IN THE COURT OF APPEALS OF IOWA

No. 2-539 / 11-1096
Filed August 22, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JOHN FITZGERALD CLARKE,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Robert A. Hutchison, Judge.

A defendant appeals his conviction for theft. **REVERSED AND REMANDED FOR NEW TRIAL.**

Mark C. Smith, State Appellate Defender, and Robert P. Ranschau, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Martha E. Trout, Assistant Attorney General, John P. Sarcone, County Attorney, and Justin Allen, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Tabor and Bower, JJ.

VOGEL, P.J.

Defendant John F. Clarke appeals from the judgment and sentence entered on his conviction for second-degree theft, following a jury trial. Clarke appeals, claiming he was denied the right to represent himself at trial. Because we find he clearly asserted his desire to proceed pro se, was not adequately appraised of the consequences of his choice, and then denied this constitutional right, we reverse and remand for new trial.

I. Background Facts and Proceedings

On May 1, 2010, the State filed a trial information charging Clarke with theft in the second degree in violation of Iowa Code sections 714.1(1) and 714.2(2) (2009). On December 1, 2010, the State filed a supplemental trial information alleging that Clarke is an habitual offender. Clarke filed a pro se "Motion for Bill of Particulars" on December 27, 2011, stating he was "prepared to defend himself." On January 18, 2011, a hearing was held in which Clarke's trial attorney orally moved to withdraw and requested substitute counsel be appointed on a standby basis. Clarke requested that he be allowed to represent himself at trial. After a lengthy colloquy, the court found that it was not in Clarke's best interests to represent himself and his reasons for wanting to discharge his trial attorney were not substantial.

Trial commenced on January 24, 2011, and Clarke was found guilty of theft in the second degree. After the denial of various post trial motions, Clarke stipulated to having been convicted of two prior felonies. On July 5, 2011, the

court entered judgment and sentenced Clarke to a term of imprisonment of up to fifteen years with a minimum of three years as well as a suspended fine of $750.[1]

II. Right to Self Representation

Clarke asserts he was denied his Sixth and Fourteenth Amendment right to self representation. The State claims Clarke failed to preserve this error by failing to "clearly and unequivocally" request to proceed pro se. *See State v. Rater*, 568 N.W.2d 655, 658 (Iowa 1997) (citations omitted). As this is a constitutional claim, our review is de novo. *State v. Johnson*, 756 N.W.2d 682, 686 (Iowa 2008).

The United States Supreme Court has stated that "the Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense." *Faretta v. California*, 422 U.S. 806, 819 (1975). However, before the right to self-representation attaches, the defendant must voluntarily elect to proceed without counsel by "knowingly and intelligently" waiving his Sixth Amendment right to counsel and "clearly and unequivocally" request to do so. *State v. Martin*, 608 N.W.2d 445, 450 (quoting *Faretta* 422 U.S. at 835). We therefore begin by reviewing the

[1] Though the issue is now moot because of our determination on the Sixth Amendment issue, it is of note that the State concedes on appeal that the fine imposed is not authorized by statute. A fine can be imposed on habitual offenders only when permitted by the applicable sentencing statute or another statute. *State v. Halterman*, 630 N.W.2d 611, 613-14 (Iowa Ct. App. 2001). Clarke's sentence was for second-degree theft, a violation of Iowa Code sections 714.1 and 714.2 and punishable as a class "D" felony. Clarke was sentenced under Iowa Code section 902.9, which permits a fine to be imposed on class "D" felonies but specifically exempts habitual offenders. Iowa Code § 902.9(5). Because no statute expressly allows habitual offenders convicted of second-degree theft to be fined, the court had no authority to impose a fine for theft as an habitual offender, even if the fine was ultimately suspended. *Halterman*, 630 N.W.2d at 613-14.

record to determine whether Clarke "clearly and unequivocally" requested to proceed pro se.

On December 27, 2010, Clarke filed a pro se "Motion for Bill of Particulars I.R. Crim 2.11(5)" in which he stated "[t]he defendant had prepared to defend himself against the charge(s)" until the State provided him with an amended trial information. At a January 18, 2011, pretrial hearing and on Clarke's court appointed attorney's oral motion to withdraw, the following record was made:

> THE COURT: I'm not clear what is being asked of me here. Is Mr. Clarke asking to proceed pro se? Is he asking for a new court-appointed attorney? I don't understand.
>
> [CLARKE'S ATTORNEY]: In conferring with my client, he would like to have someone appointed standby and he would proceed pro se.
>
> (The defendant was duly sworn by the court.)
>
> THE COURT: Is it correct that you want to discharge your current attorney and to proceed to represent yourself with a standby attorney?
>
> CLARKE: Yes, sir.
>
> THE COURT: Tell me why.

Clarke explained that he wanted standby counsel to essentially play the role of co-counsel, in which he and a defense attorney would share in conducting the trial. The district court properly rejected this hybrid use of counsel. *See Rater*, 568 N.W.2d at 658 ("Essentially, standby counsel has two purposes—to act as a safety net to ensure the litigant receives a fair hearing of his claims and to allow the trial to proceed without the undue delays likely to arise when a layman presents his own case."); *see also McKaskle v. Wiggins*, 465 U.S. 168, 183 (1984) (holding that "hybrid representation" has been specifically disallowed because "[a] defendant does not have a constitutional right to choreograph

special appearances by counsel."). The conversation between the court and Clarke continued:

> CLARKE: So what do you [the court] suggest?
> THE COURT: Well, what I suggest is that you stick with the attorney you've got, but we're going to talk further about that.
> . . . .
> CLARKE: I'm not saying that I'm, like, this—you know, that I got the experience that [counsel] has or anybody else has. But if I'm going to be hung, I'm going to hang my own self is what I'm saying.

The discussion continued with Clarke expressing dissatisfaction with his appointed counsel, and acknowledging he had filed several motions, without his attorney's knowledge. The attorney was then afforded the opportunity to detail much of the misunderstandings and communication problems with Clarke.

After hearing the mutual frustrations expressed both by Clarke and by his counsel, the court concluded:

> THE COURT: Well, [defense counsel] probably to your dismay—and certainly to Mr. Clarke's—I am not going to allow you to withdraw here on the eve of trial. Mr. Clarke, you haven't even made close to a showing that you can handle this case on your own. I can't just let somebody represent themselves because they tell me they want to. There's a real strict set of standards that you have to meet to be able to act as your attorney. You can't do that. It's not in your best interest, and I will not allow you to proceed as your own attorney.

On appeal, Clarke claims that the colloquy dealt more with his attorney's motion to withdraw rather than focusing on his corollary request to proceed pro se. We agree. Clarke twice stated he wanted to represent himself. Upon that request the function of the district court was "to provide fair notice of the obstacles inherent in self-representation before [Clarke] embarks on so perilous an endeavor." *State v. Cooley*, 608 N.W.2d 9, 16 (Iowa 2000). To ascertain a knowing, voluntary, and intelligent waiver of the right to counsel, the court must

engage in a "meaningful colloquy" to ensure the accused (1) understands the nature of the charge(s) against him including the allowable punishments; (2) is admonished as to the usefulness of an attorney; and (3) is made aware of the danger in continuing without an attorney. *Cooley*, 608 N.W.2d at 15. Although the court did inquire into Clarke's education and prior experience with the legal system, it only warned in general terms of a possible dire outcome if Clarke were to proceed on his own. The district court denied Clarke's request as it did not think it wise for Clarke to represent himself, and it may not have been. Nonetheless, Clarke had the right, as he put it, "to hang my own self."

Because Clarke asserted his desire to proceed pro se, but was not adequately informed as to the attendant consequences of such a choice, then denied the right, the district court judgment must be reversed and the case remanded for a new trial. Because of this disposition, we do not reach Clarke's other issues on appeal.

REVERSED AND REMANDED FOR NEW TRIAL.