TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-14-00512-CR

Crae Robert Pease, Appellant

v.

The State of Texas, Appellee

FROM THE COUNTY COURT AT LAW NO. 6 OF TRAVIS COUNTY
NO. C-1-CR-13-220763, HONORABLE BOB PERKINS, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

Appellant Crae Robert Pease was arrested and charged with criminal trespass following his refusal to leave certain residential property in Travis County, for which a writ of possession was executed. *See* Tex. Penal Code § 30.05. Pease pleaded not guilty to the charged offense, and the case proceeded to a jury trial at which Pease represented himself. The jury convicted Pease of criminal trespass and assessed punishment at six months' confinement in county jail and a $2,000 fine. The trial court sentenced Pease in accordance with the jury's verdict.

On appeal, Pease contends, in part, that the evidence is insufficient to support his conviction and that the trial court deprived him of his right to counsel. Because we cannot conclude from the record before us that Pease effectively asserted his right to self-representation, we reverse the judgment of the trial court and remand the case for a new trial.

DISCUSSION

In his first and tenth issues on appeal, Pease contends that the trial court wrongly denied his "right to counsel, and at the same time, failed to admonish him of the dangers of proceeding pro se."

The Sixth Amendment guarantees that "in all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." U.S. Const. amend. VI; *see Faretta v. California*, 422 U.S. 806, 807 (1975); *Williams v. State*, 252 S.W.3d 353, 355-56 (Tex. Crim. App. 2008). Generally, absent an effective waiver, counsel must be appointed by the court to represent a criminal defendant who is indigent. *Oliver v. State*, 872 S.W.2d 713, 714 (Tex. Crim. App. 1994) (citing *Johnson v. Zerbst*, 304 U.S. 458 (1938)); *see* Tex. Code Crim. Proc. art. 1.051(c) ("An indigent defendant is entitled to have an attorney appointed to represent him in any adversary judicial proceeding that may result in punishment by confinement and in any other criminal proceeding if the court concludes that the interests of justice require representation."). The assistance of counsel protects a defendant's right to a fair trial, ensuring that the prosecution's case is subjected to meaningful adversarial testing and safeguarding the defendant's rights. *Williams*, 252 S.W.3d at 355-56 (citations omitted).

In *Faretta*, the Supreme Court recognized that the Sixth Amendment also includes the corresponding right to proceed without counsel when the defendant knowingly, intelligently, and voluntarily elects to do so. *Faretta*, 422 U.S. at 835; *see Indiana v. Edwards*, 554 U.S. 164, 170 (2008). However, the right to self-representation does not attach until it has been clearly and unequivocally asserted by the defendant. *Faretta*, 422 U.S. at 835. Once clearly and unequivocally

asserted, the trial judge must inform the defendant about the "dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" *Williams*, 252 S.W.3d at 356 (quoting *Faretta*, 422 U.S. at 835). In making these admonishments, no formulaic questioning or particular script is required, *Burgess v. State*, 816 S.W.2d 424, 428 (Tex. Crim. App. 1991), and the "trial judge has no duty to inquire into an accused's 'age, education, background or previous mental history in every instance where an accused expresses a desire to represent himself,'" *Williams*, 252 S.W.3d at 356 (quoting *Goffney v. State*, 843 S.W.2d 583, 584-85 (Tex. Crim. App. 1992)). However, "the trial judge must inform the defendant 'that there are technical rules of evidence and procedure, and he will not be granted any special consideration solely because he asserted his pro se rights.'" *Id*. (quoting *Johnson v. State*, 760 S.W.2d 277, 279 (Tex. Crim. App. 1988)). Unless a defendant has knowingly and intelligently waived his right to counsel after proper inquiry and admonishment, a trial court may not proceed without counsel. *See Oliver*, 872 S.W.2d at 714-16.

"The State bears a heavy burden to demonstrate that the defendant intelligently, voluntarily, and knowingly waived his constitutional right to either retained or appointed counsel." *Fernandez v. State*, 283 S.W.3d 25, 29 (Tex. Crim. App.—San Antonio 2009, no pet.) (citing *Trevino v. State*, 555 S.W.2d 750, 751 (Tex. Crim. App. 1977)); *see also Upton v. State*, 853 S.W.2d 548, 553 (Tex. Crim. App. 1993) ("The State has the burden to establish a valid waiver of Fifth and Sixth Amendment rights to counsel."). Courts indulge every reasonable presumption against waiver and do not presume acquiescence in the loss of fundamental rights. *Williams*, 252 S.W.3d at 356 (citing *Zerbst*, 304 U.S. at 464). To determine whether a defendant's waiver is effective,

courts consider the totality of the circumstances, "including the background, experience, and conduct of the accused." *Id*. The record must contain proper admonishments concerning self-representation and any necessary inquiries of the defendant so that the trial court may make an assessment of his knowing exercise of the right to defend himself. *Goffney*, 843 S.W.2d at 583.

Here, Pease appeared on the day of trial and began to argue his pretrial motions without the assistance of counsel. However, an attorney present in the courtroom at the time informed the trial judge that he was there at Pease's request. Pease asked the court to allow the attorney to act as his standby counsel. The following exchange took place between the trial judge and Pease:

> COURT: . . . . Under the law, every American citizen is entitled to have an attorney for him or hire their own attorney if they can; or if they want to represent themselves, they can represent themselves. They have a constitutional right to representation by a lawyer. They have a constitutional right to represent themselves. They do not have a right to—a constitutional right to have standby counsel appointed, which I'm calling a "hybrid counsel." In other words, they're sort of your lawyer and they're sort of not. You don't have a constitutional right to do that.
>
> Now, in some cases, courts have gone ahead and appointed standby counsel. For instance, you get guys that are going to trial on murder cases and stuff like that insist on representing themselves, even though they're looking at life or 99 years in the penitentiary if they're convicted. And a lot of times in those cases, courts have appointed standby counsel and things like that where, you know, there are—catastrophic consequences can occur.
>
> PEASE: You mean I can go to jail?
>
> COURT: But my understanding of the law is that you're not entitled to standby counsel. I don't really see—its clear to me that you have a great interest in this case, that you're a smart man, that you know what you're doing, you—
>
> PEASE: I don't know about that.

COURT: —filed all these motions. And so—and it's further my understanding that we had a *Faretta* hearing. Judge Wisser conducted a *Faretta* hearing back in March or something like that, several months ago, at which point—because they wanted to make sure that you did want to represent yourself and you indicated that you did. You went through that whole hearing insisting that you did want to represent yourself. I take it you still do represent—

PEASE: Right.

COURT: Do you still want to do that?

PEASE: I had the caveat that I would be able to have somebody sitting there next to me in case I needed to have some questions answered was my understanding. And as I said before—

COURT: Well, I mean, you're not entitled to that. That's what I am saying. You know, you're entitled to represent yourself or you're entitled to have a lawyer represent you. Do you want a lawyer to represent you?

PEASE: Not to represent me, but, I mean, to stand by me. Because I—

COURT: I'm not going to appoint you a standby counsel.

The State contends that this exchange demonstrates that Pease clearly waived his right to the assistance of counsel and asserted the right to represent himself. The State points out that there is no constitutional right to standby counsel and that if a court in its discretion denies a request for standby counsel, it must remind the defendant that "he must choose between two mutually exclusive rights—the right to self representation or to representation by counsel." *See Scarbrough v. State*, 777 S.W.2d 83, 92 (Tex. Crim. App. 1989); *Fulbright v. State*, 41 S.W.3d 228, 235 (Tex. App.—Fort Worth 2001, pet. ref'd). The State contends that the trial court properly informed Pease of the choice presented after denying his request for standby counsel and that Pease restated his intention to represent himself.

We agree that the trial court properly informed Pease that he did not have a constitutional right to standby counsel and that he was instead required to choose between proceeding to trial with counsel or proceeding to trial without the assistance of counsel. *See Scarbrough*, 777 S.W.2d at 93; *see also Burgess*, 816 S.W.2d at 428 n.1 ("As part of the admonishments the trial court should make clear that the accused has no right to standby counsel in the event he chooses self-representation, and should inform him whether in its discretion the court intends to allow it."). However, when asked by the trial judge about his desire to proceed without representation, Pease qualified his assertion of self-representation by stating that he wanted to conduct his defense with the aid of standby counsel. Based on this exchange, Pease's assertion of self-representation was conditional and therefore equivocal. *See Scarbrough*, 777 S.W2d at 93 (explaining that when trial court denies defendant's request for standby counsel and defendant continues to insist in conducting his own defense with aid of standby counsel, "it may be said his assertion of the right to self-representation is 'conditional' and thus, 'equivocal'").

Further, even if we considered Pease's assertion of self-representation to be clear and unequivocal, we still could not conclude that Pease's waiver of counsel was effective. The trial court did not admonish Pease on the dangers and disadvantages of self-representation on the day of trial, and although the trial judge referred to the fact that a *Faretta* hearing had previously been held, a reporter's record from this hearing has not been provided to this Court.[1] Nothing in the record

[1] Because both parties' briefs refer to a *Faretta* hearing having occurred in this case prior to trial, this Court requested a supplemental reporter's record containing a transcript of this hearing. *See* Tex. R. App. P. 34.6(d) (supplementation of reporter's record). According to the court reporter's response, no such record exists. Although generally it is incumbent on the appellant to request a record of proceedings, the trial court is charged with the responsibility of making a record reflecting

before us demonstrates that any admonishments were ever given or that any inquiries were made with respect to whether Pease's assertion of self-representation was knowingly, intelligently, and voluntarily made.[2] Accordingly, we cannot conclude that record affirmatively demonstrates that Pease knew what "he [was] doing and his choice [was] made with eyes open.'" *See Faretta*, 422 U.S. at 835; *see also Goffney*, 843 S.W.2d at 585 (concluding that statement in judgment that defendant had "knowingly, intelligently, and voluntarily waived his right to counsel" failed to meet requirements of *Faretta* because the record "[did] not contain the admonishments of the dangers and disadvantages of self-representation" and that "[p]resuming waiver from a silent record is impermissible").

Because we cannot conclude that Pease effectively invoked his right to represent himself, we must conclude that he was denied his right to be represented by counsel at trial. *See Williams*, 252 S.W.3d at 358-59 (explaining that invalid waiver of counsel waives nothing, and right to counsel remains intact). The denial of the constitutional right to counsel at trial is a structural defect, and "prejudice is presumed because the trial has been rendered inherently unfair and

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that the defendant was sufficiently admonished, and we do not, in the absence of such a record, presume that the defendant knowingly and intelligently elected to represent himself. *Goffney v. State*, 843 S.W.2d 583, 585 (Tex. Crim. App. 1992).

[2] The clerk's record contains two documents, purportedly executed by Pease, entitled "Waiver of Attorney." The first document is dated January 16, 2014, and is signed "Nein Danke," which according to Pease is German for "No Thank You." The second document is dated March 3, 2014, and appears to bear Pease's signature, but includes a notation that it is signed "under duress." These documents do not, on their face, constitute a clear and unequivocal assertion by Pease of his right to proceed without counsel, and the State does not contend otherwise. Instead, the State contends that these documents do not render Pease's otherwise effective waiver invalid. Because we have concluded that the record does not affirmatively demonstrate that Pease ever effectively waived his right to counsel, we need not decide this issue.

unreliable." *Id*. at 357. Based on the record before us, the trial court's decision to permit Pease to proceed without representation constitutes reversible error, not subject to a harm analysis. *See id*. We sustain Pease's first and tenth issues on appeal.

Although we have concluded that Pease's conviction must be reversed, we still must consider any issue raised by Pease that, if sustained, would entitle him to an acquittal rather than a new trial. *See Rains v. State*, 604 S.W.2d 118, 120 (Tex. Crim. App. 1980) ("Although the judgment must be reversed we still must address the appellant's contention that the evidence was insufficient, for this ground would entitle the appellant to a judgment of acquittal rather than a new trial."); *Thompson v. State*, 408 S.W.3d 614, 627 (Tex. App.—Austin 2013, no pet.). Of the ten additional issues raised by Pease on appeal the only issues that would potentially entitle him to an acquittal are those that essentially claim that the evidence is insufficient to support his conviction. Having reviewed the record, and viewing the evidence in the light most favorable to the verdict, we conclude that the evidence is sufficient to support Pease's conviction. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (standard of review).

At trial, the State introduced evidence showing that Fannie Mae purchased the property at issue at a foreclosure sale on December 7, 2010, and, after sending a notice of eviction, filed a forcible-detainer action. *See* Tex. Prop. Code §§ 24.002-.011 (forcible-detainer statute). Consequently, Fannie Mae obtained a judgment entitling it to immediate possession of the property. Deputy Almar Saenz with the Travis County Constable's Office testified that on May 23, 2013, he executed a writ of possession and evicted Pease and his wife from the property. Hallie Waller, a real estate agent, testified that she was hired by Fannie Mae to ensure that the property was vacated and made ready for sale. According to Waller, eight days after Pease's eviction, she encountered

him at the property and informed him "on behalf of [Fannie Mae], you are not welcome on the property, in the front yard or backyard or anywhere on the property or in the property." Nevertheless, on December 11, 2013, officers with Austin Police Department saw Pease exiting the front door of the property, despite the fact that Waller had previously had the locks rekeyed.

Through out the trial, Pease asserted that he, and not Fannie Mae, held legal title to the property. However, the undisputed evidence presented at trial established that the quitclaim deed on which Pease relies was not executed until January 3, 2011, after Fannie Mae purchased the property at foreclosure. Moreover, the evidence presented by the State showed that Fannie Mae had previously established its right to immediate possession of the property through a forcible-detainer action and that Pease's quiet-title action against Fannie Mae was dismissed by a federal court. Based on the evidence presented, we conclude that a rational finder of fact could have found that Pease entered or remained on property of another, without effective consent, and that he had notice that entry was forbidden. *See* Tex. Penal Code § 30.05. We overrule issues four, seven, eight, nine, and twelve. Because Pease's remaining issues, to the extent they are preserved, are not necessary to the outcome of this appeal, we do not reach them.[3] *See* Tex. R. App. P. 47.1.

[3] In issues two, three, five, six, and eleven, Pease complains that the clerk's record does not contain the trial judge's judicial oath of office; the assistant prosecutor for the State did not have proper statutory oath and bond on file; the information was defective because it did not state the owner of the property, did did not contain a citation to the penal code, and did not state that the property was a habitation; and the court failed to include the affirmative defense of mistake in the charge.

CONCLUSION

Having concluded that the record is insufficient to establish that Pease knowingly, intelligently, and voluntarily waived his right to counsel, we reverse the trial court's judgment and remand for a new trial.

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Scott K. Field, Justice

Before Justices Puryear, Goodwin, and Field

Reversed and Remanded

Filed: May 5, 2016

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