

ground one of his motion. Therefore, we reverse on this basis and remand for further proceedings. This disposition renders the remainder of Freeman's claims moot.

Freeman was convicted of one count of manslaughter with a firearm based on events that occurred on July 18, 1997, and he was sentenced to 180 months in prison. His direct appeal was affirmed without opinion, see Freeman v. State, 731 So. 2d 661 (Fla. 2d DCA 1999), and mandate issued on March 10, 1999.

On October 30, 2007, Freeman filed a motion for postconviction relief based on newly discovered evidence. After receiving a response from the State, the postconviction court ordered an evidentiary hearing on this ground, and it appointed counsel to represent Freeman at the hearing.

At the start of the evidentiary hearing, appointed counsel told the court that Freeman had told him that he wanted to represent himself at the hearing. Counsel noted that he and Freeman were in disagreement over whether certain witnesses should be presented at the evidentiary hearing. The court turned to Freeman and asked what "the problem" was with having appointed counsel represent him. Freeman responded that he had not asked the court to appoint counsel for him and that "I want to represent myself." At that point, the following dialogue occurred:

THE COURT: Please, Mr. Freeman, don't interrupt me. I've already made a determination that it is in your best interest to have [appointed counsel] represent you. He is a trained lawyer. He knows what he's doing, and I think—and I still believe it is in your best interest to have [appointed counsel] represent you. So other than just a general desire to represent yourself, is there any other issue that you have with regards to [appointed counsel]?

MR. FREEMAN: Well, you know, I know my case better than anybody in here. I know all the facts of my case, and with that being so, even though [appointed counsel]

have [sic] way more experience in law than I do and I'm just a pro se inmate, you know—

THE COURT: Well, you're not pro se now—

MR. FREEMAN: Yeah.

THE COURT: —because you have [appointed counsel] representing you.

MR. FREEMAN: Same thing. You know, I feel qualified to represent myself and this ain't nothing but a simple evidentiary hearing. I got everything already lined up. The only thing I need is the Court to subpoena all my witnesses for number one. . . .

. . . .

MR. FREEMAN: I want to represent myself.

THE COURT: I understand.

MR. FREEMAN: I feel it's in my best interest to represent myself, but if the Court feel it ain't in my best interest, then I feel even the Court should at least let me be co-counsel. I don't see nothing wrong with that.

THE COURT: Well, you can't be co-counsel.

MR. FREEMAN: Then I want to represent myself.

The court subsequently denied Freeman's motion to discharge appointed counsel because it did not find that there was a conflict of interest, "professional negligence, unprofessional conduct, or general ineffectiveness." Thus, the hearing proceeded with appointed counsel representing Freeman against Freeman's wishes.

In this appeal, Freeman contends that the postconviction court erred by failing to hold a Faretta-type hearing after he unequivocally stated that he wanted to discharge his court-appointed counsel and proceed pro se. We agree.

The supreme court has specifically addressed a postconviction defendant's right to waive counsel and represent himself during postconviction proceedings. In Durocher v. Singletary, 623 So. 2d 482, 483 (Fla. 1993), the court noted that "[c]ompetent defendants have the constitutional right to refuse professional counsel and to represent themselves, or not, if they so choose. If the right to representation can be waived at trial, we see no reason why the statutory right to collateral counsel cannot also be waived."² (Citations omitted.) The court also noted that "[r]egardless of our feelings about what we might do in a similar situation, we cannot deny [the postconviction defendant] his right to control his destiny to whatever extent remains." Id. at 484.

However, the right to self-representation is not absolute. In Durocher, the court also provided a caveat:

[W]e also recognize that the state has an obligation to assure that the waiver of collateral counsel is knowing, intelligent, and voluntary. Accordingly, we direct the trial judge forthwith to conduct a Faretta-type evaluation of [the

²We recognize that, as a noncapital postconviction defendant, Freeman does not have a statutory right to appointed counsel. See § 924.066(3), Fla. Stat. (2007) ("A person in a noncapital case who is seeking collateral review under this chapter has no right to a court-appointed lawyer."). However, "due process concerns dictate the appointment of counsel in certain postconviction proceedings." Russo v. Akers, 724 So. 2d 1151, 1152 (Fla. 1998) (emphasis omitted). "The question in each proceeding of this nature before this Court should be whether, under the circumstances, the assistance of counsel is essential to accomplish a fair and thorough presentation of the petitioner's claims. . . . Each case must be decided in the light of the Fifth Amendment due process requirements." Graham v. State, 372 So. 2d 1363, 1365 (Fla. 1979). Regardless of the source of the trial court's authority to appoint counsel in the first instance, however, we can conceive of no reason why the reasoning of Faretta and Durocher would not apply to permit a noncapital postconviction defendant to represent himself in postconviction proceedings should he knowingly, voluntarily, and intelligently choose to do so. To hold otherwise would be to strip a small subclass of defendants, i.e., noncapital postconviction defendants, of the Sixth Amendment right of self-representation that every other criminal defendant possesses.

defendant] to determine if he understands the consequences of waiving collateral counsel and proceedings.

Id. at 485; see also Alston v. State, 894 So. 2d 46, 57 (Fla. 2004) (reiterating the Durocher standard for determining whether postconviction defendants may waive postconviction counsel).

Here, contrary to Durocher, the postconviction court failed to hold a hearing to determine whether Freeman's request to represent himself was knowing, intelligent, and voluntary and whether Freeman understood the consequences of waiving collateral counsel. Instead, the court held only a de facto Nelson³ hearing, found no ineffectiveness on the part of appointed counsel, and then required Freeman to proceed with unwanted court-appointed counsel because, in the court's opinion, it was in Freeman's "best interest."

While we understand the postconviction court's concern for Freeman's "best interests," the court's consideration of those interests was not determinative of Freeman's right to represent himself. Under Faretta and Durocher, Freeman had the constitutional right to waive counsel and represent himself unless his waiver was found, after a hearing, not to be knowing, intelligent, and voluntary. Unless and until such a finding was made, Freeman's constitutional right to self-representation applied. Thus, the postconviction court erred by denying Freeman's unequivocal request to represent himself without holding the hearing contemplated by Faretta and Durocher.⁴

³Nelson v. State, 274 So. 2d 256 (Fla. 4th DCA 1973).

⁴We note that the de facto Nelson hearing held by the postconviction court was a proper response to Freeman's request to discharge appointed counsel. See Nelson, 274 So. 2d at 258. And once the court found no ineffectiveness on the part of appointed counsel, it was not required to appoint substitute counsel for Freeman. Id. at

In support of the postconviction court's ruling, the State argues that Freeman was not entitled to a Faretta-type hearing because he had no constitutional "right" to postconviction counsel. Based on Durocher, we reject this argument. If Freeman has the right to waive representation by constitutionally required counsel at trial, he can certainly choose not to be represented by counsel appointed largely on the postconviction court's discretion. See Durocher, 623 So. 2d at 483.

Alternatively, the State argues that any error in failing to conduct a Faretta-type hearing was harmless because the postconviction court allowed Freeman to speak at certain times during the hearing and make a "closing argument." We disagree because this participation was insufficient to vindicate Freeman's right to self-representation under Faretta. As this court explained in Goldsmith v. State, 16 So. 3d 1035, 1038 (Fla. 2d DCA 2009):

The rationale underlying the Faretta decision is that the defendant has a constitutional right to conduct his own defense without the benefit of counsel. [Faretta, 422 U.S.] at 814, 95 S.Ct. 2525. This right includes "the calling and interrogation of favorable witnesses, the cross-examination of adverse witnesses, and the orderly introduction of evidence." Id. at 818, 95 S.Ct. 2525. If a trial court improperly denies a defendant these rights, the only proper remedy is to have a new proceeding at which the defendant is permitted to exercise them. This necessarily requires a proceeding at which the defendant pro se can call and interrogate witnesses, cross-examine unfavorable witnesses, and introduce evidence.

259. However, the finding that appointed counsel was not ineffective did not permit the postconviction court to then force Freeman to proceed with unwanted appointed counsel in the face of his unequivocal request to represent himself. Instead, at that point, the court was required to hold a hearing to determine whether Freeman's decision to represent himself was made knowingly and voluntarily and with an understanding of the consequences of that decision. See Faretta, 422 U.S. at 835.

Thus, the improper denial of a criminal defendant's right to proceed without counsel is per se reversible error. Id.; see also Tennis v. State, 997 So. 2d 375, 379-80 (Fla. 2008); Fleck v. State, 956 So. 2d 548, 549 (Fla. 2d DCA 2007); Reddick v. State, 937 So. 2d 1279, 1284 (Fla. 4th DCA 2006). And a defendant whose right to represent himself has been improperly denied can have that right vindicated only by having a new proceeding at which the defendant can actually exercise his right to self-representation.

Here, while the postconviction court did allow Freeman to speak at certain points during the evidentiary hearing, it did not allow him to call and interrogate witnesses, cross-examine unfavorable witnesses, or introduce evidence. In fact, the court specifically refused to allow Freeman to call certain witnesses that he wanted to present on his own behalf. This action improperly denied Freeman his right to represent himself, and this error is not harmless.

Accordingly, we reverse and remand for further proceedings on Freeman's motion. If Freeman persists in his request to represent himself at a new evidentiary hearing, the postconviction court must conduct a Faretta-type hearing as set out in Durocher. If, after conducting such a hearing, the court determines that Freeman has knowingly, intelligently, and voluntarily chosen to represent himself in the postconviction proceedings, the court must hold a new evidentiary hearing.

Reversed and remanded for further proceedings.

MORRIS, J., Concurs.
KHOUZAM, J., Concurs with opinion.

KHOUZAM, Judge, Concurring.

I agree with the majority that the trial court, under the facts of this case, should have conducted the Faretta-type evaluation described in Durocher v. Singletary, 623 So. 2d 482 (Fla. 1993). This case appears to be a case of first impression in Florida with respect to a defendant's exercise of the right of self-representation after the appointment of counsel in a noncapital postconviction case. I write to explain that even though Durocher is a death penalty case involving certain statutory rights to counsel afforded to indigent death row inmates in collateral relief proceedings, its reasoning with respect to the exercise of a defendant's right to represent himself after appointment of counsel should be equally availing in noncapital postconviction cases. Admittedly, a defendant does not have an absolute right to counsel in noncapital postconviction cases. See Russo v. Akers, 724 So. 2d 1151 (Fla. 1998). But if counsel is appointed in a noncapital postconviction case, the defendant who unequivocally expresses his desire to discharge his court-appointed counsel should not be deprived of his right of self-representation in the absence of a proper Faretta-type inquiry.