NONPRECEDENTIAL DISPOSITION
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United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Argued April 23, 2024
Decided May 8, 2024

Before

FRANK H. EASTERBROOK, *Circuit Judge*

MICHAEL Y. SCUDDER, *Circuit Judge*

THOMAS L. KIRSCH II, *Circuit Judge*

No. 23-1619

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, *v.* DEMONTRION PHILLIPS, *Defendant-Appellant*.	Appeal from the United States District Court for the Northern District of Illinois, Western Division. No. 3:21-CR-50025(1) Iain D. Johnston, *Judge*.

O R D E R

Demontrion Phillips has been twice convicted and sentenced for bank robberies that he committed years apart. While awaiting trial on the second case for bank robbery, Phillips asked the district court to allow him to represent himself, as he did at his first trial. After conducting a colloquy under *Faretta v. California*, 422 U.S. 806, 835 (1975), to confirm that Phillips was validly waiving his right to counsel, the court granted his motion. On appeal, Phillips argues that the *Faretta* colloquy was defective, and he thus did not knowingly and intelligently waive his Sixth Amendment right to counsel. But

because the record adequately supports the district court's determination that Phillips did knowingly and intelligently waive his right to counsel, we affirm.

Background

In 2017 Phillips was charged with and later convicted of bank robbery under 18 U.S.C. § 2113(a), (d). During this prosecution, he moved to proceed pro se and, after conducting a *Faretta* colloquy, the district court granted his motion. Phillips later pleaded guilty and received a prison term of four years followed by four years of supervised release, plus a special assessment and restitution order of about $36,000. Phillips was released from prison and began serving his term of supervised release in December 2020.

Five months after he began his term of supervised release, he was indicted for robbing two more banks. He moved to represent himself in this new prosecution and in the proceedings to revoke his supervised release in the 2017 case. In explaining his rationale for self-representation, Phillips noted that he and his attorney believed that self-representation would lead to "more productive court dates." Phillips added that he had "many years in experience with legal proceedings," had the equivalent of a high school diploma, and had attended community college to study criminal justice.

In January 2022, the same judge from the 2017 case conducted a *Faretta* hearing (the "January colloquy"). He asked Phillips about his education at community college; Phillips explained that it covered math and reading, but he dropped out before he could study criminal justice. The judge also asked him to elaborate on his experience with criminal cases; Phillips said that he had twice successfully defended himself in state cases with defenses of "lack of evidence" and "improper identification." After telling him that federal cases can be more complex than state cases, the judge asked Phillips to describe his familiarity with the Federal Rules of Evidence and Criminal Procedure. Phillips responded, "I am aware of every case law, every federal rule, everything at this moment that's going on with the law, at this moment, due to our case law on our tablet that I get to read and see every day, 24 hours a day" in the prison law library.

Before ruling on Phillips's motion to represent himself, the judge also discussed the risks particular to this case. He asked the government to state the statutory maximum (it said "20 years" per count) and confirmed that Phillips knew that he was facing a 20-year term for each count and that any new sentence might run consecutively to a sentence imposed for violating the conditions of his supervised release. He also confirmed that Phillips knew he could face a special assessment. The judge further

warned Phillips that a decision to proceed pro se is final and that he could not abuse his right to counsel by improperly seeking a lawyer later. The judge ended by reminding Phillips that the court cannot provide legal advice, that he would face many difficulties representing himself, and that going "solo" is "a terrible mistake." After receiving these admonitions, Phillips stood by his request to represent himself, saying that it was "completely voluntary." The judge then granted his motion.

As the case proceeded, and despite the admonition that his decision to represent himself was final, Phillips asked for (and received) a lawyer twice. First, four months after going pro se, the judge granted Phillips's request to reappoint counsel. Two months later, Phillips pivoted and once again moved to proceed pro se. The court held a second *Faretta* hearing (the "July colloquy") and granted his motion. Phillips then represented himself through trial and was convicted on both counts of bank robbery. Later, he asked the judge for (and received) a lawyer for sentencing in both the 2021 case and 2017 revocation case. The judge sentenced him to eight years in prison in the 2021 case, consecutive to the two-year prison term later imposed for violating the terms of his supervised release in the 2017 case. Also, the judge ordered a three-year term of supervised release and approximately $10,000 in restitution.

Analysis

On appeal, Phillips argues that he did not validly waive his Sixth Amendment right to counsel because the district court conducted a defective *Faretta* colloquy in the 2021 case. Phillips does not appear to challenge the July 2022 colloquy; instead, he focuses on the four months between the court granting his first motion to proceed pro se, after the January colloquy, and the date that it reappointed counsel the first time.

As an initial matter, the parties dispute whether we can rely on the *Faretta* colloquy in the 2017 case to remedy any defects in the January 2022 colloquy. The government contends that the record for the 2017 case was subsumed into the record for this case because, in the district court, revocation proceedings for the 2017 case occurred alongside the proceedings for the 2021 bank robbery charges. (Phillips appealed the revocation of his supervised release, but after that appeal was consolidated with this appeal, we granted his motion to dismiss the former appeal.) Phillips responds that the colloquies occurred in two separate cases and that, by considering the 2017 colloquy, we would be reviewing a dialogue that the district judge did not incorporate into his January 2022 colloquy. But we have no need to rely on the 2017 colloquy here. The circumstances of the January 2022 colloquy, on their own, assure us that Phillips's waiver of counsel was knowing and intelligent.

To determine whether a defendant has knowingly waived the right to counsel, we consider four factors: (1) "the extent of the district court's formal inquiry into the defendant's waiver of counsel, if any" at the *Faretta* colloquy; (2) "other evidence in the record showing the defendant understood the dangers and disadvantages of self-representation"; (3) "the defendant's background and experience"; and (4) "the context of the choice to proceed pro se." *United States v. Jones*, 65 F.4th 926, 929 (7th Cir. 2023). Generally, at the colloquy a district court should probe the defendant's age, education, and knowledge of the criminal charges, possible penalties, and difficulties of proceeding pro se. *United States v. Johnson*, 980 F.3d 570, 577 (7th Cir. 2020). But the inquiry is not a "talismanic procedure." *United States v. Vizcarra-Millan*, 15 F.4th 473, 486 (7th Cir. 2021). And although we encourage judges conducting *Faretta* hearings to use questions listed in the *Benchbook for U.S. District Court Judges*, doing so is not essential to conducting a valid *Faretta* colloquy. *United States v. Underwood*, 88 F.4th 705, 710 (7th Cir. 2023). Finally, on appeal, we take a fresh look at the district court's legal conclusion that a defendant has knowingly waived the right to counsel, and we review for clear error the factual findings underpinning that conclusion. *Jones*, 65 F.4th at 929.

We begin by focusing on the first factor and conclude that the district court's *Faretta* colloquy was wide-ranging and thorough, and it therefore supports finding a valid waiver of counsel. The judge ensured that Phillips understood the charges in his two pending cases and the possible consecutive 20-year prison terms they carried. The judge also made sure that Phillips understood the serious risks he was taking by waiving his right to counsel (a "terrible mistake," the inability of the court to advise him, and the potential finality of the decision). And the judge solicited from Phillips the extent of his education in community college, his declared familiarity with the federal rules, and his success in representing himself in two previous state cases. Assured by Phillips that his request was "completely voluntary" and was motivated by his desire to control his case better, the judge properly relied on this inquiry to conclude that Phillips's waiver of his right to counsel was both voluntary and intelligent.

Phillips nonetheless argues that the *Faretta* hearing was flawed, but we are not persuaded. First, Phillips contends that the district judge improperly delegated the duty to warn him of the penalties he faced by asking the government to advise him of the statutory maximum term in prison. But the judge did not have the government advise Phillips. Rather, the judge accepted the government's statement that the maximum was 20 years for each bank robbery count (a correct statement, *see* 18 U.S.C. § 2113(a)), and then the judge himself advised Phillips about that possible sentence and confirmed that

Phillips understood this penalty. We have endorsed such an approach before. *See United States v. Banks*, 828 F.3d 609, 615 (7th Cir. 2016).

Next, Phillips points out that in the colloquy the judge omitted asking him about his grade-school education or age, and he never advised Phillips about the possibility of supervised release, fines, or restitution penalties. But the judge had no reason to do so. Regarding education, Phillips told the judge that he had the equivalent of a high school diploma, had spent time in community college learning math and reading, and regularly reads case law about the federal rules. All of this collectively allowed the judge to conclude reasonably that Phillips had the equivalent of a high-school education. It is also understandable that the judge did not ask Phillips for his age: He had presided over Phillips's 2017 case, and the record provides no basis for thinking that the judge, who reminded Phillips about that case, had forgotten who Phillips was. Finally, regarding the penalties of supervised release, fines, or a restitution order, the judge knew that Phillips was already acquainted with supervised release and restitution, having imposed those penalties in his 2017 case. As Phillips's counsel conceded at oral argument, although we do not rely on the 2017 colloquy to remedy any gaps in the January 2022 colloquy, we need not ignore all of the judge's prior interactions with Phillips. Thus, these grounds were sufficiently covered.

Finally, Phillips argues that the judge failed to advise him that he could raise defenses to his charges, *see Von Moltke v. Gillies*, 332 U.S. 708, 724 (1948), even if the judge was under no duty to specify those defenses, *see Underwood*, 88 F.4th at 710. But "different circumstances may require variations in inquiry," *id.*, and here the judge undeniably knew that Phillips was aware that he could advance defenses: He boasted to the judge that he defeated his state criminal charges while representing himself using the defenses of lack of evidence and improper identification.

Thus, the first factor of our review—the *Faretta* colloquy—adequately supports the district judge's finding that Phillips waived his right to counsel. To the extent the colloquy has any deficiencies, a review of the record to assess the remaining factors leaves no doubt that Phillips validly waived his right to counsel. *See Johnson*, 980 F.3d at 577 (noting that "failure to conduct a full inquiry is not necessarily fatal"). First, Phillips had previously represented himself in state court twice as well as in the bank robbery case for which he was, at the time of his latest charges, on supervised release. This repeated experience in self-representation, which "he himself touted … as proof that he did not need counsel," *id.*, supports the conclusion that he knew about, and accepted the risks of, proceeding pro se. Second, apart from his past self-representation, Phillips

also had other substantial contacts with the legal system, and these contacts confirm that he understood the nature of criminal proceedings. *See Underwood*, 88 F.4th at 711. Finally, Phillips was 27 at the time of this prosecution, was fully literate, and claimed to read and to understand the federal rules. *See Jones*, 65 F.4th at 930. These factors, in addition to the *Faretta* colloquy, show that Phillips validly "chose to represent himself 'with eyes open.'" *Jones*, 65 F.4th at 929 (quoting *Faretta*, 422 U.S. at 835).

AFFIRMED