

IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

PHILIPPE JEAN PACE,)
)
) Petitioner,)
)
) -vs-)
)
) STATE OF OKLAHOMA,)
)
) Respondent.)

NOT FOR PUBLICATION

No. C-2011-592

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
MAY 10 2012

SUMMARY OPINION
GRANTING CERTIORARI

MICHAEL S. RICHIE
CLERK

C. JOHNSON, JUDGE:

Petitioner, Philippe Jean Pace, was charged in Pontotoc County District Court, Case No. CF-2011-305, with Knowingly Concealing Stolen Property, After Former Conviction of Two or More Felonies. Petitioner entered a negotiated plea of nolo contendere to the crime charged. On June 13, 2011, the Honorable C. Steven Kessinger accepted Petitioner's plea and pursuant to the plea agreement sentenced him to twenty years imprisonment with all but the first ten years suspended. His sentence was ordered to run concurrently with sentences revoked in Case Nos. CF-08-452, CF-08-367 and CF-08-247. Petitioner subsequently filed a motion to withdraw his no contest plea and the district court denied the motion after a hearing held on June 23, 2011. Petitioner now appeals the denial of his motion to withdraw.

Petitioner raises the following propositions of error:

- I. The record fails to show that Petitioner's pro se representation was the result of a knowing, voluntary, and intelligent waiver of the right to counsel made following a proper inquiry by the court into

Mr. Pace's ability to represent himself and advisement of the dangers of self-representation.

- II. The district court erred in not allowing Mr. Pace to withdraw his plea which was entered as a result of ignorance, misunderstanding, misapprehension, and without deliberation.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, and briefs, we reverse the district court's ruling and grant the petition for writ of certiorari.¹ Petitioner argues in his first proposition that he did not knowingly and voluntarily waive his right to be represented by counsel at his plea hearing.

While the Sixth Amendment to the United States Constitution guarantees the right to counsel a defendant may waive this right upon a showing that such waiver has been made knowingly, intelligently and voluntarily. *Faretta v. California*, 422 U.S. 806, 835, 95 S.Ct. 2525, 2541, 45 L.Ed.2d 562 (1975). A defendant's knowing and voluntary waiver of the right to counsel requires that he or she be informed of the dangers and disadvantages of self-representation. *Mathis v. State*, 2012 OK CR 1, ¶ 7, 271 P.3d 67, 71-72; *Faretta*, 422 U.S. at 835, 95 S.Ct. at 2541. "[U]nder both the state and federal constitutions anything less than a record which shows that the defendant rejected the offer of counsel with knowledge and understanding of the perils of self-representation is not waiver." *Nave v. State*, 1991 OK CR 42, ¶ 16, 808 P.2d 991, 994. Further, in order to validly waive the assistance of counsel and

¹ Because this case requires relief based upon error raised in Proposition I, Petitioner's second proposition will not be addressed.

proceed *pro se*, a defendant must be competent to make this decision and must be clear and unequivocal in his desire to proceed *pro se*. See *Fitzgerald v. State*, 1998 OK CR 68, ¶ 6, 972 P.2d 1157, 1162. As waiver of counsel will not be lightly presumed, this Court must indulge every reasonable presumption against waiver. *Norton v. State*, 2002 OK CR 10, ¶ 7, 43 P.3d 404, 407; *Lineberry v. State*, 1983 OK CR 115, ¶ 3, 668 P.2d 1144, 1145. Whether a waiver of counsel was made knowingly, intelligently, and voluntarily “depends in each case upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.” *Edwards v. Arizona*, 451 U.S. 477, 482, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). See also *Braun v. State*, 1995 OK CR 42, ¶ 12, 909 P.2d 783, 788.

Petitioner indicated in the Summary of Facts Form that he understood he had the right to have an attorney represent him and that he was waiving this right. The transcript of the plea hearing indicates that Petitioner had told the trial judge the week prior to the hearing that he wanted to “work out a deal with the State and get this over with.” During the plea hearing Petitioner was advised that he had a right to counsel and the following was the extent to which the trial court discussed the waiver of this right with Petitioner:

THE COURT: Has anybody forced you, threatened you, or coerced you to get you to do that?

THE DEFENDANT: No, sir.

THE COURT: Do you believe that’s in your best interest?

THE DEFENDANT: I guess. I really don't know.

THE COURT: Well, if you don't know, we're not going any farther and I'll just have you returned to the jail.

THE DEFENDANT: Yes. Yes. That's fine. I believe it - - it's my best counsel (sic).

THE COURT: Okay. It's your best - - you believe it's in your best interest?

THE DEFENDANT: Best - - best interest, yes.

THE COURT: The court finds the Defendant did knowingly, intelligently, and voluntarily waive his right to counsel.

Counsel was appointed to represent Petitioner at the hearing on the motion to withdraw his plea. Counsel asked Petitioner if he had waived his right to counsel and if he had ever requested an attorney but Petitioner was not asked whether the trial judge or any other person had advised him of the dangers of self-representation. Defense counsel asked Petitioner if he had stopped the court at any time during the plea hearing and asked for counsel. Petitioner answered that he told the court he was confused but the judge responded that he would send him back to jail so Petitioner agreed to go ahead and enter his plea. When asked about his prior convictions, Petitioner stated that he had been represented by counsel. Petitioner testified that he was confused in the present case and should have requested a lawyer. At the end of the hearing, defense counsel offered no comments in closing. The State argued that Petitioner understood the system and did not request counsel so

his motion to withdraw should be denied. On this record, the district judge denied Petitioner's motion to withdraw.

The record before this court reflects no warnings given to Petitioner by the trial judge or any other person regarding the dangers of self-representation. While there is no laundry list of factors which the trial court must address when accepting a waiver of counsel, it is "necessary that a defendant be made aware of the problems of self-representation so the record establishes that he understands that his actions in proceeding without counsel may be to his ultimate detriment.... [T]he defendant's technical knowledge of the law and its operation at trial is totally irrelevant in the assessment of his knowing exercise of the right to defend himself." *Mathis v. State*, 2012 OK CR 1, ¶ 8, 271 P.3d 67, 72, quoting *Johnson v. State*, 1976 OK CR 292, ¶ 34, 556 P.2d 1285, 1294.

The record before this Court does not reflect that Appellant either clearly and unequivocally asserted his right of self-representation or knowingly and intelligently relinquished the benefits of representation by counsel. Thus, the mandatory record is not present and waiver cannot be presumed. We find that the trial court abused its discretion in denying Petitioner's motion to withdraw. *Coyle v. State*, 1985 OK CR 121, ¶ 5, 706 P.2d 547, 548; *Cox v. State*, 2006 OK CR 51, ¶ 30, 152 P.3d 244, 255. Accordingly, we grant the writ and allow Petitioner to withdraw his plea and proceed to trial.

DECISION

The Petition for Writ of Certiorari is **GRANTED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2012), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

**AN APPEAL FROM THE DISTRICT COURT OF PONTOTOC COUNTY
THE HONORABLE C. STEVEN KESSINGER, SPECIAL JUDGE**

**APPEARANCES AT PLEA
WITHDRAWAL HEARING**

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OPINION BY: C. JOHNSON, J.
A. JOHNSON, P.J.: CONCUR
LEWIS, V.P.J.: CONCUR
LUMPKIN, J.: CONCUR
SMITH, J.: CONCUR