IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-216

Filed: 19 September 2017

Union County, No. 12 CRS 53801

STATE OF NORTH CAROLINA

v.

MARVIN LOUIS MILLER, JR.

Appeal by defendant from judgment entered 28 September 2016 by Judge Jeff Carpenter in Union County Superior Court. Heard in the Court of Appeals 6 September 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Kathryn H. Shields, for the State.

Leslie Rawls for defendant-appellant.

TYSON, Judge.

Marvin Louis Miller, Jr. ("Defendant") appeals from a judgment entered upon the jury's verdicts finding him guilty of sale of cocaine, possession with intent to sell or deliver cocaine, and maintaining a place to keep controlled substances. We find no error.

I. Background

The Union County Sheriff's Department received information from a known user of crack cocaine ("the informant") in June 2012, who suggested Defendant was selling and delivering cocaine from his home. Sheriff's deputies arranged for a controlled undercover buy with the informant. Deputies searched the informant and her car prior to the purchase, fitted her with an audio recording device, and provided her with fifty dollars in cash.

Deputies followed the informant as she drove down Defendant's street. They lost sight of her car when she turned onto Defendant's long dirt driveway and waited nearby.

The informant entered Defendant's home, told Defendant she wished to purchase crack cocaine and gave Defendant the cash money the officers had provided. Defendant left the room. Two other women were present inside the home, and were smoking what appeared to be crack cocaine, which Defendant had placed on a table.

Defendant returned and placed crack cocaine on the washer and dryer. The informant picked up the crack cocaine and left. The informant met with deputies and gave them the substance she had purchased, which was later determined to be less than one-tenth of a gram of cocaine.

A grand jury indicted Defendant on charges of possession with intent to sell or deliver cocaine, sale of cocaine, and maintaining a place to keep controlled substances on 8 October 2012. Defendant's case was called for trial on 26 September 2016, six

years later. At the start of the hearing, before jury selection commenced, Defendant raised an issue with his court-appointed counsel, and indicated he wished to proceed *pro se*. The trial court denied Defendant's request.

Defendant moved to dismiss at the close of the State's evidence, which the trial court denied. Defendant did not present any evidence at trial. The jury found Defendant guilty of all charged offenses. The trial court consolidated the convictions into one judgment and sentenced Defendant to a term of 17 to 30 months of imprisonment. Defendant appeals.

II. Jurisdiction

Jurisdiction lies in this Court from final judgment of the superior court entered upon the jury's verdict pursuant to N.C. Gen. Stat. §§ 7A-27(b)(1) and 15A-1444(a) (2015).

III. Right to Self-Representation

Defendant argues the trial court denied him his constitutional right to self-representation by foisting counsel upon him, failing to fully advise him of his right to represent himself, and suggesting that the court would not allow Defendant to proceed *pro se* if he could not demonstrate trial skills.

A. Standard of Review

"The standard of review for alleged violations of constitutional rights is *de novo*." *State v. Graham,* 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009) (citation omitted).

B. Analysis

Defendant initially raised an issue with his court-appointed attorney prior to jury selection. The following exchange occurred:

> THE DEFENDANT: I wanted to see could I get me another lawyer. I had one lawyer and she went off the case and I got a job, it's been about four years ago, it's been going on about four or five years and I want to ask could I get another lawyer, could I get a court lawyer. My bond's $100,000, I'm not going anywhere, I'm 63 years old.
>
> . . . .
>
> THE COURT: I'm not sure that lowering your bond is going to do anything for you if you're out of jail already.
>
> THE DEFENDANT: I'm talking about I got a pending bond on me, I got my house put up on it.
>
> THE COURT: Okay. And unless there's some really good reason why Mr. Williams is unable to represent you, Mr. Williams is going to be your lawyer. What – is there a really good reason why Mr. Williams can't represent you?
>
> THE DEFENDANT: Yeah, I got a whole lot of stuff I can't understand. I got to talk to a lawyer that can advise me what to do.
>
> THE COURT: Well, Mr. Williams is your lawyer.
>
> THE DEFENDANT: I know, but – I know he [sic] my lawyer but he want me to plead.

MR. WILLIAMS: I was originally appointed to Mr. Miller back in 2012, he had me terminated, he hired Ms. Kendrick[].

THE COURT: Right, then you got reappointed.

MR. WILLIAMS: Then I got reappointed so at that time that Ms. Kendrick withdrew from the case, I think I was present, it was during an admin [sic] term. Mr. Miller is now saying he doesn't know why she ever withdrew from the case. I told him I didn't remember that. We were in front of Judge Bragg some time in the spring, that's when I was actually reaffirmed that I was appointed [sic]. I spoke to Mr. Miller about the case, I told him about the strengths and weaknesses, I told him what he would possibly be looking for at trial. So I haven't advised him to plead, I just told him the strengths and weaknesses of the case. He brought it to my attention this morning. We were actually here before ready to go to trial but the matter wasn't called so this is something new to me, but he wanted to address it so I told him I would let him address the Court.

THE COURT: Okay. Mr. Miller.

THE DEFENDANT: Yes, sir.

THE COURT: In regards to your bond, I'm going to deem that you've made a motion for reduction pro se. Mr. Williams, you are not adopting that motion, are you, as his attorney of record?

MR. WILLIAMS: No, your Honor.

THE COURT: I'm going to deny that motion. In regards to your request to have another counsel other than Mr. Williams, I'm going to deny that motion as well. Mr. Williams is going to continue to be your lawyer, represent you in this case.

During jury selection, the trial court noted that documentation was missing from the court file regarding the reappointment of Defendant's counsel.

> THE COURT: Mr. Williams, I have looked at the files for Mr. Miller and it appears as though you were appointed early on and maybe I know that you were appointed -- reappointed after Ms. Kendrick withdrew but there was no formal notation of that in the file, so Mr. Miller I'm formally appointing Mr. Williams and it will be noted in the file that Mr. Williams is your attorney. Although he's been acting as your attorney up until now we're going to correct it in the file, okay?
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> THE DEFENDANT: No.
>
> THE COURT: No? Well, Mr. Williams is going to be your lawyer whether you want him to be or not.

After conducting another bench conference, the court addressed Defendant.

> THE COURT: You want a lawyer, don't you, Mr. Miller?
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> THE DEFENDANT: Yes, sir.
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> THE COURT: You don't want to represent yourself, do you?
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> THE DEFENDANT: I got –
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> MR. WILLIAMS: Just a simple question, do you want to represent yourself or do you want a lawyer?
>
> THE DEFENDANT: Can I represent myself?
>
> THE COURT: You can, but I probably – I'm probably not going to be willing to let you do that unless you can prove to me that you have the skills and abilities to do that. Do you really want to represent yourself? They're going to call -- I saw a resume in one of these files here that somebody had a degree in biochemistry that they're going to call as a

> witness. Do you think you're in a position to confront and cross examine a witness with any level of skill?
>
> THE DEFENDANT: But I can tell you –
>
> MR. WILLIAMS: Don't discuss the case.
>
> THE COURT: I don't want to talk to you about your case, just Mr. Williams was appointed to represent you, you thought that you wanted a lawyer enough that you went and hired Ms. Kendrick at least on some level Mr. Williams has sort of been through you with this process since Ms. Kendrick got out. You do want a lawyer, don't you?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Okay. Thank you, sir. Mr. Williams is your lawyer.

"Criminal defendants have a constitutional right to the assistance of counsel in conducting their defense. Implicit in this right to counsel is the constitutional right to refuse the assistance of counsel and proceed *pro se*." *State v. Jackson,* 128 N.C. App. 626, 628, 495 S.E.2d 916, 918 (citations omitted), *disc. review allowed in part,* 348 N.C. 286, 501 S.E.2d 921 (1998); *see also State v. Fulp,* 355 N.C. 171, 174, 558 S.E.2d 156, 158 (2002) (stating that "a defendant has a right to handle his own case without interference by, or the assistance of, counsel forced upon him against his wishes") (quotation marks and citations omitted).

"Of the two rights, however, the right to counsel is preeminent and hence, the default position." *State v. Walters*, 182 N.C. App. 285, 292, 641 S.E.2d 758, 762 (2007)

(citing *Fields v. Murray,* 49 F.3d 1024, 1028 (4th Cir. 1995) (en banc)). Before allowing a defendant to waive in-court representation, "the trial court must insure that constitutional and statutory standards are satisfied." *Fulp,* 355 N.C. at 174-75, 558 S.E.2d at 159.

"First, the defendant's waiver must be expressed clearly and unequivocally. Second, the trial court must ensure that the defendant's waiver is knowing, voluntary, and intelligent." *State v. Reid,* 151 N.C. App. 379, 385, 565 S.E.2d 747, 752 (citation omitted), *disc. review denied,* 356 N.C. 622, 575 S.E.2d 522 (2002).

Defendant first argues the trial court erred by not fully advising him of his right to self-representation and by mis-informing him of the right in suggesting that the court "probably [was] not going to be willing" to let Defendant represent himself unless Defendant could prove to it that he had "the skills and abilities to do that."

Our Supreme Court has held that the Sixth Amendment right to self-representation does not require the trial court to advise the defendant of that right. *State v. Branch*, 288 N.C. 514, 548, 220 S.E.2d 495, 518 (1975), *cert. denied*, 433 U.S. 907, 53 L. Ed. 2d 1091 (1977), *overruled on other grounds by State v. Adcock*, 310 N.C. 1, 310 S.E.2d 587 (1984). The defendant in *Branch* argued the trial court should have advised him of his right to proceed without counsel after denying his motion to continue to employ different counsel, citing *Faretta v. California*, 422 U.S. 806, 45 L. Ed. 2d 562 (1975). *Branch*, 288 N.C. at 548, 220 S.E.2d at 518.

In overruling the defendant's argument, our Supreme Court noted that *Faretta* "stands for the proposition that a defendant has a right to proceed without a lawyer and not have counsel forced upon him against his wishes. Such is not the situation here." *Id*. Our Supreme Court reaffirmed this holding in *State v. Hutchins*, 303 N.C. 321, 279 S.E.2d 788 (1981), and noted the Court in *Branch* "indicated that *Faretta* did not carry with its recognition of the right of self-representation a concurrent recognition of the right to be warned of its existence." *Id*. at 338, S.E.2d at 799. As applied here, the trial court owed no duty to inform Defendant of his right to self-representation. *Id*. at 337-38, 279 S.E.2d. at 799. Defendant's argument is overruled.

Defendant next argues the trial court forced counsel upon him by appointing counsel the day of trial and telling Defendant that "Mr. Williams is going to be your lawyer whether you want him to be or not." We disagree.

Although Defendant stated some dissatisfaction with his court-appointed counsel, Defendant never asserted he wanted to waive his right to counsel and proceed *pro se*. Rather, on the morning of his trial, Defendant requested another lawyer be appointed, specifically if he could "get a court lawyer," because he was dissatisfied that his current appointed counsel had "want[ed] him to plead."

Our Supreme Court has also addressed this issue. "Statements of a desire not to be represented by court-appointed counsel do not amount to expressions of an intention to represent oneself." *Hutchins,* 303 N.C. at 339, 279 S.E.2d at 800.

Defendant never stated that he wished to represent himself and proceed to trial without the assistance of counsel. Indeed, multiple times Defendant answered in the affirmative that he wanted a lawyer, and told the court "I got a whole lot of stuff I can't understand. I got to talk to a lawyer that can advise me what to do."

"Given the fundamental nature of the right to counsel, we ought not to indulge in the presumption that it has been waived by anything less than an express indication of such an intention." *Id*. Defendant's general question, "Can I represent myself?" does not meet this standard. Defendant was not requesting to represent himself, but only questioning whether he had the right to do so. To be sure, shortly after posing the question to the court, Defendant affirmatively stated that he wanted counsel, and negated any inference that he was electing to represent himself.

Because Defendant did not clearly and unequivocally waive his right to counsel, the trial court did not force Defendant to accept counsel at trial by reappointing Mr. Williams to represent him. *See id*. at 338, 279 S.E.2d at 799 ("Unless an accused makes *some* form of an affirmative statement which would amount to a manifestation of a desire to proceed *pro se*, it cannot be reasonably argued that an accused has been forced to accept representation at trial.") (emphasis original).

It appears Defendant wanted a different attorney appointed other than Mr. Williams. While an indigent Defendant is entitled to have counsel appointed to him, he is "not entitled to have the court appoint counsel of his own choosing." *State v.*

Frazier, 280 N.C. 181, 198, 185 S.E.2d 652, 663, *death penalty vacated*, 409 U.S. 1004, 34 L. Ed. 2d 295 (1972).

The right to competent court-appointed counsel does not include the right to "to insist that counsel be removed and replaced with other counsel merely because defendant becomes dissatisfied with his attorney's services." *State v. Sweezy*, 291 N.C. 366, 371, 230 S.E.2d 524, 528 (1976).

Our Supreme Court has stated:

> In the absence of . . . an expression by defendant of a desire to proceed *pro se*, when faced with a claim of conflict between defendant and his attorney, the trial court must determine only that the defendant's present counsel is able to render competent assistance and that the nature of the conflict will not render such assistance ineffective.

State v. Johnson, 341 N.C. 104, 111, 459 S.E.2d 246, 250 (1995).

Here, Defendant's asserted conflict with Mr. Williams was that counsel wanted Defendant to enter a plea and Defendant wanted "to talk to a lawyer that can advise me what to do." Mr. Williams denied this assertion, stating that he had informed Defendant of the strengths and weaknesses of the case, but had not advised Defendant to plead.

The court inquired into Defendant's reasons for wanting new counsel. Defendant's alleged conflict with Mr. Williams was not such to render his counsel ineffective. Defendant has failed to show the trial court erred in reappointing Mr.

Williams as Defendant's court-appointed counsel despite Defendant wanting different counsel appointed.

Defendant, citing *Faretta v. California,* argues that the trial court's discussion into his ability to represent himself constituted an impermissible inquiry of Defendant's technical legal knowledge. *Faretta*, 422 U.S. 806, 45 L. Ed. 2d 562. We disagree.

Once a defendant clearly and unequivocally waives his right to counsel and elects to proceed *pro se*, the court must conduct a thorough inquiry to ensure that the defendant knowingly, intelligently, and voluntarily waived the right. *Fulp*, 355 N.C. at 175, 558 S.E.2d. at 159. "Under *Faretta*, [a] defendant's 'technical legal knowledge . . . [is] not relevant to an assessment of his knowing exercise of the right to defend himself.'" *State v. Lane*, 365 N.C. 7, 26, 707 S.E.2d 210, 222 (2011) (quoting *Faretta*, 422 U.S. at 836, 45 L. Ed. 2d at 582).

Defendant did not clearly and unequivocally waive his right to counsel and elect to represent himself. Despite the brief reference to Defendant's "skills and abilities," the trial court did not conduct inquiry into whether Defendant had knowingly exercised his right to defend himself. Any asserted error in the trial court's statements are harmless beyond a reasonable doubt.

IV. Conclusion

Defendant did not clearly and unequivocally waive his right to counsel and elect to represent himself. The trial court did not force counsel upon Defendant and did not deny him the right to self-representation. Defendant received a fair trial, free from prejudicial errors he preserved and argued. We find no error. *It is so ordered*.

NO ERROR.

Judges ELMORE and STROUD concur.

Report per Rule 30(e).