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ARKANSAS COURT OF APPEALS

DIVISION III
No. CR-17-659

SUBSTITUTED SEPTEMBER 5, 2018; Shabazz v. State, 2018 Ark. App. 399

Opinion Delivered May 2, 2018

MELCHIZEDEK SHABAZZ APPELLANT	APPEAL FROM THE HOWARD COUNTY CIRCUIT COURT [NO. 31CR-16-75]
V.	HONORABLE TOM COOPER, JUDGE
STATE OF ARKANSAS APPELLEE	REVERSED AND REMANDED

PHILLIP T. WHITEAKER, Judge

A Howard County Circuit Court jury convicted Melchizedek Shabazz of possession of marijuana with intent to deliver, and he was sentenced to 30 years' imprisonment in the Arkansas Department of Correction. He appeals, claiming that he was denied his Sixth Amendment right to counsel at his suppression hearing. We agree.

I. *Facts*

On the morning of May 23, 2016, Howard County Deputy Sheriff Joey Davis stopped Shabazz's vehicle for speeding. Deputy Davis smelled the odor of "green" marijuana and saw several small pieces of a green, leafy substance—possibly marijuana—on the console. Shabazz admitted to Deputy Davis that he smoked marijuana earlier that morning and that there was some marijuana in the car. He then handed Deputy Davis a small container that contained a small amount of marijuana. Thereafter, Deputy Davis conducted a search of the vehicle, which revealed a brown paper sack containing 28 small white zipper-lock bags containing a

substance believed to be marijuana. A search of the trunk revealed four white trash bags containing over 45 different containers and bags of suspected marijuana—many of which were labeled and appeared to have come from a marijuana dispensary. In total, the suspected marijuana weighed approximately eight pounds.

II. *Procedural History*

Shabazz was arrested and charged with possession of marijuana with intent to deliver. He was appointed counsel to represent him on the charges. On June 3, 2016, his counsel filed a motion to suppress, alleging that Shabazz's arrest was unlawful because the officer lacked probable cause or reasonable suspicion to stop, detain, or arrest him; that the stop, detention, and arrest of Shabazz was merely a pretext for an investigation; that the officer lacked consent to search the vehicle or a search warrant to do so; and that the search of the vehicle was therefore unlawful, unreasonable, and without probable cause. On June 7, 2016, Shabazz filed a pro se motion to suppress evidence and dismiss, alleging that the officer lacked consent to search the vehicle; that the officer lacked cause to search the vehicle under Rule 12.4 of the Arkansas Rules of Criminal Procedure; and that the initial stop was illegal.

On June 8, 2016, the court conducted a pretrial hearing. Shabazz was present at the hearing with his appointed counsel. The court questioned why Shabazz was filing pro se motions while being represented by appointed counsel. Shabazz responded that he believed that his counsel was ineffective, stated that counsel had not been in contact with him, and explained that he was unhappy with the standard motion to suppress filed by counsel. The following colloquy between the court and Shabazz occurred:

THE COURT: Let me ask you something real quick to cut to the point—cut to the chase. Do you wish to represent yourself?

THE DEFENDANT: No, sir.

The court then explained to Shabazz that he was represented by counsel, who had filed motions on his behalf, and the court would not permit pro se motions that competed against those of counsel. The court then informed Shabazz that he could file his own motions only if he represented himself. Shabazz responded with more protests about the effectiveness of his appointed counsel. The court responded that it would not "micromanage" the public defender but told Shabazz that he could represent himself if he did not like the representation afforded by appointed counsel. Shabazz asked the court to appoint him a different attorney. The court denied the request. When Shabazz continued to argue that his counsel was clearly ineffective, the court responded:

THE COURT: I'll say it one more time, and that's the last time I'm going to say it, I will let you represent yourself. You have that constitutional right. I am not going to micromanage the way attorneys represent their clients.

THE DEFENDANT: Well, yes, sir, I would like to represent myself.

At this point in the proceeding, Shabazz's appointed counsel handed to him the discovery received from the State and the motions that had been filed by counsel on his behalf. The following colloquy between the court and Shabazz occurred:

THE COURT: And I'm going to let you represent yourself, but I'm going to just give you one little spiel that I tell people that want to represent themselves. You know, you haven't been trained in the law. Do you have a college degree?

THE DEFENDANT: No, sir.

THE COURT: And you obviously haven't been to law school. I tell people all the time, I've tried 150 jury trials when I was prosecutor and I wouldn't represent myself. With that in mind, do you still wish to represent yourself?

(No response)

THE COURT: Mr. Shabazz?

THE DEFENDANT: Sir?

THE COURT: Do you still wish to represent yourself?

(No response)

THE COURT: I'll ask you one more time. Do you still wish to represent yourself?

THE DEFENDANT: Your Honor, at this — I would like to continue to proceed with [counsel] at this time—. And so I can read this thing that he has—.

Hearing that Shabazz desired to continue with appointed counsel, the court then began to reschedule the motions and jury-trial settings to a subsequent date during the month of August. When Shabazz learned that the hearing on his motions would not be heard until August, the following colloquy between the court and Shabazz occurred:

THE DEFENDANT: On August 10?

THE COURT: August 10.

THE DEFENDANT: Oh, no, sir. If—. I would proceed for myself today instead of sit in jail, Your Honor. I'd rather proceed myself today.

THE COURT: You'd like to go to trial next Tuesday?

(No response)

THE COURT: That's when your trial is set now.

THE DEFENDANT: And you said you're going to set if off to August the what?

THE COURT: Well, that's my next trial date here in this county.

THE DEFENDANT: August the what?

THE COURT: August 10, pretrial; August 23, trial. Trial, even months for my jury trials. Judge Yeargan is odd months.

THE DEFENDANT: If I represent myself, when can my hearings — when can my motions be ruled on?

THE COURT: Today.

THE DEFENDANT: You'll rule on my motion today?

THE COURT: I will.

THE DEFENDANT: Well, —. And there's no other way for my motion to be ruled unless I dismiss counsel?

THE COURT: Yeah. You can't — If you have an attorney, he files the pleadings for you. If you don't have an attorney, you file — you act as your own attorney and you file the pleadings. You see, because if you're filing them and your attorney's filing them, they could be inconsistent or conflicting.

THE DEFENDANT: And there's no way—.

THE COURT: So your choice is represent yourself, which I would not recommend under any circumstances, go to trial next Tuesday, motions today; or I'll continue your case, leave [counsel] on, and we'll have your pretrial August 10 and your trial August 23.

THE DEFENDANT: Well, Your Honor, I'd like to represent myself if you'll rule on my motions today.

THE COURT: Okay. You all ready?

After a recess, the court began the hearing on the motion to suppress with the following colloquy:

THE COURT: Are you ready to go forward on your motion to suppress?

THE DEFENDANT: Yes, sir.

THE COURT: I see that you filed a motion to suppress evidence and dismiss. Any other motions that you have today?

THE DEFENDANT: No, sir.

THE COURT: Let me look. Here's something else that you filed. Let me get to it. Oh, that's just —. That's the only motion. Are you ready to go forward? Do you have any witnesses?

. . .

THE COURT: Before we go forward, we had a long discussion earlier today, and I know I've seen a lot of people since then, and you made a decision --. After I questioned you, you made a decision that you think it's in your best interest to represent yourself. Is that correct?

THE DEFENDANT: Yes, sir.

[DEFENSE COUNSEL]: So —

THE COURT: Do you want [defense counsel] standing close in case you have questions? Do you want him to assist you?

THE DEFENDANT: If he would like —. If he wants to, I don't have any problem with it.

THE COURT: I'll ask him to stand close and be available if you would like?

THE DEFENDANT: It's okay with me.

THE COURT: Okay. [Defense counsel], just have a seat.

[DEFENSE COUNSEL]: Yes, sir.

The trial court then held the suppression hearing. Shabazz conducted the cross-examination of all the State's witnesses. Defense counsel was on hand during the questioning,

but it does not appear that Shabazz requested his assistance. In fact, defense counsel left the courtroom to take a phone call during the questioning of one of the State's witnesses.

After the State rested its case, the court asked if Shabazz had any witnesses he wished to call. Shabazz indicated that there was additional information that he needed in order to go forward with his defense. The following colloquy took place:

[PROSECUTOR]: State rests.

THE COURT: Mr. Shabazz, call your first,

THE DEFENDANT: Oh.

THE COURT: Do you wish to testify?

THE DEFENDANT: No. You said the next witness.

THE COURT: Or you can make legal arguments.

THE DEFENDANT: Your Honor, is— could I see the law on —

[PROSECUTOR]: I just want to clarify, he's not going to call witnesses before we start going—

THE COURT: Are you going to call any witnesses?

THE DEFENDANT: I would like more physical evidence, the logs at the time —

THE COURT: Well, let me ask you —

THE DEFENDANT: At the time —

THE COURT: Stay focused on one question at a time. Do you wish to call any witnesses?

THE DEFENDANT: No more physical —

THE COURT: I'm sorry?

THE DEFENDANT: No more witnesses.

THE COURT: Okay. You have no witnesses.

THE DEFENDANT: No more witnesses, no, sir.

THE COURT: Do you wish to make a legal argument to me?

THE DEFENDANT: Your Honor, is there any way I could see the log on certification and radar guns?

THE COURT: You're representing yourself. You're going to have to find all that information.

THE DEFENDANT: So I would have to find that information on my own?

THE COURT: It would be incumbent on you and your burden to bring that forward if you feel it was necessary at this hearing or trial.

THE DEFENDANT: Is there any way we could set a continuance for a few days and — so I could get that evidence?

THE COURT: It was your choice to go forward on the suppression hearing today, Mr. Shabazz. Do you have any legal arguments you wish to make concerning the — your motion to suppress?

Shabazz, with the help of standby counsel, then attempted to articulate his legal basis for suppression. At the conclusion of the hearing, the trial court denied his motion. At that point, Shabazz informed the court he would need help at trial, and the trial court reappointed defense counsel to represent him at trial. Shabazz was found guilty at trial and sentenced to thirty years. In this appeal, Shabazz argues that the suppression hearing was a critical stage of the proceedings, that he did not knowingly and intelligently waive his right to counsel at that hearing, and that he should be granted a new trial.

III. *Analysis*

Our standard of review is whether the trial court's finding that the waiver of rights was knowingly and intelligently made was clearly against the preponderance of the evidence. *Pierce v. State*, 362 Ark. 491, 209 S.W.3d 364 (2005).

A. Critical-Stage Analysis

The United States Supreme Court has provided the following case law concerning our critical-stage analysis: (1) A criminal defendant has a Sixth Amendment right to an attorney at every critical stage of the proceedings. *Hammett v. Texas*, 448 U.S. 725 (1980); (2) A stage is a critical stage in a criminal proceeding if the substantial rights of the criminal defendant may be affected. *Mempa v. Rhay*, 389 U.S. 128 (1967); and (3) The complete denial of counsel during a critical stage of a judicial proceeding mandates a presumption of prejudice because the adversary process itself has been rendered presumptively unreliable. *Roe v. Flores-Ortega*, 528 U.S. 470 (2000). Our supreme court has held that a critical stage is characterized by an opportunity for the exercise of judicial discretion or when certain legal rights may be lost if not exercised at that stage. *Anderson v. State*, 367 Ark. 536, 242 S.W.3d 229 (2006).

We hold that a suppression hearing is a critical stage of the proceeding because if the suppression court determines that evidence is admissible, that determination is final, conclusive, and binding at trial. In fact, the court's decision on a motion to suppress may often spell the difference between a conviction or an acquittal. Thus, we conclude that the Sixth Amendment right to counsel applies to suppression hearings. The issue then becomes whether Shabazz validly waived that right.

B. Waiver Analysis

In *Faretta v. California*, 422 U.S. 806 (1975), the United States Supreme Court held that before an accused manages his or her own defense, the accused must first "knowingly and intelligently" waive the right to counsel. Furthermore, the trial court maintains a weighty responsibility in determining whether an accused has knowingly and intelligently waived this right. *Johnson v. Zerbst*, 304 U.S. 458 (1938); *Murdock v. State*, 291 Ark. 8, 722 S.W.2d 268 (1987). Every reasonable presumption must be indulged against the waiver of fundamental constitutional rights. *Brewer v. Williams*, 430 U.S. 387 (1977).

The burden is on the State to show that an accused voluntarily and intelligently waived his or her fundamental right to the assistance of counsel. *Hatfield v. State*, 346 Ark. 319, 57 S.W.3d 696 (2001). We determine whether an intelligent waiver of the right to counsel has been made in each case on the particular facts and circumstances, including the background, the experience, and the conduct of the accused. *Bledsoe v. State*, 337 Ark. 403, 989 S.W.2d 510 (1999). While a case-by-case approach is used to determine intelligent waiver of counsel, a specific warning of the dangers and disadvantages of self-representation—or a record showing that the defendant possessed such required knowledge from other sources—is required to establish the validity of a waiver. *Id.* Our supreme court has held that the "constitutional minimum" for determining whether a waiver was knowing and intelligent is that the accused be made sufficiently aware of his or her right to have counsel present and of the possible consequences of a decision to forgo the aid of counsel. *Id.*

We hold under these particular facts and circumstances that Shabazz's waiver was not knowingly or intelligently made. The court was the first to suggest that Shabazz proceed pro se. Shabazz initially indicated that he did not want to proceed pro se; rather, he simply

indicated his unhappiness with his current counsel and wanted other counsel appointed. Only when the court informed him that he could not have other appointed counsel and that his trial date would be postponed if he continued with current counsel did Shabazz seemingly agree to proceed pro se; but even then, his agreement was ambiguous. We also note there was limited inquiry into his educational history or background with the criminal-justice system. In this regard, the court inquired only if Shabazz had a college degree, to which Shabazz answered no. The court never inquired into Shabazz's experience with the criminal-justice system.[1] Moreover, while the trial court explained that even with his own experience in criminal matters he would not represent himself, we conclude that this was inadequate to explain the legal pitfalls of self-representation. The trial court did not adequately explain the risks or the consequences of proceeding without counsel; nor did the court inform Shabazz of the danger of proceeding so quickly with the suppression hearing without the benefit of counsel or the completion of discovery. In short, we conclude that there was simply an insufficient investigation into whether Shabazz's willingness to proceed was knowingly or intelligently asserted, and the trial court's questioning as to his wish to proceed pro se did not meet the constitutional minimum as set forth by our supreme court.

The State argues that, even if the trial court erred in allowing Shabazz to proceed pro se, the decision was harmless because Shabazz was provided the assistance of standby counsel. The State is correct that the assistance of standby counsel can rise to such a level that the

[1]The State in its brief refers this court to Shabazz's criminal history and his apparent self-representation in other previous criminal or postconviction matters; however, there is no evidence that the trial court was aware of this information at the time it decided to allow Shabazz to represent himself.

defendant is deemed to have had counsel for his or her defense, thereby mooting any assertion of involuntary waiver. *Hatfield v. State*, 346 Ark. 319, 57 S.W.3d 696 (2001). Whether such assistance rises to that level is a question that must be answered by looking at the totality of the circumstances. *Id.* In this case, on this issue demonstrate that the assistance must be substantial, such that counsel was effectively conducting a defense. *Id.* However, viewing the totality of the circumstances, we hold that the role of standby counsel in this case was not substantial. Counsel did not participate in the questioning of the witnesses and even left the courtroom at one point. While counsel did provide some limited assistance to Shabazz, such assistance was not so substantial as to render harmless the improper waiver of counsel.

Shabazz contends that the violation of his right to counsel should result in a new trial. The State, on the other hand, argues that Shabazz is entitled to only a new suppression hearing. An accused is entitled to relief from a conviction whenever the proceedings indicate the unfairness of trial without the help of a lawyer. *Gibson v. State*, 298 Ark. 43, 764 S.W.2d 617 (1989). Therefore, we reverse Shabazz's conviction and remand for retrial.

Reversed and remanded.

HIXSON and MURPHY, JJ., agree.

Short Law Firm, by: *Lee D. Short*, for appellant.

Leslie Rutledge, Att'y Gen., by: *Christian Harris*, Ass't Att'y Gen., for appellee.