

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

EMANUEL D. MITCHELL)
)
 Appellant,)
 vs.)
)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

NOT FOR PUBLICATION

No. F-2011-866

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

JUN 20 2013

MICHAEL S. RICHIE
CLERK

SUMMARY OPINION

SMITH, VICE PRESIDING JUDGE:

Emanuel D. Mitchell was tried by jury and convicted of Count I, Murder in the First Degree in violation of 21 O.S.Supp.2009, § 701.7(B); and Count II, Conspiracy to Commit a Felony (Robbery with a Dangerous Weapon), after former conviction of two or more felonies, in violation of 21 O.S.2001, §§ 421, 801, in the District Court of Oklahoma County, Case No. CF-2009-3297.¹ Mitchell was tried by jury and convicted of Unauthorized Use of a Motor Vehicle in violation of 47 O.S.2001, § 4-102, in the District Court of Oklahoma County, Case No. CF-2009-3341. In accordance with the jury's recommendation, the Honorable Kenneth C. Watson sentenced Mitchell in Case No. CF-2009-3297 to life imprisonment (Count I) and thirty-five (35) years imprisonment (Count II). Mitchell must serve 85% of his sentence on Count I before becoming eligible for parole consideration. In Case No. CF-2009-3341 he was sentenced to ten (10) years imprisonment. Mitchell appeals from these convictions and sentences.

¹ The Information charged Mitchell with a Count III, Possession of a Firearm after former conviction of a felony. The State dismissed the firearms charge at the beginning of the second stage of trial.

Mitchell raises four propositions of error in support of his appeal:

- I. Mr. Mitchell's convictions and sentences must be reversed because the trial court refused to permit him to represent himself, in violation of the Sixth Amendment to the United States Constitution and Article 2, § 20 of the Oklahoma Constitution;
- II. Application of the felony-murder doctrine to Mr. Mitchell under the facts of this case was not supported by the law or evidence, resulting in a conviction and sentence which are violative of Mr. Mitchell's rights under the due process clauses of the State and Federal Constitutions and thereby requires this Court to reverse and dismiss Count I;
- III. The trial court denied Mr. Mitchell his due process right to present a defense by forbidding argument or instruction on the defense theory of the case; and
- IV. Mr. Mitchell was denied effective assistance of counsel in violation of his rights under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article 2, §§ 7, 9 and 20 of the Oklahoma Constitution.

After thorough consideration of the entire record before us, including the original record, transcripts, exhibits and briefs, we find that Proposition I requires reversal.

A criminal defendant has a constitutional right of self-representation. *Mathis v. State*, 2012 OK CR 1, ¶ 7, 271 P.3d 67, 71-72; *Faretta v. California*, 422 U.S. 806, 818-21, 95 S.Ct. 2525, 2532-34, 45 L.Ed.2d 562 (1975). As this court has said, "The test whether a defendant has intelligently elected to proceed pro se is not the wisdom of the decision or its effect upon the expeditious administration of justice." *Johnson v. State*, 1976 OK CR 292, ¶ 34, 556 P.2d 1285, 1294. A defendant must be warned of the dangers and disadvantages of self-representation, based on all the circumstances of the case. *Mathis*, 2012 OK CR 1, ¶ 15, 271 P.3d at 74; *Faretta*, 422 U.S. at 835, 95 S.Ct. at 2541. Armed with that information, he must then knowingly and intelligently waive the benefits of

counsel. *Mathis*, 2012 OK CR 1, ¶ 7, 271 P.3d at 71-72; *Faretta*, 422 U.S. at 835, 95 S.Ct. at 2541. No particular knowledge of law or courtroom procedure is required. *Coleman v. State*, 1980 OK CR 75, ¶ 5, 617 P.2d 243, 245; *Faretta*, 422 U.S. at 836, 95 S.Ct. at 2541. “[A] defendant must be competent to make this decision and must be clear and unequivocal in his desire to proceed *pro se*.” *Mathis*, 2012 OK CR 1, ¶ 7, 271 P.3d at 72. If these requirements are met, a defendant who understands his right of self-representation and has a clear intent to exercise it must be allowed to proceed. *Johnson*, 1976 OK CR 292, ¶ 37, 556 P.2d at 1296. The possibility that a defendant may later disrupt a trial is not a reason to deny self-representation before any disruption has occurred. *Coleman*, 1980 OK CR 75, ¶ 5, 617 P.2d at 245. The Court strongly encourages trial courts to appoint standby counsel for a *pro se* defendant. *Mathis*, 2012 OK CR 1, ¶ 17, 271 P.3d at 74-75.

On February 24, 2010, over a year before trial, Mitchell sent a letter to the trial court asking that defense counsel, Jay Trenary, be dismissed. However, at a motions hearing on April 14, 2010, Mitchell told the trial court that he would like Trenary to remain on his case, and agreed that they had worked out any differences. At a status conference on February 8, 2011, thirty days before the scheduled trial date, Mitchell again asked that Trenary be removed. Mitchell complained that Trenary did not visit him in jail as much as he would like, had not contacted or returned calls from Mitchell’s family members, was too friendly with the district attorney, and had not filed certain motions in the case. After hearing from Trenary and the district attorney, the trial court denied the motion.

The court noted that Trenary had joined in the motions filed by Mitchell's co-defendant, Anthony Morrison, found that Mitchell's other concerns were not sufficient to warrant new counsel, and found that Trenary was zealously representing his client. Mitchell was not asking to go *pro se*; he wanted other counsel to be appointed to represent him. Mitchell interrupted a status hearing on March 31, 2011, with a question for his defense counsel. In response, Trenary articulated on the record Mitchell's concerns that Trenary was not filing motions on Mitchell's defense, and confirmed that co-defendant Morrison's counsel, Ms. McPhail, was acting as lead counsel in the case, Trenary had joined in her motions on Mitchell's behalf, and the trial court's rulings applied to both defendants. Mitchell did not ask either that new counsel be appointed or that he be allowed to proceed *pro se* at that time.

After *voir dire* began and the jury pool was excused for the first day, defense counsel, Trenary, presented some motions on Mitchell's behalf. Trenary noted Mitchell's belief that his defense was compromised because Jerome Ersland, the intended robbery victim in this case who was later charged with and convicted of first degree murder for Parker's death, spent a great deal of money on his defense team while he, Mitchell, had only a public defender.² Trenary stated that Mitchell did not say he had any specific problems with Trenary's representation, but felt his constitutional rights were not being protected because he was stuck with a public defender. Trenary asked that the case be dismissed

² Mitchell was mistaken. Trenary was not actually a public defender; he was court-appointed to represent Mitchell because the Oklahoma County Public Defender office represented Morrison. However, all parties appeared to assume Mitchell's point was that a court-funded attorney did not have the resources available to privately funded counsel.

because the State's funding of the public defender office deprived Mitchell of the resources available to Ersland. The motion was denied. Mitchell personally complained to the trial court that all the court's rulings had benefited the State, and he apparently attributed that to the lack of resources at the public defender's office. Trenary affirmed on the record that he was prepared to go to trial and defend Mitchell; noted that he personally believed that Oklahoma underfunded public defense counsel; said he had explained to Mitchell that Ersland's attorneys had filed motions to recuse the D.A. and judge, and similar motions, that appeared to have no legal basis and he was more selective with his resources. Neither Trenary nor Mitchell, at this point, asked that another attorney be appointed or raised the possibility of Mitchell going *pro se*. Co-defendant's counsel, McPhail, noted on the record at this point that "at every stage of this proceeding" Mitchell has made baseless arguments which disrupted the proceedings, she was concerned that this would negatively affect Morrison, and if there were any disruptions or outbursts she would file a motion to sever based on that potential for prejudice in being associated with Mitchell.

On April 19, 2011, the second day of jury selection, Trenary presented on Mitchell's behalf a handwritten motion to proceed *pro se*. The grounds were very similar to the points Mitchell argued in February, 2011, when he asked for new appointed counsel. Trenary said Mitchell (a) was concerned that Trenary supported David Prater's election as District Attorney; (b) believed the trial court was not impartial; and (c) believed trial counsel should have done "many things" that counsel believed were "wasteful of my time and were not going to yield

anything of value towards this trial.” Mitchell told the trial court directly that he did not want Trenary to represent him because (a) he had an inappropriate relationship with Prater; (b) Trenary told him no black person could get a fair trial in Oklahoma and used the “n” word to refer to him [Trenary denied this]; and (c) he had a right under *Faretta v. California* to defend himself. Mitchell stated he had a GED. Although he referred to *Faretta*, Mitchell said “I would like to appoint counsel . . . and I would like this man here to be removed from representing me.”

The trial judge denied this request, saying he had considered this issue before and was not inclined to let Mitchell go *pro se*. The court stated,

I mean, we're ready to pick a jury. I entertained this matter before. It was my understanding you weren't at that time asking to go *pro se*, you were asking the Court to appoint you a different lawyer and I declined that request. I'm again declining this request because I think it's in your best interest that you be represented by counsel. [¶] I won't prohibit you from assisting and asking Mr. Trenary to ask - I mean, you're pretty much, if you feel this way, you're on your own, you can direct Mr. Trenary to ask the questions that you want asked and you can confer with him, but I'm not going to let you get up and address the jury. That's my ruling. I think I have an obligation to look out for your best interest, to give you as fair a trial as anyone, black or white, can get in Oklahoma County, and that's what I intend to do. But I'm not going to let you get up and address this jury. Of course, you're not a trained lawyer, you don't - do you even have the discovery, all the discovery material?

The trial court also told Mitchell that he could write out the questions he wanted Trenary to ask. Mitchell continued to object that *Faretta* did not state he needed to be a trained attorney to represent himself, and “me and this man right here cannot get along, he no longer, he can no longer represent me.” When Mitchell continued to object after the court repeated its ruling, the trial court warned him that the issue was settled and if Mitchell had any outbursts or disrupted the

proceedings, the trial would proceed without him. Thereafter, Trenary stated on the record that he had offered Mitchell a pen and legal pad, but Mitchell had refused them because they came from Trenary.

The history above shows that Mitchell clearly and unequivocally asked to exercise his right of self-representation. The State argues that, because Mitchell asked for new counsel to be appointed before trial, his motion to proceed *pro se* amounted to a personality conflict with his attorney. Mitchell certainly had difficulty in working with Trenary. However, this difficulty does not transform Mitchell's motion to represent himself into some other complaint. On the contrary, any personality conflict forms the basis of Mitchell's very clear request to proceed *pro se*. Before Mitchell made this request, he tried several times to have appointed counsel removed and different counsel appointed. Rather than diluting the effect of Mitchell's *pro se* request, this fact strengthens it – the record suggests Mitchell viewed self-representation as a last resort after he felt his concerns about his representation were not addressed. As the State admits, the record shows he was familiar with his rights under *Faretta*. Mitchell knew what he was asking, and asked for it clearly.

The State argues that the trial court properly denied Mitchell's request because Mitchell "engaged in obstructionist misconduct." The record fails to support this claim. Up to this point, there is no indication that Mitchell had actually obstructed any proceeding. Counsel for Mitchell's co-defendant did note on the record that, at every stage, Mitchell had made an argument disrupting the proceedings. However, there is no indication that he had been particularly

disorderly or disruptive in earlier proceedings. The record shows that, in pretrial proceedings, Mitchell raised factual or legal arguments, sometimes interrupting the proceedings to do so. After the trial court denied Mitchell's motion to go *pro se*, the court characterized these as "outbursts" and warned Mitchell not to engage in them during trial. The possibility that Mitchell might have done so is not enough to justify denying his request to proceed *pro se*. *Coleman*, 1980 OK CR 75, ¶ 5, 617 P.2d at 245. The State supports its claim of obstructionist misconduct with the argument that Mitchell filed his motion to go *pro se* on the second day of *voir dire* proceedings. The State completely fails to explain how filing this motion at this time was itself so obstructionist that the fact of filing the motion precluded the trial court's ability to grant it.

The State argues that Mitchell's motion was too late, and characterizes it as happening "mid-trial". The record does not support this claim. The *voir dire* process in this case took six days. Mitchell made his request at the beginning of the second day of jury selection. A jury had not yet been chosen or sworn, no jeopardy had attached to the proceedings, and the trial had not yet begun. We are unable to agree that this very early stage of the trial proceedings is "mid-trial". While Mitchell asked for a continuance if he represented himself, the record does not suggest his motion was made for purposes of delay. Instead, the record supports the conclusion that Mitchell was genuinely dissatisfied with counsel's representation and felt he could better represent himself. We have held a motion to go *pro se* is timely where it is made before a jury has been selected. *Coleman*, 1980 OK CR 75, ¶ 6, 617 P.2d at 245.

The State finally suggests that Mitchell's claim must fail because he has not shown valid reasons for counsel's discharge, including demonstrable prejudice by counsel against his client, incompetence and conflict of interest. The State has confused two separate issues, and this is not the test here. This language is taken from *Swain v. State*, 1980 OK CR 120, ¶ 13, 621 P.2d 1181, 1183. In *Swain*, after the evidence was presented but before closing argument the defendant asked to fire appointed counsel so he could hire an attorney. *Swain* is wholly concerned with the procedure and show of proof necessary when a defendant seeks to replace one attorney with another. It simply does not apply to a defendant who wants to discharge counsel and represent himself. *Faretta*, and this Court's subsequent cases cited here, control this issue. If the *Faretta* requirements are met, a defendant need not show "valid reasons" as per *Swain* before he may represent himself.

Before the jury was picked or sworn, Mitchell asked to waive counsel and exercise his right to self-representation. The trial court made no attempt to ensure that this waiver was knowing and intelligent. Rather than warn Mitchell about the dangers of self-representation, the court cited some of those dangers as reasons for its refusal to grant Mitchell's request. This is the precise error which required reversal in *Faretta*, 422 U.S. at 836, 95 S.Ct. at 2541. This proposition is granted, and the case reversed and remanded for a trial in which Mitchell may be allowed to exercise the right of self-representation.

We address Propositions II and III to give the lower court guidance on remand. In Proposition II, we find that the trial court did not err in allowing a

felony murder prosecution against Mitchell, for the reasons stated in *Morrison v. State*, F-2011-624, slip op. at 3-8 (Okl.Cr. June 20, 2013). We find in Proposition III that the trial court did not err in refusing to give jurors a civil instruction on intervening cause, for the reasons stated in *Morrison*, slip op. at 8-10.

Given our resolution of Proposition I, Proposition IV is moot.

DECISION

The Judgments and Sentences of the District Court of Oklahoma County are **REVERSED and REMANDED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2013), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE KENNETH C. WATSON, DISTRICT JUDGE

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OPINION BY: SMITH, V.P.J.

LEWIS, P.J.: DISSENT
LUMPKIN, J.: DISSENT
C. JOHNSON, J.: CONCUR
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LEWIS, PRESIDING JUDGE, DISSENTS:

At what point should one be allowed to represent himself. The trial court in this matter did everything one should expect to protect Appellant's rights. The court refused to allow Appellant to go forward pro se after the trial had begun. I find that this was the appropriate course of action and would affirm Appellant's conviction.

LUMPKIN, JUDGE: DISSENT

A criminal defendant may be denied the right to self-representation if he persists in disorderly, disruptive, and disrespectful behavior after a judge has warned him that such conduct may constitute a waiver of his right. *Coleman v. State*, 1980 OK CR 75, ¶ 5, 617 P.2d 243, 245; *Johnson v. State*, 1976 OK CR 292, ¶ 42, 556 P.2d 1285, 1297 quoting *Faretta v. California*, 422 U.S. 806, 834, 95 S.Ct. 2525, 2541, footnote 46. Appellant's conduct throughout the pre-trial proceedings illustrates his equivocation on representing himself and that through his disorderly and disruptive behavior, he waived the right to self-representation.

Appellant waited until the second day of jury selection to request to proceed *pro se*, despite having over a year to make such a request. All previous requests had been for another lawyer; requests which had been properly denied as they did not demonstrate counsel's prejudice, incompetence or conflict of interest. See *Johnson*, 1976 OK CR 292, ¶ 33, 556 P.2d at 1294. When those motions were denied, Appellant did not seek to represent himself, but chose to stay with counsel.

On the first day of jury selection, the trial court heard personally from Appellant concerning his complaints about counsel. The court directed counsel to talk with Appellant concerning counsel's preparations for trial and the consequences of Appellant's repeated outbursts. It was at this point that counsel for co-defendant Morrison commented that Appellant had been

disruptive and made groundless arguments at every stage of the proceedings and that if Appellant had further outbursts, she would file another motion for severance (severance had already been denied once). It was against this backdrop that Appellant filed his motion to proceed *pro se* the very next day, much to counsel's surprise, and under repeated warnings from the judge not to engage in further outbursts.

This record indicates Appellant's request to proceed *pro se*, and request for a continuance if the motion was granted, was a last minute attempt to delay proceedings. Looking to the entire record, including the statements made by counsel for co-defendant Morrison, more than a possibility is shown that Appellant would continue to disrupt proceedings. Based upon this record, I find Appellant has lost his right of self-representation by his disruptive, disorderly and obstructionist misconduct. The trial court did not abuse its discretion in denying the motion to proceed *pro se* and no reasons exist warranting reversal of Appellant's conviction.