability that he was the father of the victim's fetus was 99.9999%. In addition, counsel had already examined the laboratory procedures pursuant to Rule 417 and found no issues with the statistics or procedures. Consequently, at this point, the proceedings under section 116-3 were complete and there were no remaining issues to litigate.

¶ 20 The record further reveals that, although counsel submitted defendant's request to proceed *pro se* to the court, when defendant appeared before the court, he never demanded to represent himself. Instead, defendant repeatedly stated that he wanted an independent laboratory to conduct the analysis because the proper protocols were not followed during his trial. Defendant also stated that he wanted to examine the laboratory reports himself and claimed that counsel did not share the calculations with him, but his claim was contradicted by the letter from counsel that he had in front of him. Considering the overall context of the proceedings, we find

that defendant did not make a clear and unequivocal demand to represent himself, but instead, requested additional testing after receiving the test results.

¶ 21 In addition, we reject defendant's assertion that the trial court conducted a *Krankel*-type inquiry into the reasonableness of counsel's representation. The record shows that the only mention of *Krankel* and counsel's representation came from counsel herself after defendant characterized her statements to the court as "hearsay" and complained that he was not given the laboratory reports to "question her presentation." The court never asked defendant any questions regarding counsel's representation. After defense counsel and the ASA asserted that the proceedings were complete, the court merely asked defendant what more he was hoping to accomplish in the proceedings and if he planned to hire an expert. Based on this record, we conclude that defendant did not make a timely, clear and unequivocal demand to represent himself, and accordingly, his present claim that he was denied his right to self-representation by the trial court fails.

¶ 22 For these reasons, we affirm the judgment of the circuit court of Cook County.

¶ 23 Affirmed.