STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 3, 2000
v	No. 214098 Wayne Circuit Court
KAREEM NELSON, Defendant-Appellant.	LC No. 98-000537

Before: Fitzgerald, P.J., and Holbrook, Jr. and McDonald, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of two counts of armed robbery, MCL 750.529; MSA 28.797, and one count of carjacking, MCL 750.529a; MSA 29.797(a). Defendant was ultimately sentenced as a third habitual offender to an enhanced sentence of 15 to 30 years under MCL 769.13; MSA 28.1085. We reverse and remand for a new trial.

Defendant argues that he was erroneously denied the right to self-representation. We agree.

Criminal defendants have a constitutional right to proceed in propria persona in any criminal proceeding. *People v Belanger*, 227 Mich App 637, 641; 576 NW2d 703 (1998). This Court reviews constitutional issues de novo. *People v Cain*, 238 Mich App 95, 108; 605 NW2d 28 (1999).

Our review of the record indicates that a colloquy took place between defendant and the court, and that after repeated attempts to fire his appointed attorney, defendant straightforwardly asked the court whether he could represent himself. In response to defendant's request, the court simply instructed him to "sit and pay attention and be quiet." The trial court's response clearly falls short of our Supreme Court's expectations, set forth in *People v Adkins (After Remand)*, 452 Mich 702, 723; 551 NW2d 108 (1996), that trial courts create a record during the initial waiver of counsel process to establish compliance with MCR 6.005 and *People v Anderson*, 398 Mich 361; 247 NW2d 857 (1976). *Anderson, supra* at 366-367, requires that the trial court establish that (1) the defendant's request is unequivocal; (2) the defendant has asserted his right to self-representation knowingly, intelligently, and voluntarily; and (3) the defendant will not unduly disrupt the court while acting as his own counsel. *Adkins*, supra at 721-722. MCR 6.005 additionally requires the trial court to "offer the

assistance of an attorney and to advise the defendant about the possible punishment for the charged offense." *Id.* at 722. In this case, the court conducted no inquiry at all when defendant indicated his desire to represent himself at trial.

Recently, this Court applied the *Anderson* requirements in *People v Rice*, 231 Mich App 126, 137; 585 NW2d 331 (1998), rev'd 459 Mich 899; 589 NW2d 280 (1998), on remand 235 Mich App 429; 597 NW2d 843 (1999), which compelled us to reverse a defendant's conviction on the basis that the defendant's eleventh-hour request to represent himself was denied. Therein, this Court categorically requested that our Supreme Court adopt a timeliness requirement in situations involving requests for self-representation, as many other jurisdictions have done. In response, our Supreme Court did not create a timeliness requirement, and no such requirement currently exists. See *People v Rice*, 459 Mich 899; 589 NW2d 280 (1998). Thus it is of no consequence that defendant's request for self-representation was made on the day of trial.

Plaintiff argues that defendant failed to exhibit an intentional relinquishment or abandonment of the right to counsel. We disagree. To the extent that defendant was allowed to say anything at all, he expressed quite clearly his desire to relinquish and abandon counsel. While at first defendant impliedly requested substitute counsel, after his efforts to speak were abruptly thwarted by the court, he clearly asked to represent himself, indicating that he was willing to abandon the right to counsel.

Plaintiff also argues that by using foul language to describe his conflict with his attorney defendant showed that he would be disruptive to the proceedings. Obviously defendant's use of a vulgarity in court was inappropriate. However, the use of one vulgarity, especially given defendant's obvious frustration with the court's refusal to hear him, does not, in isolation, form the basis for us to conclude that defendant would have been disruptive to the proceedings generally. The record fails to demonstrate that defendant was the cause of any previous disruption or delay. Although defendant's "outbursts" were persistent, defendant was merely trying to address his concerns regarding counsel and to exercise his right to representation before trial began. We conclude that defendant's persistent efforts to voice his concerns before trial does not necessarily mean that he would have unduly disrupted the judicial process once the trial began. In fact, the record indicates that once the jury was seated, defendant did not disrupt the process, despite his dissatisfaction.

Plaintiff also argues that defendant's request was not an unequivocal request to represent himself. Defendant clearly asked the court, after repeated attempts to describe his dissatisfaction with his attorney, and after firing his attorney "for the record": "[Judge], could I represent myself?" This was after defendant had indicated at the June 5 hearing that he would "probably" be representing himself at trial. A defendant's request to represent himself could not be more straightforward than was defendant's in this case, especially given his limited opportunity to speak.

Furthermore, the record reveals that defendant had already passed a competency examination before trial; thus, it cannot be said that defendant was already presumed to be unable to knowingly relinquish his right to counsel or incompetent to represent himself. The court simply failed to give him the opportunity to knowingly and intelligently relinquish any right.

The standard for knowingly relinquishing the right to counsel in order to exercise the right of self-representation is not whether the defendant has a legal education, and "competence" does not refer to legal skills. *Anderson, supra* at 367-368. Accordingly, the one question the court posed to defendant, "Did you go to law school, Mr. Nelson?", was inappropriate.

Furthermore, courts consistently consider whether a defendant claiming the right to self-representation is "literate." See *Rice, supra* and *People v Holcomb*, 395 Mich 326; 235 NW2d 343 (1975). Among the other factors that the court below failed to consider was whether defendant in this case was literate; however, defendant did state that he studied a lot in the law library, indicating that he was in fact literate.

Plaintiff also argues that this Court should create a timeliness requirement for the assertion of the right to proceed pro se. In fact, as mentioned above, there is no such timeliness requirement in the law as it currently stands, and existing case law expressly provides that no such requirement exists. See *Rice, supra,* 459 Mich 899, and *Anderson, supra* at 367-368. Accordingly, defendant's unequivocal request to represent himself could not have been rejected on the basis of untimeliness. Furthermore, defendant indicated at the June 5 hearing, three days before trial, that he would "probably" be representing himself, and not for the first time on the day of trial as plaintiff contends.

The harmless error doctrine does not apply to this situation. In *Anderson, supra* at 405, our Supreme Court explained that the denial of the right to self-representation is a structural defect that defies harmless error standard and requires automatic reversal. See also *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

Thus, we conclude that the court's total unwillingness to make any inquiry or even to acknowledge defendant's request to represent himself fell short of the requirement that once a defendant has affirmatively declared his desire to proceed pro se, the trial court must substantially comply with the requirements of *Anderson, supra*, and the ample precedent adhering to that decision. The court's failure in this case constituted a "complete omission of the court rule and the *Anderson* requirements" under *People v Dennany*, 445 Mich 412, 439; 519 NW2d 128 (1994). Therefore, defendant's conviction must be reversed on this basis.

Because of our resolution of this issue, we do not reach defendant's remaining issues.

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Donald E. Holbrook, Jr.
/s/ Gary R. McDonald