

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000889-MR

GEORGE PHILLIPS

APPELLANT

v. APPEAL FROM MONROE CIRCUIT COURT
HONORABLE EDDIE C. LOVELACE, JUDGE
ACTION NO. 07-CR-00020

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: TAYLOR, CHIEF JUDGE; CLAYTON, JUDGE; LAMBERT,¹
SENIOR JUDGE.

TAYLOR, CHIEF JUDGE: George Phillips brings this appeal from an April 27,
2010, order of the Monroe Circuit Court revoking his sentence of probation. We
affirm.

¹ Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

On August 22, 2007, appellant pleaded guilty to failure to comply with sex offender registration and with being a second-degree persistent felony offender. Appellant was sentenced to seven-years' imprisonment probated for a period of five years. Thereafter, the Commonwealth filed a motion to revoke appellant's probation, and a revocation hearing was scheduled for March 17, 2010. During the revocation hearing, the Commonwealth attempted to introduce into evidence a document through a probation officer witness. Appellant's counsel did not object, but appellant attempted to object to the exhibit's introduction. After a colloquy with appellant, the circuit court ordered that appellant would be permitted to proceed *pro se* with only standby counsel during the revocation proceeding. The revocation hearing was ultimately continued until April 21, 2010, at which time appellant proceeded *pro se* with standby counsel. Following the revocation hearing, the circuit court revoked appellant's probation. This appeal follows.

Appellant contends that the circuit court erred by allowing him to proceed *pro se* with only standby counsel during the revocation hearing.² More specifically, appellant asserts that the circuit court failed to determine whether appellant knowingly, intelligently, and voluntarily waived his right to counsel and failed to conduct a hearing that satisfied the requirements set forth in *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975).

² Appellant did not preserve this issue for appeal but has requested that we review same for palpable error pursuant to Kentucky Rules of Criminal Procedure (RCr) 10.26.

In this Commonwealth, a criminal defendant possesses the right to counsel at a probation revocation hearing. Kentucky Revised Statutes (KRS) 533.050(2); *Miller v. Com.*, 329 S.W.3d 358 (Ky. App. 2010). A criminal defendant, likewise, possesses the right to reject representation by counsel and proceed *pro se*. *Depp v. Com.*, 278 S.W.3d 615 (Ky. 2009)(citing *Faretta*, 422 U.S. 806). However, the relinquishment of the right to be represented by counsel in a criminal proceeding must be made knowingly, intelligently, and voluntarily.³ *Id.*

To ensure that a defendant waived his right to counsel knowingly, intelligently, and voluntarily, the circuit court must inform defendant as to the:

“[D]angers and disadvantages of self-representation, so that the record will establish he knows what he is doing and his choice is made with eyes open.”

Com. v. Terry, 295 S.W.3d 819, 822 (Ky. 2009)(quoting *Faretta*, 422 U.S. at 835).

And, to determine whether a defendant’s waiver is made with “eyes open,” the circuit court must conduct a hearing that satisfies the requirements of *Faretta*. See *Faretta*, 422 U.S. 806. Although *Faretta* does not require the court to follow a specific script or utilize any “magic words,” it does require “consideration of case-specific factors such as the defendant’s education, experiences, sophistication, the complex or easily grasped nature of the charge, and the state of the proceedings.”

Grady v. Com., 325 S.W.3d 333, 342 (Ky. 2010). Simply put, the court must

³ The requirement that the relinquishment of the right to counsel be made knowingly, intelligently, and voluntarily also applies when a defendant proceeds with hybrid counsel or standby counsel. *Grady v. Com.*, 325 S.W.3d 333 (Ky. 2010).

ensure that defendant is “made sufficiently aware of his right to have counsel present and of the possible consequences of a decision to forgo the aid of counsel.” *Depp*, 278 S.W.3d at 618. If so informed, a defendant’s waiver of counsel is made knowingly, intelligently, and voluntarily. *Depp*, 278 S.W.3d 615. Our review proceeds accordingly.

At the initial probation revocation hearing, the record reveals that the Commonwealth attempted to introduce an exhibit. Although appellant’s counsel did not object, appellant *pro se* inquired whether he could object. This inquiry prompted the following exchange between the circuit court and appellant:

Circuit Court: “Well, I appointed you an attorney.”

Appellant: “I don’t, I can take care of it, if I may, if I may address the court, I’d appreciate that.”

Circuit Court: “Well, you’ve not, I’ve not been through the *Faretta* hearing but I’ll let, I’ll let you be heard.”

.....

Defense Counsel: Ok, your honor is the way I understand Mr. Phillips wants to represent himself?

Circuit Court: You want to represent yourself?

Appellant: Yes, that would be fine.

Circuit Court: Well then let me ask you a few questions then Mr. Phillips before I do that sir.

Appellant: What?

Circuit Court: Do you understand that if you represent yourself

Appellant: Well now wait a minute your honor

Circuit Court: No now wait a minute let me talk.

Appellant: Alright.

Circuit Court: I'm talking don't you know its rude to interrupt somebody when they're talking have you ever been trained on those lines – well I doubt it.

Appellant: I apologize.

.....

Circuit Court: Ok. Now, you have to be held to an accounting as a lawyer, in other words, you have to know something about the proper time for objections and, and the burden in this case of course for the Commonwealth to show that you violated these orders. You have the right to have witnesses, you have the right to question them, but you'll be held accountable to the proper legal standards and if the court, which I don't, well I haven't heard anything, but if I should decide you've violated those and impose sentence, you'd be sent to appropriate institution to be selected Kentucky Department of Corrections. And, if you wish to appeal, you'd need to know something about the appellate process and what it takes and the time frame, and all of those involved. You uh, if you're gonna represent yourself then in this action it's not Mr. Berry's responsibility to get subpoenas out for witnesses, so it'd be your responsibility to get subpoenas for witnesses to have those served in Barren County, or Monroe County or whatever county it might be. It'd be your duty to know whether the Commonwealth is perhaps putting on evidence that might be improper, you need to look at the Kentucky Rules of Evidence relating to these types of hearings and everything, with that in mind you don't want anybody to assist you?

Appellant: “Well, your honor, I would like to have assistance, but, I've got some things I need to tell the court, and you're just not, you're not being informed about everything that's going on in this case judge.”

Circuit Court: Well, that's nothing unusual.

Appellant: Well, I agree probably right (inaudible).

Circuit Court: Probably nothing unusual.

Appellant: That's probably true.

Circuit Court: On that. I'm gonna let Mr. Berry just as standby counsel so if he, if you want to consult with him he'll be here, or one of the, his uh, one of the ladies over there, but I'll let Mr. Berry since he's probably been more experienced and everything I know they're upset over it but I'll let him do that so.

Appellant: Cause I'm going to ask him to help as far as getting the subpoenas out and stuff like that.

Circuit Court: I thought you were biting off more than you could chew there.

Appellant: Well but Judge, ok, alright

Circuit Court: Alright thank you very much.

From the above, it is clear that the circuit court made appellant aware of his right to counsel during the revocation proceeding. The circuit court clearly explained to appellant the consequences of a decision to proceed without the benefit of counsel or with only standby counsel. In fact, when appellant announced his intention to proceed *pro se*, the circuit court plainly acknowledged the necessity of conducting a *Faretta* hearing. The circuit court was aware that appellant possessed a college education, had extensive experience with the court system, and clearly understood the appropriate time to object to the Commonwealth's introduction of evidence. Also, the court explained the stage of

the proceeding and ensured that appellant was aware of the consequences if he was found to have violated his probation. Upon the whole, we believe the circuit court satisfied the requirements of *Faretta* and, thus, did not err by allowing appellant to proceed *pro se* with standby counsel during the probation revocation proceeding.

For the foregoing reasons, the order of the Monroe Circuit Court is affirmed.

ALL CONCUR.

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