FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D18-4775

ANDRE BERNARD RICHARDSON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

On appeal from the Circuit Court for Duval County.
James H. Daniel, Judge.

December 30, 2020

KELSEY, J.

This is Appellant's direct appeal from his convictions and sentences for attempted second-degree murder, possession of a firearm by a convicted felon, and shooting or throwing deadly missiles. He seeks a new sentencing hearing based on two unpreserved arguments related to his sentencing phase, at which he had elected to represent himself: that the trial court committed fundamental error by failing to engage in a new *Faretta*[*] colloquy "before sentencing began"; and that his standby counsel was not present for the very last part of sentencing—a three-minute

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[*] *Faretta v. California*, 422 U.S. 806, 819 (1975) (finding an implied Sixth-Amendment right to self-representation).

concluding segment of a hearing continued from the previous afternoon. As to the first issue, our standard of review is de novo. *See Hooks v. State*, 286 So. 3d 163, 167 (Fla. 2019). We review the second issue for abuse of discretion. *See Jones v. State*, 449 So. 2d 253, 258 (Fla. 1984). We find no merit to either argument, and affirm.

I. Facts.

As to both arguments, the chronology is important. The post-trial-motion phase and the sentencing phase occurred in a span of only four days, Monday through Thursday of the same week, and involved four separate hearings that together totaled only about four hours.

The jury returned its verdict on August 30, 2018. The trial court set sentencing for October 8, 2018. Before then, Appellant's counsel filed a motion for new trial, also to be heard on October 8. Appellant filed a pro-se motion that his counsel declined to adopt.

At the beginning of the Monday, October 8 hearing, Appellant discharged his counsel. The trial court conducted an extremely thorough and unchallenged *Faretta* inquiry—covering 17 pages of the transcript—after which Appellant reconfirmed his desire to discharge his counsel. The trial court appointed the public defender as standby counsel, the lawyers discussed scheduling, and the court continued the case to the next day. This Monday hearing was less than an hour and a half long, and that time was interrupted by the court's having to deal with a jury selection issue in another case.

On Tuesday, October 9, a one-hour hearing occurred at which the trial court discussed scheduling, provided Appellant a copy of his former counsel's post-trial motion, and set post-trial motions and sentencing for the next day. The trial court renewed the offer of appointed counsel, which Appellant refused. The trial court repeated a brief summary of the *Faretta* considerations and asked again if Appellant understood and still wanted to represent himself. Appellant confirmed that he did.

On Wednesday, October 10, the trial court again renewed the offer of appointed counsel, which Appellant again refused. Standby

counsel was present. The trial court reminded Appellant of the *Faretta* considerations, and Appellant again declined. Appellant argued his pro-se post-trial motion, which the trial court denied. Appellant asked for and received some time to prepare to argue the post-trial motion his former counsel had filed, then presented additional argument including new argument not raised in that motion or his pro-se motion. The trial court denied the motion and moved directly to sentencing.

Upon announcing that sentencing was about to begin, the trial court again renewed the offer to appoint counsel. The court again reminded Appellant of the advantages of having a lawyer, and Appellant stated that he understood and still wished to represent himself. Appellant presented argument about his presentence investigation report and about the evidence at trial. He discussed his past, his efforts to work and obtain counseling, and his desire for the court to consider a probationary sentence because he had successfully completed probation in the past. He explained his version of the facts leading to a prior conviction. He objected repeatedly to the State's portrayal of the facts of this case, and presented argument as to why he did not think the State had proven guilt. He acknowledged his scoresheet totals, but asked for probation, even if for a term of 15 or 20 years.

The trial court reviewed the evidence and explained that probation was not available due to the statutory mandate of a term of years for the attempted-murder conviction. The court pronounced Appellant guilty and sentenced him to 40 years for the attempted-murder conviction, day for day; 15 years for the PFCF conviction, with a three-year mandatory minimum sentence during which no gain time could accrue; and 15 years for the shooting deadly missiles conviction (all concurrent). The State raised a question about whether gain time could accrue on the attempted murder sentence after the first 25 years, if at all.

The trial court advised Appellant of the need for a lawyer to handle the notice of appeal and preparation of the record, and asked again if he wanted counsel. Appellant then asked for counsel, and the court reappointed standby counsel to perfect the appeal. The trial court also signed an appointment for appellate counsel to take over thereafter. The lawyers and the court then

discussed the day-for-day issue as it related to the attempted murder conviction, and the court continued the hearing to the next morning to allow time for research on that issue.

On Thursday, October 11, court convened at 8:58 a.m. and recessed at 9:01 a.m. (That's three minutes.) The court's docket notes in the record indicate standby counsel was present, although the transcript did not list counsel as present. The court and the prosecutors discussed the day-for-day issue, the court explained it to Appellant, and the court pronounced sentence of 40 years day for day on the attempted murder conviction. The court reminded Appellant of the appeal deadlines and that he had appointed appellate counsel.

II. *Faretta*.

Against this factual backdrop, Appellant now argues that he is entitled to a new sentencing hearing because the trial court did not conduct a new *Faretta* inquiry "before it began the sentencing phase." So phrased, the argument is clearly contrary to the record, which reveals that the trial court conducted a full, lengthy *Faretta* hearing at the first hearing on Monday, October 8, which had been set for both sentencing and new-trial arguments; repeated the inquiry in shorter form on Tuesday, October 9, renewing the offer of counsel; and reminded Appellant of the *Faretta* considerations and renewed the offer of counsel when the sentencing hearing started on Wednesday, October 10. Appellant also argues that the trial court should have conducted a new *Faretta* hearing at the beginning of the Thursday three-minute hearing. We find no merit to these arguments, but write to address Appellant's mistaken reliance on our decision in *Howard v. State*, 147 So. 3d 1040 (Fla. 1st DCA 2014).

Appellant rests his *Faretta* argument on the statement in *Howard* that "[f]ailure to renew the offer of counsel at a critical stage and conduct a *Faretta* inquiry if the defendant rejects the renewed offer of counsel is *per se* reversible error." *Id.* at 1043. Appellant's reliance is misplaced, because the quoted sentence is taken out of context. The *Howard* error does not exist on the facts of this case.

The appellant in *Howard* received a full *Faretta* inquiry on October 2, 2012, before trial. *Id.* at 1041. He received another full inquiry before jury selection on February 11, 2013. *Id.* at 1041–42. At the *end* of the February 21 hearing set for the motion for new trial and the first part of sentencing, which ended up only addressing the motion for new trial, the trial court asked a passing "by the way" question about whether the appellant had still wanted to represent himself. *Id.* at 1042. At a March 26 hearing for sentencing, and again at a continuation of the sentencing hearing on April 4, the court renewed the offer of counsel, without a full *Faretta* inquiry. *Id.* The court conducted a full *Faretta* inquiry at the final sentencing hearing on April 12. *Id.* We held that the trial court's failure to conduct a new *Faretta* hearing for the new-trial and sentencing hearing on February 21, and the failures to do so for the sentencing hearings on March 26 and April 4, constituted reversible error. *Id.* at 1043.

Our analysis in *Howard* emphasized that the trial court conducted three critical-phase hearings over a span of over two months without conducting a new *Faretta* hearing. *Id.* We held the error was not cured by conducting a full inquiry at the final sentencing hearing. *Id.*

As we made clear, our analysis in *Howard* centered on the passage of significant time without a renewed, full *Faretta* inquiry for critical-phase hearings. We reinforced that approach in distinguishing *Neal v. State*, 142 So. 3d 883 (Fla. 1st DCA 2014), in which the court conducted a full *Faretta* hearing before trial and the defendant, after accepting and consulting with standby counsel, entered a plea mid-trial. *Howard*, 147 So. 3d at 1043 (noting that unlike in *Neal*, the sentencing phase in *Howard* took "several months and multiple hearings" to complete).

The facts of this case differ markedly and materially from those of *Howard*. Rather than allowing over two months to pass while conducting critical-stage hearings without a new *Faretta* inquiry, the trial court here conducted a full inquiry on Monday, appointed standby counsel who was present all week; and renewed the *Faretta* analysis briefly on Tuesday and Wednesday together with a renewed offer of appointed counsel. This reminder of rights and renewed offer of counsel was sufficient under *Howard*. *See also*

Cuyler v. State, 131 So. 3d 827, 828 (Fla. 1st DCA 2014) ("While a full *Faretta* inquiry need not be conducted at every stage of criminal proceedings, once counsel has been waived under *Faretta*, the offer of assistance of counsel must be renewed by the court at each critical stage of the proceedings.").

Appellant has not argued, and the record does not demonstrate, that Appellant was confused about or had forgotten his rights in the span of three short hearings in three days. He had standby counsel available each day, but declined to avail himself of counsel's services. *See* Fla. R. Crim. P. 3.111(d)(5) (requiring renewal of offer of counsel only at stages at which defendant appears *without* counsel). Instead, each time Appellant was asked, he acknowledged understanding his rights, and he affirmatively declined appointed counsel (until accepting counsel for purposes of appeal at the conclusion of sentencing).

In this factual context, we also reject Appellant's apparent suggestion that it was fundamental error for the trial court not to conduct a full *Faretta* inquiry at the three-minute "hearing" on Thursday. It was not a new critical phase, and Appellant's rights had been protected adequately throughout the four short hearings within those four days. The full inquiry provided on Monday was still fresh and current, and the trial court had reminded Appellant of it and had renewed an offer of appointed counsel on Tuesday and Wednesday. He had standby counsel all four days. The short gap between recess of the Wednesday afternoon hearing (at 4:07 p.m.), and the beginning of the three-minute conclusion Thursday (at 8:58 a.m.), was not significant enough to violate Appellant's constitutional rights. We therefore reject Appellant's argument and affirm.

III. Presence of Standby Counsel.

Appellant also claims entitlement to a new sentencing hearing because standby counsel was not present at the three-minute Thursday-morning hearing, when the court clarified that Appellant would not be eligible for gain time during the 40-year sentence for attempted second-degree murder. Although the "appearances" page on that hearing transcript does not list standby counsel, the court docket notes indicate that standby

counsel was present. Even if standby counsel did not attend that brief discussion, however, we would find no reversible error.

Throughout the new-trial and sentencing phase, after having been thoroughly apprised of the pitfalls of self-representation and the benefits of having a lawyer, Appellant steadfastly refused to accept an attorney or to seek help from standby counsel once appointed. He has not asserted that he needed or would have requested the assistance of standby counsel for the narrow issue explained at this extremely short hearing, which had already been discussed the previous afternoon with standby counsel present—and Appellant did not seek any assistance from standby counsel then. Sentence had already been pronounced and did not change at this hearing. There was no testimony. Ultimately the gain-time issue was controlled by statutes and rules governing the Department of Corrections; it was not discretionary. We find this argument factually unfounded, and the trial court's action within its discretion in any event. Accordingly, we also affirm as to this issue.

AFFIRMED.

JAY and TANENBAUM, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

Andy Thomas, Public Defender; and Megan Long, Assistant Public Defender, Tallahassee, for Appellant.

Ashley Moody, Attorney General; Trisha Meggs Pate, Assistant Attorney General; and Steven E. Woods, Assistant Attorney General, Tallahassee, for Appellee.