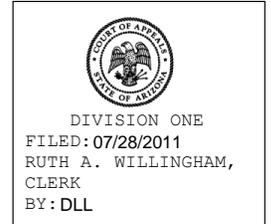


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



STATE OF ARIZONA,) 1 CA-CR 09-0801
)
Appellee,) DEPARTMENT A
)
v.) **MEMORANDUM DECISION**
)
) (Not for Publication -
DONALD LEE COOK,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2005-033017-001SE

The Honorable Connie Contes, Judge

CONVICTIONS VACATED; REMANDED

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O R O Z C O, Judge

¶1 Donald Lee Cook appeals his convictions on two counts
of sexual conduct with a minor under twelve years of age. He

argues he is entitled to a new trial because the superior court denied him the right to represent himself at trial. For the following reasons, we vacate the convictions and remand for a new trial.

FACTS AND PROCEDURAL BACKGROUND

¶2 A grand jury indicted Cook on molestation and two counts of sexual conduct with a minor, all dangerous crimes against children. At the State's request, the superior court dismissed the molestation charge without prejudice before trial. After the jury convicted Cook, the court sentenced him to life imprisonment on each conviction, to be served consecutively. Cook filed a timely appeal.¹ We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and Arizona Revised Statutes (A.R.S.) sections 12-120.21.A.1, -2101.B (2003), 13-4031, -4033.A (2010).²

DISCUSSION

¶3 Cook argues that the superior court erred by denying him the right to represent himself at trial. Rather than denying his latest request for continuance and leaving to Cook

¹ Cook's sentencing was consolidated with entry of judgment and sentencing on his convictions in February 2008 for eight counts of sexual exploitation of a minor in another trial. The superior court sentenced Cook to 17 years on each count of sexual exploitation of a minor, to be served consecutively to each other and consecutive to the sentences imposed in this case.

² We cite to the current version of applicable statutes where no revisions material to this decision have since occurred.

the choice of whether to proceed pro se, the trial court terminated his self-representation.

¶14 The United States and Arizona Constitutions guarantee a defendant the right to waive counsel and to represent himself. *Faretta v. California*, 422 U.S. 806, 819 (1975); Ariz. Const. art. 2, § 24. "This is so because the Sixth Amendment affords the defendant the right to make a defense, and unless the accused has acquiesced in representation by appointed counsel, the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not his defense." *Robinson v. Hotham*, 211 Ariz. 165, 169, ¶ 13, 118 P.3d 1129, 1133 (App. 2005) (citing *Faretta*, 422 U.S. at 821) (internal punctuation omitted). "To exercise this right, a defendant must voluntarily and knowingly waive his right to counsel and make an unequivocal and timely request to proceed pro se." *State v. Lamar*, 205 Ariz. 431, 435-36, ¶ 22, 72 P.3d 831, 835-36 (2003); Ariz. Crim. R. P. 6.1.c ("[a] defendant may waive his or her rights to counsel . . . after the court has ascertained that he or she knowingly, intelligently and voluntarily desires to forego them").

¶15 The right to self-representation, however, is not absolute. It is "not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law." *Faretta*, 422 U.S. at

834 n.46. The trial court accordingly “may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct.” *Id.* (citing *Illinois v. Allen*, 397 U.S. 337 (1970)). The court also has discretion to deny a request for self-representation conditioned on a continuance of trial to allow time to prepare a defense. *State v. De Nistor*, 143 Ariz. 407, 413, 694 P.2d 237, 243 (1985); see also *Lamar*, 205 Ariz. at 435-38, ¶¶ 21-37, 72 P.3d at 835-38. Improper denial of the right to represent oneself in a criminal trial is structural error, requiring reversal. See *State v. Ring*, 204 Ariz. 534, 552-53, ¶ 46, 65 P.3d 915, 933-34 (2003) (citing *McKaskle v. Wiggins*, 465 U.S. 168 (1984)).

¶16 In August 2006, after conducting a colloquy to determine that Cook was voluntarily and knowingly waiving his right to counsel, the trial court granted Cook’s request to represent himself in this and two related sex-crime cases. After his February 2008 convictions in other cases on eight counts of sexual exploitation, Cook continued to represent himself in this case for another twenty months. During the next year, the court granted him five continuances to allow him more time to prepare his defense in this case.

¶17 On January 23, 2009, however, the court warned Cook that it was unwilling to grant additional continuances based on his contention that his defense was hindered because of a jail

policy limiting his access to his legal files. This issue arose at a hearing on Cook's motion to compel the sheriff to allow him to keep all of his legal materials in his cell. The court denied the motion to compel after an attorney for the sheriff's office explained that inmates are allowed only three boxes of legal materials in their cells at any one time for security and safety reasons, but that they may exchange any of those boxes during weekdays for boxes kept nearby. The court additionally warned Cook:

So Mr. Cook, you're on notice that if this matter is continued again, if you request a continuance again for additional -- the same reason or additional reasons at some point, I'm going to have to consider appointing you counsel, because at some point this matter has to be resolved one way or another either through a plea agreement or a trial, and I can't keep on continuing it for your inability to become prepared, whatever reason it may be. It begins to look like a course of conduct that suggests that it may be difficult for the Court to follow the criminal process and have this matter proceed to resolution one way or another.

In its minute entry, the court further advised Cook:

The Court advises that if Defendant continues to contend that his ability to represent himself is hindered by the jail's policies regarding access to his files, the Court will consider appointing counsel for Defendant because the Court is concerned about the number of trial continuances that have been requested by Defendant and his apparent inability or, perhaps unwillingness to proceed to trial without the benefit of counsel. Defendant's conduct in seeking

continuances of his trial is becoming a habit and pattern that the Court will have to break.

The court nevertheless later granted two additional motions by Cook to continue trial.

¶18 At a hearing on June 12, 2009, in which the court addressed yet another motion to continue filed by Cook, as well as an oral motion by the prosecutor to revoke Cook's self-representation in part on grounds of undue delay, the court reiterated its concern that in the event Cook continues the pattern of requesting additional continuances, it would be left with "no choice but to take away your right to continue to represent yourself, because it appears that you're not moving towards -- not processing towards proceeding to trial in this matter . . . at some point this has to stop and it has to go to trial." The court further advised Cook that if he was not prepared for trial the next trial date, "I'm going to appoint counsel for you because I will show [it is] an excessive pattern and practice of intentional unpreparedness to proceed on your own behalf." In its minute entry that date, the court reiterated its warning that if Cook was not prepared for the next trial date, July 13, 2009, it would appoint counsel to represent him. At the State's request, without objection from Cook, however, the court continued the trial date to September 21, 2009.

¶19 At a hearing on pending motions on September 11, 2009, a little more than a week before the last scheduled trial date, the court addressed yet another motion by Cook to continue trial for sixty days. Cook argued a continuance was required because jail policies and equipment were preventing him from preparing his defense, including obtaining a report from his expert witness and viewing or listening to interviews of witnesses disclosed by the State. The court noted that the Office of Public Defense Services had approved hiring the expert witness for him more than two years earlier, which should have afforded Cook sufficient time to prepare the expert witness for trial. The court initially indicated that Cook either must be prepared to go to trial on September 21, 2009, or have counsel appointed, reasoning:

We're going to go to trial on Monday.

Now, I also told you, I warned you, it's in the June 12th, 2009, minute entry, that if you were not prepared for trial on July 13th, 2009, then I would appoint counsel for you. I do believe that you've contributed -- your filing this subsequent -- this motion for sixty-day continuance now, even after July 13, 2009, can constitute grounds for appointment of counsel for you, that you've abused your right to represent yourself by continually delaying and not being prepared for trial.

You've demonstrated a pattern of behavior in -- that leads to the impression that you are never going to be ready and that you are

going to delay as long as possible to allow this matter to proceed to trial.

So, the only thing I'll allow you to do at this point is either be prepared to proceed on your own on Monday or be prepared to proceed with counsel on Monday.

¶10 Cook responded as follows:

And I'd like to just add the reason I've been doing so many continuances is to try to preserve my due process rights, which I'm not getting, and that's why I have been forced to continue and continue and continue, because I'm not getting my due process rights. I'm not able -- you know, I'm not -- I can't work without them, you know. I can't work without my due process rights. I can't work without the right to have my -- the right to have a lot of things: my legal material, viewing DVDs. I can't do anything, you know, unless I'm able to watch -- I mean, I'm not effectively able to do anything unless I can see the interviews.

. . . As I wrote down here, you know, it's out of my control.

At that, the court terminated Cook's self-representation:

I think your own comments now have provided enough grounds for me to appoint Ms. Fluharty as your counsel. I am going to find that for all of the reasons that you've continuously put on the record, you can no longer effectively -- you can't represent yourself any longer because you've abused that privilege and you've also admitted how terribly hampered you have been or become in doing so.

So in order to no longer those be issues, and to no longer allow your representation of yourself to abuse the court process, I am going to convert Ms. Fluharty's role in this

case from advisory counsel to court-appointed counsel.

The court then denied Cook's motion to continue but set the first day of trial out four days, to September 17, 2009, with consent of counsel for both parties.

¶11 In her minute entry, the court further explained its reasoning for terminating Cook's self-representation as follows:

Based upon Defendant's representations on the record this date and throughout the pendency of this case, the Court finds Defendant has effectively waived his right of self-representation. Defendant has engaged in consistent and persistent dilatory and obstructionist conduct for an excessive length of time. By minute entry dated June 12, 2009, the Court warned Defendant that further dilatory conduct would jeopardize his right to self-representation.

IT IS THEREFORE ORDERED that Defendant has forfeited his right of self-representation through his dilatory and obstructionist conduct, which has interfered with and disrupted a judicious, orderly, and timely resolution of this matter. Defendant is no longer permitted to represent himself.

IT IS FURTHER ORDERED appointing Ann M. Fluharty and the Office of the Public Defender to represent Defendant for all further proceedings.

¶12 We review a superior court's decision to terminate a criminal defendant's self-representation de novo. See *State v. Rasul*, 216 Ariz. 491, 493, ¶ 4, 167 P.3d 1286, 1288 (App. 2008).

We defer to the court's findings of fact, however, unless they are clearly erroneous. See *id.*

¶13 We conclude that on this record, the court erred in terminating Cook's self-representation. Although the court "may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct," *Faretta*, 422 U.S. at 834 n.46, Cook's repeated requests for continuances did not constitute the type of deliberate misconduct that would allow the court to terminate his right to represent himself.

¶14 The right to self-representation is not absolute and cannot be exercised at the expense of the orderly administration of the judicial process. See *De Nistor*, 143 Ariz. at 414, 694 P.2d at 243 (court did not abuse its discretion in denying defendant a continuance mid-trial to allow her the necessary time to prepare to represent herself). In this case, however, the record makes clear that the court based its finding that Cook had engaged in "dilatory and obstructionist conduct" on his repeated motions to continue due to his contention that his in-custody status and jail policies hindered his ability to prepare his defense. Cook's apparently unceasing requests for continuances and assertions that officials were denying him his rights irritated the superior court, which over time granted many requests for extensions of time, both by Cook and by the State. Cook's requests, however, do not constitute

obstructionist misconduct that might allow termination of his self-representation. See *Faretta*, 422 U.S. at 834 n.46; cf. *State v. Bush*, 109 Ariz. 487, 489, 512 P.2d 1221, 1223 (1973) (court did not abuse its discretion in revoking right to self representation after defendant fired his advisory counsel and walked out of court during jury selection); *State v. Martin*, 102 Ariz. 142, 146, 150, 427 P.2d 639, 643, 647 (1967) (denial of self-representation was justified on basis of defendant's repeated verbal outbursts, "wild antics" and "utter and complete disrespect for the court"); *State v. Whalen*, 192 Ariz. 103, 108, 961 P.2d 1051, 1056 (App. 1997) (court did not abuse its discretion in revoking defendant's right to self-representation after he disregarded warnings that he must obey court rules to defend himself at trial from the front of the courtroom).

¶15 If, in the view of the superior court, additional continuances would have unduly delayed or disrupted trial, the court had discretion to deny Cook's request for a continuance and order him to be prepared for trial or to choose to be represented by his advisory counsel. See *De Nistor*, 143 Ariz. at 413, 694 P.2d at 243. By denying the continuance and terminating his self-representation, the court did not give Cook that choice. On this record, under these circumstances, the court erred.

CONCLUSION

¶16 For the foregoing reasons, we reverse Cook's convictions and remand for proceedings consistent with this decision.

/S/

PATRICIA A. OROZCO, Judge

CONCURRING:

/S/

DIANE M. JOHNSEN, Presiding Judge

/S/

ANN A. SCOTT TIMMER, Judge