Rel: July 12, 2019

ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2018-2019

CR-17-0943

Frank Morgan Connell, Jr.

v.

City of Daphne

Appeal from Baldwin Circuit Court
(CC-17-1594)

On Application for Rehearing

COLE, Judge.

This Court's opinion of April 12, 2019, is withdrawn, and the following opinion is substituted therefor.

Frank Morgan Connell, Jr., who was not represented by counsel, was convicted in the Fairhope Municipal Court of

second-degree criminal mischief, see § 13A-7-22, Ala. Code 1975, and was sentenced to 180 days in jail. The municipal court suspended that sentence and placed Connell on 12 months' probation. Connell, again acting pro se, appealed his conviction and sentence to the Baldwin Circuit Court for a trial de novo. Following a jury trial in that court, Connell, still acting pro se, was found guilty of second-degree criminal mischief. The circuit court sentenced Connell to 6 months in jail; that sentence was split and he was ordered to serve 60 days in jail, followed by 1 year of unsupervised probation. Connell was also ordered to pay court costs, $963.60 in restitution, and a $500 fine. Connell filed a timely notice of appeal.

On appeal, Connell, who is still proceeding pro se, argues that his Sixth Amendment right to counsel was violated because, although he never waived his right to counsel, he was required to represent himself in both the municipal court and the circuit court. We agree, and we reverse Connell's conviction and sentence and remand this case.

Facts and Procedural History

On July 10, 2017, Connell was arrested for violating City of Daphne Ordinance No. 2003-18, which incorporates § 13A-7-22, Ala. Code 1975. On August 29, 2017, Connell appeared in the Daphne Municipal Court, at which time both the municipal-court judge and the city prosecutor recused themselves from Connell's case. Connell's case was then transferred to the Fairhope Municipal Court. Connell pleaded not guilty, and the municipal court presented him with a waiver-of-counsel form, which he refused to sign. (C. 40.) The municipal court noted on that form that the "Defendant refused to sign"; however, it also "checked the box" that Connell had waived his right to counsel "knowingly, intelligently, and voluntarily." (C. 40.) The case-action summary also reflects that Connell refused to sign the waiver-of-rights form but includes no assertion that Connell waived his right to counsel. (C. 8.) The record on appeal does not indicate that the municipal court ever inquired into Connell's indigency status or advised him of his right to counsel or advised him of his right to have counsel appointed if he could not afford counsel. Likewise, the record on appeal does not reveal any colloquy with Connell regarding any waiver of his right to counsel.

The same day he refused to waive his right to counsel, Connell, acting pro se, was found guilty by the municipal court and was sentenced to 180 days in jail. The court suspended that sentence and placed Connell on 12 months' probation. Connell timely appealed his conviction and sentence to the circuit court for a trial de novo.

In the circuit court, Connell again appeared without counsel. (R. 1.) There is no waiver-of-rights form in the circuit-court record, and nothing in the record on appeal indicates that the circuit court inquired into Connell's indigency status, advised him of his right to counsel, or advised him that he had the right to appointed counsel if he could not afford counsel. As was the case in the municipal court, nothing in the record shows that the circuit court conducted a colloquy with Connell about a waiver of his right to counsel. Instead, the circuit court and Connell had the following exchange:

> "The Court: All right. Mr. Connell, let me go over a couple of things with you. The first thing that I'd like to inform you of is this is a Class A misdemeanor which carries a range of punishment of up to one year in the county jail or, I guess, in the city jail, that would be in the City of Daphne, and a fine not to exceed--is it $500 in the city?

"[City Prosecutor]: Yes, sir.

"The Court: So the first thing I'm going to tell you is you have the real possibility that if a jury convicts you that you could be spending the next year in the county jail. I'm just making you aware that that is what you're facing.

"The other thing I'm going to tell you is if you represent yourself, you are not going to be a witness and an attorney at the same time. Meaning if you want to testify, you're going to sit in the stand, you're going to take an oath, and you're going to testify and you'll be subject to cross-examination. But when you are acting as your attorney, you are not going to testify. Do you understand the difference that I'm making?

"Mr. Connell: I do.

"The Court: Okay. Anything else we need to cover before we bring the jury in?

"[City Prosecutor]: Judge, I just want to make sure that--and I don't know if Mr. Connell understands the ramifications. I believe you just explained part of it to him. We had offered a withhold adjudication, paying restitution on the issue, and he has declined it. And I don't know that he understands what that is and--

"The Court: I think what the City is saying is that if you will admit that you did this conduct and pay the restitution, after a period of time, one year--after 12 months, the charge will be dismissed. I'm telling you that if you present your case to this jury and they find you not guilty, obviously, you're walking out of here. No court cost. No restitution. No nothing. If that jury finds you guilty, you have the real possibility of going to the city jail for up to one year.

"Mr. Connell: Right. I understand.

"The Court: All right. Go get the jury. And, sir, I've never tried a case with you. I think you've tried a case before. Please don't continue to tell me you're not an attorney or apologize for not being a attorney. I know you're not an attorney. Just argue the best you can.

"Mr. Connell: Right."

(R. 6-8 (emphasis added).) Connell then entered his plea of not guilty, and his trial commenced. At trial, Connell made objections, cross-examined the City's witness, called his own character witness, testified in his own behalf, admitted 16 exhibits, and made a closing argument. The jury found Connell guilty.

Thereafter, the circuit court ordered a presentence-investigation report and scheduled Connell's sentencing hearing for April 26, 2018. Connell hired counsel for his sentencing hearing, and his counsel moved to continue the first hearing date. The circuit court granted that motion and reset Connell's sentencing for May 24, 2018. When counsel appeared at the hearing, however, he told the circuit court that he wanted to withdraw, stating that the attorney-client relationship had deteriorated. Three days before that hearing, Connell notified the court that his counsel had

withdrawn and moved the circuit court to continue his sentencing hearing.[1] The circuit court granted defense counsel's motion to withdraw but denied Connell's motion to continue because the hearing had already been continued once. The circuit court then sentenced Connell to 6 months in jail, split the sentence, and ordered Connell to serve 60 days in jail, followed by 1 year of probation.

Discussion

As set out above, the sole issue Connell raises on appeal is whether the circuit court violated his Sixth Amendment right to counsel.

Before addressing this claim, we address the City's argument that this issue was not preserved for appellate review. It is well settled that, "[u]nless a defendant has or waives assistance of counsel, the Sixth Amendment is a jurisdictional bar to a valid conviction and sentence." Berry v. State, 630 So. 2d 127, 130 (Ala. Crim. App. 1993) (citing Johnson v. Zerbst, 304 U.S. 458 (1938)). See also Ex parte

[1]Although the circuit court's denial of this motion appears in the record on appeal (R. 107), the motion itself is not included in the record. Connell's brief to this Court, and an attached exhibit, indicate that Connell filed the motion in an attempt to retain new counsel.

Pritchett, 117 So. 2d 356 (Ala. 2012); Baker v. State, 933 So. 2d 406, 409 (Ala. Crim. App. 2005); Woodruff v. City of Pelham, 1 So. 3d 157, 159 (Ala. Crim. App. 2008). It is equally well settled that "[t]he United States Supreme Court's holding in Alabama v. Shelton, 535 U.S. 654, 122 S. Ct. 1764, 152 L. Ed. 2d 888 (2002), makes the possibility of incarceration the trigger for the right to representation of counsel." Woodruff, 1 So. 3d at 161. See also Argersinger v. Hamlin, 407 U.S. 25, 37 (1972) (holding that, "absent a knowing and intelligent waiver, no person may be imprisoned for any offense ... unless he was represented by counsel at his trial"). Because Connell's claim is jurisdictional and because he was sentenced to imprisonment, the Sixth Amendment entitled him to counsel and his claim that he was deprived of that right is properly before this Court. Thus, we now address whether Connell's Sixth Amendment right to counsel was violated.

In Carnley v. Cochran, 369 U.S. 506, 516-17 (1962), the United States Supreme Court held that "[t]he record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and

understandingly rejected the offer. Anything less is not waiver." "Presuming waiver from a silent record is impermissible." Id. at 516. As this Court has stated, "[t]he right to counsel does not depend upon a request by the accused." Berry, 630 So. 2d at 129 (citing Brewer v. Williams, 430 U.S. 387 (1977); Kitchens v. Smith, 401 U.S. 847 (1971)). "If a defendant in a criminal proceeding is not represented by counsel, the State must prove an intentional relinquishment of that right." Berry, 630 So. 2d at 129 (citing Johnson v. Zerbst, 304 U.S. 458 (1938)). As the Alabama Supreme Court stated in Ex parte Shelton, 851 So. 2d 96 (Ala. 2000):

> "To establish a knowing and intelligent waiver of counsel, 'the record at the outset of the trial should establish three factors: 1) that the defendant was informed that he had the right to counsel, 2) that the defendant was informed that if he could not afford counsel the state would appoint counsel to represent him, and 3) an affirmative showing by the defendant that, understanding these rights, he still elects to proceed without counsel.'"

851 So. 2d at 101 (quoting Jenkins v. State, 482 So. 2d 1315, 1317 (Ala. Crim. App. 1985)).

The United States Supreme Court has held that, "in order to represent himself, the accused must 'knowingly and

intelligently' forgo" the benefits of counsel. Faretta v. California, 422 U.S. 806, 835 (1975) (quoting Johnson v. Zerbst, 304 U.S. at 464-65). The Court explained that, "[a]lthough a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of 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.'" 422 U.S. at 835 (quoting Adams v. United States ex rel. McCann, 317 U.S. 269, 279 (1942)). "If the record is not clear as to the defendant's waiver and request of self-representation, the burden of proof is on the State." Tomlin v. State, 601 So. 2d 124, 128 (Ala. 1991) (citing Carnley, 369 U.S. at 517). "A waiver of counsel can only be effectuated when the defendant asserts a 'clear and unequivocal' right to self-representation." 601 So. 2d at 128 (quoting Westmoreland v. City of Hartselle, 500 So. 2d 1327, 1328 (Ala. Crim. App. 1986)). Once the clear and unequivocal assertion of self-representation is made, this Court "looks to a totality of the circumstances involved in determining whether the defendant knowingly and intelligently

waived his right to counsel." 601 So. 2d at 129 (citing Jenkins v. State, supra). The first test, however, is whether there is a clear and unequivocal assertion of the right to self-representation. If there was no such assertion, we do not apply the totality-of-the-circumstances test to determine if that waiver of counsel and assertion of self-representation was knowing and voluntary.

Here, "[u]pon a careful review of the record as a whole, ... we find that there is no evidence that the appellant in the instant case 'knowingly and intelligently' waived his right to counsel." Jenkins, 482 So. 2d at 1317. Nor does the record suggest that Connell made a "clear and unequivocal" assertion of the right to self-representation either in the municipal court or in the circuit court. Rather, the record before us shows the opposite.

As stated above, when Connell was presented with a waiver-of-counsel form in the municipal court, Connell expressly refused to sign it, thereby indicating that he was not willing to waive his right to counsel. (C. 40.)[2] In

[2]Although the municipal court checked the box on the form that "the foregoing waiver of counsel is made by the Defendant knowingly, intelligently, and voluntarily," nothing in the

other words, by refusing to sign the waiver-of-counsel form, Connell was neither "knowingly, intelligently, or voluntarily" waiving his right to counsel nor "clearly and unequivocally" invoking his right to self-representation. In sum, Connell's refusal to sign the waiver-of-counsel form and the lack of a colloquy between Connell and the municipal court regarding Connell's rights show neither that he "knowingly, intelligently, and voluntarily" waived his right to counsel nor that he "clearly and unequivocally asserted" his right to self-representation.

More importantly, we cannot find that either of those things occurred in the circuit court. See Yarborough v. City of Birmingham, 353 So. 2d 75, 78 (Ala. Crim. App. 1977) ("[A] trial de novo means that the slate is wiped clean and a trial in the Circuit Court is had without any consideration being given to prior proceedings in another court."). The circuit-court record contains no waiver-of-rights form, shows no offer of counsel or the right to have counsel appointed if Connell could not afford counsel, shows no waiver of Connell's right

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record shows any discussion of Connell's right to counsel. Moreover, the case-action summary only reflected that Connell refused to sign the waiver-of-counsel form. (C. 8.)

to counsel, and contains only a brief discussion as to Connell's self-representation. The circuit court ensured only that Connell understood the charge and potential sentence if he rejected the City's plea offer and explained the difference between acting as a witness and as an attorney. Although Connell was accurately informed of the range of punishment, there was no indigency inquiry, no explanation of Connell's right to counsel, and no indication that anyone ever informed Connell that the circuit court would appoint an attorney to represent Connell if he could not afford one. Notably, the circuit court stated that it had never tried a case with Connell and concluded the brief exchange by stating: "Please don't continue to tell me you're not an attorney or apologize for not being a attorney. I know you're not an attorney. Just argue the best you can." (R. 8.) In sum, nothing in the record indicates that Connell chose to "knowingly, intelligently, and voluntarily" waive his right to counsel or that he made a "clear and unequivocal" assertion of the right to self-representation.

Although the City points to the "warnings" from the circuit court as evidence indicating that Connell waived his

right to counsel, the Alabama Supreme Court found in Ex parte Shelton that the trial record failed to establish that Shelton "was offered counsel" as constitutionally required because the "trial judge's admonitions to Shelton to the effect that he needed a lawyer are a far cry from explanations of the right to counsel or offers of appointed counsel if Shelton could not afford to retain counsel." Ex parte Shelton, 851 So. 2d at 101. Thus, our Supreme Court held that Shelton had not "intelligently and understandingly waived his right to counsel." 851 So. 2d at 102. Here, the circuit court's recognition that Connell was not an attorney and the circuit court's advice to "[j]ust argue the best you can" is even further from an explanation of his right to counsel or an offer to appoint counsel if Connell could not afford one.

As in Jenkins and Shelton, the record in this case does not show that Connell was ever informed of his right to counsel or was ever offered to have counsel appointed for him if he could not afford to retain counsel. Because "[p]resuming waiver from a silent record is impermissible," Carnley, 369 U.S. at 516, absent the requisite showing that Connell was "offered counsel" as required by Carnley, we

cannot find that Connell waived his Sixth Amendment right to counsel. Moreover, because the record is silent as to whether Connell was "offered counsel" or "clearly and unequivocally" asserted the right to self-representation, there is no reason to, as the City argues, evaluate the totality of circumstances to determine whether Connell validly waived his right to counsel.[3,4]

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[3]In both its brief on appeal and its application for rehearing, the City cites Coughlin v. State, 842 So. 2d 30 (Ala. Crim. App. 2002), in support of its argument that "Connell voluntarily, knowingly, and intelligently waived his right to counsel on the record by appearing a trial and at sentencing without counsel, after having been given a reasonable time to retain counsel." (City's application for rehearing, p. 1.) Specifically, the City urges us to apply a "totality of the circumstances" test to find waiver because "Connell is intelligent, articulate, [and] experienced in criminal litigation." (City's application for rehearing, p. 2.) The City's reliance on Coughlin and the "totality of circumstances" test is misplaced because Connell never asserted a right to self-representation. Thus, the issue is not "whether [Connell] was apprised of the dangers of self-representation or of his right to withdraw his waiver of counsel." Coughlin, 842 So. 2d at 37. Rather, Connell was never offered counsel or the right to be appointed counsel if he could not afford one in the first place. Only once a defendant has been apprised of that right do we then address whether that right was waived and self-representation was chosen according to the "totality of circumstances" test used in Coughlin. Moreover, we also note that there is nothing in the record showing other litigation in which Connell represented himself. Although this Court may take judicial notice of its own records, see Nettles v. State, 731 So. 2d 626, 629 (Ala. Crim. App. 1998), there is only one other case

In Presley v. City of Attalla, 88 So. 3d 930, 933 (Ala. Crim. App. 2011), this Court held that, "[a]lthough the trial court need not engage in a formal colloquy with the defendant, there must be direct evidence in the record to establish that the defendant knowingly and voluntarily waived his or her right to counsel." As in Presley, "the record in this case does not indicate that the trial court ever offered [Connell] appointed counsel in this case." 88 So. 3d at 936. Likewise, the circuit court "never advised [Connell] of the dangers and disadvantages of self-representation and did not advise him that he had the right to withdraw any waiver of counsel during proceedings." Presley, 88 So. 3d at 936. Therefore, as this

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in which Connell filed a notice of appeal in this Court, and that case was dismissed because the docket fee was not paid. Connell v. State (No. CR-11-0230, Dec. 12, 2011), 120 So. 3d 1252 (Ala. Crim. App. 2011) (table).

[4]The City also argues to this Court that Connell was not indigent and could have retained counsel to represent him because Connell initially retained counsel for his sentencing hearing. Connell, however, asserts that "it was a financial hardship for [him] to retain counsel for sentencing" and that "he was able to do so only because the price was 80%-95% cheaper than retaining an attorney for a jury trial." (Connell's brief, p. 6.) In any event, the record does not show that any indigency determination was ever made in either the municipal court or the circuit court. We cannot speculate as to Connell's indigency status below.

Court did in Presley, we must reverse the circuit court's judgment and remand this case for a new trial. See also Woodruff v. City of Pelham, 1 So. 3d 157 (Ala. Crim. App. 2008) (reversing and remanding for a new trial where the record was silent as to whether the trial court had advised Woodruff of the right to counsel, the dangers of self-representation, and the right to withdraw a waiver of the right to counsel at any time during the proceedings).

Conclusion

Accordingly, we reverse Connell's conviction and sentence and remand this case to the circuit court for that court to properly advise Connell on the record of his Sixth Amendment right to counsel and for further proceedings consistent with this opinion.

APPLICATION OVERRULED; OPINION OF APRIL 12, 2019, WITHDRAWN; OPINION SUBSTITUTED; REVERSED AND REMANDED.

Windom, P.J., and McCool and Minor, JJ., concur. Kellum, J., concurs in the result.