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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001749-MR

DONNIE MILSAP — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE
ACTION NO. 07-CR-002591

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CAPERTON, NICKELL, AND WINE, JUDGES.

CAPERTON, JUDGE: The Appellant, Donnie Milsap, was convicted on one count of illegal possession of a controlled substance, one count of possession of marijuana, and of being a persistent felony offender in the first degree, for which he received a total sentence of ten years imprisonment. On appeal, Milsap alleges that the court below erred in allowing him to represent himself without holding a

Faretta hearing, and in forcing him to accept the services of his attorney as "whisper" counsel. Milsap also alleges that the court erred in failing to grant his motion for directed verdict. Finally, he asserts that he is entitled to a reduction in his sentence because of a change in the law. Having reviewed the record, the arguments of the parties, and the applicable law, we reverse and remand for additional proceedings consistent with this opinion.

On June 12, 2007, Louisville Metro Narcotics Detectives Chauncey Carthan and Jonathan Lesher were patrolling on the evening shift. The two were assigned to a special summer task force focused on violent crimes and drug crimes. At approximately 8:30 p.m., Detectives Lesher and Carthan were involved in a traffic stop of a vehicle in which Milsap was a passenger. The occupants of the vehicle were not wearing seatbelts, and Detective Carthan activated his lights to indicate that the vehicle should pull over. Detective Lesher testified that he got out of the cruiser first, and approached the passenger side of the vehicle[1] where Milsap was sitting, and that he smelled marijuana. Detective Lesher asked Milsap if he had any drugs in the vehicle, and Milsap handed him some marijuana.

Detective Lesher testified that at that point, he asked Milsap to exit the vehicle, and observed that there was something plastic in Milsap's mouth. Detective Lesher testified that he recognized the object to be crack cocaine. Detective Lesher testified that his recognition of the substance was based upon its

[1] Detective Carthan testified that he would often wait and watch his partner approach a stopped vehicle so he could observe the movements of the occupants from a different vantage point than the approaching officer, to ensure officer safety.

packaging and its off-white color. Detective Lesher then handcuffed Milsap and walked him back to the rear of the vehicle, at which time he motioned to Detective Carthan that there was something in Milsap's mouth. Detective Carthan told Milsap to spit it out, and Milsap complied, although Detective Carthan testified that he had to repeat the order more than once, and threaten the use of a taser before Milsap did so. Detective Lesher recovered three individually wrapped bundles of suspected crack cocaine, which subsequently tested positive for cocaine.

Milsap was later charged with and convicted of one count of illegal possession of a controlled substance, one count of possession of marijuana, and being a persistent felony offender in the first degree. As previously noted, Milsap was sentenced to ten years imprisonment. It is from that conviction and sentence that Milsap now appeals to this Court.

As his first basis for appeal, Milsap argues that the court below committed reversible error in failing to ensure that Milsap knowingly, intelligently, and voluntarily waived his right to counsel, and that the court forced him to accept his attorney as "whisper" counsel. Milsap asserts that below, he made a motion to represent himself *pro se*, and to be relieved of the services of his appointed counsel, Dawn Elliott[2].

[2] At Milsap's arraignment, Julie Kaelin of the Louisville Metro Public Defender's Office was appointed to represent Milsap. Kaelin had represented Milsap previously, and based upon the representations made to the trial court, Milsap had little confidence left in Kaelin's abilities. Thereafter, on March 17, 2009, the date for which trial was initially scheduled Milsap appeared before the court and again requested alternate counsel. At that time, the court relieved Kaelin, and the entire Louisville Metro Public Defender office from representation. At the next

According to Milsap, Elliott failed to appear for the trial date scheduled for February 16, 2010, because of childcare issues, and the trial was delayed until April 13, 2010. Subsequently, the trial was again delayed until August 10, 2010. On the morning of trial, Milsap informed the court that he was unhappy with Elliott's representation. Apparently, Milsap had requested that Elliott file certain motions, and she had not done so. Milsap also complained about a lab report which he alleged was fraudulent. When initially asked whether he would prefer to represent himself, Milsap replied that he did not, and wanted instead for Elliott to be replaced with new counsel.

In response, the court informed Milsap that the trial was going to happen that day, and that Elliott was rendering competent representation and would not be replaced. The court advised Milsap against being his own attorney should he make the decision to do so, because it was dangerous and confusing. The court than called a recess to allow Milsap time to change into his street clothes.

When the parties reappeared several minutes later, Milsap again requested that Elliott be relieved, and this time, stated that he would rather represent himself than have Elliott as his lawyer. The court again cautioned Milsap against representing himself, and required him to keep Elliott as "whisper" counsel, only if he needed help, because she was skilled in legal procedure and Milsap needed someone present in case he had a question. Milsap continued to

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appearance, Dawn Elliott, an attorney from the assigned counsel list, appeared for Milsap.

object to Elliott's representation in any form. The court informed Milsap that he would be required to participate in accordance with the rules, and would be held to the same standard as the lawyers. The court again strongly cautioned Milsap against representing himself. Finally, the trial court told Milsap that it was going to inform the jury that he was representing himself with assistance from his attorney only if needed. When asked if that was a fair statement, Milsap replied that it was.

The court did inform the jury that Milsap was representing himself, and that his attorney was only there if he needed help.[3] Milsap now argues that while he had the right to reject counsel and represent himself, such a waiver must have been made knowingly and intelligently. Milsap asserts that the trial court had an affirmative duty to hold a hearing pursuant to *Faretta v. California*, 422 U.S. 806, 819-20, 95 S.Ct. 2525, 45 L.Ed.2d 562(1975) to determine whether Milsap's waiver was knowing and voluntary in this instance.

Milsap argues that the exchange between himself and the court did not satisfy the constitutional mandates of *Faretta*, as the judge made no attempt to ascertain Milsap's knowledge of the law, or to advise him of the risks of proceeding *pro se*. Further, Milsap argues that the court erred in forcing him to accept his attorney as standby counsel, even though Milsap made it clear that he did not want his attorney involved with the case.

[3] The record reveals that Milsap's counsel was actively assisting him during *voir dire*, but that Milsap did conduct the suppression hearing, the opening statement, cross-examination of the witnesses, and closing argument.

In response, the Commonwealth argues that Milsap knowingly, intelligently and voluntarily waived his right to counsel pursuant to *Faretta*. The Commonwealth asserts that although the court did not specifically make a finding that Milsap had made a knowing and intelligent waiver, this finding was implicit in the colloquy between Milsap and the court, and that the court's repeated warnings against proceeding *pro se* were sufficient to comply with *Faretta*. Having reviewed the record and the colloquy between the court and Milsap, we cannot agree.

Certainly, Milsap had the right under the Sixth Amendment of the United States Constitution to reject counsel and represent himself during the course of a criminal proceeding. *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). However, the relinquishment of that right must be made knowingly and intelligently. *Id.* at 835. Thus, before a defendant can proceed *pro se*, the trial court must ensure that a defendant's waiver of counsel is knowingly and intelligently made.

As our United States Supreme Court held in *Iowa v. Tovar*, 541 U.S. 77, 124 S.Ct. 1379, 158 L.Ed.2d 209 (2004):

> We have not, however, prescribed any formula or script to be read to a defendant who states that he elects to proceed without counsel. The information a defendant must possess in order to make an intelligent election, our decisions indicate, will depend on a range of case-specific factors, including the defendant's education or sophistication, the complex or easily grasped nature of the charges, and the state of the proceeding.

Moreover, our courts have held that a trial court may implicitly find a waiver to be knowing, intelligent, and voluntary, and that an express finding need not be made on the record. *See Depp v. Commonwealth*, 278 S.W.3d 615 (Ky. 2009). Finally, concerning the appointment of "whisper counsel," *Faretta* clearly holds that the "standby counsel" may be appointed even over the objection of the accused to aid the accused in the event that the termination of defendant's self-representation becomes necessary. *See also Chapman v. Commonwealth*, 265 S.W.3d 156 (Ky. 2007).

Nevertheless, while it is true that a waiver may be implicit, our courts have set forth some standards by which to determine whether or not the waiver was knowing and voluntary in accordance with *Faretta*. Recently, in *Commonwealth v. Terry* 295 S.W.3d 819 (Ky. 2009), our Kentucky Supreme Court stated:

> In order to give guidance to trial judges across the Commonwealth, we note, with approval, the model *Faretta* hearing questions used in federal courts: When a defendant states that he wishes to represent himself, you should … ask questions similar to the following:
> (a)Have you ever studied law?
> (b)Have you ever represented yourself or any other defendant in a criminal action?
> (c)You realize, do you not, that you are charged with these crimes: (Here state the crimes with which defendant has been charged).
> (d)You realize, do you not, that if you are found guilty of the crime charged in Count I, the court … could sentence you to as much as ___ years in prison, and fine you as much as $___? (Then ask [the defendant] a similar question with respect to each other crime with which he may be charged in the indictment or information).

(e)You realize, do you not, that if you are found guilty of more than one of those crimes, this court can order that the sentences be served consecutively, that is, one after the other?
(f)You realize, do you not, that if you represent yourself, you are on your own? I cannot tell you how you should try your case or even advise you as to how to try your case.
(g)Are you familiar with the [Kentucky] Rules of Evidence?
(h)You realize, do you not, that the [Kentucky] Rules of Evidence govern what evidence may or may not be introduced at trial and, in representing yourself, you must abide by those rules?
(i)Are you familiar with the [Kentucky] Rules of Criminal Procedure?
(j)You realize, do you not, that those rules govern the way in which a criminal action is tried?
(k)You realize, do you not, that if you decide to take the witness stand, you must present your testimony by asking questions of yourself? You cannot just take the stand and tell your story. You must proceed question by question through your testimony.
(l)Then say to the defendant something to this effect:
I must advise you that in my opinion, you would be far better defended by a trained lawyer than you can be by yourself. I think it is unwise of you to try to represent yourself. You are not familiar with the law. You are not familiar with court procedure. You are not familiar with the rules of evidence. I would strongly urge you not to try to represent yourself.
(m)Now, in light of the penalty that you might suffer if you are found guilty and in light of all of the difficulties of representing yourself, is it still your desire to represent yourself and to give up your right to be represented by a lawyer?
(n)Is your decision entirely voluntary on your part?
(o)If the answers to the two preceding questions are in the affirmative, [and in your opinion, the waiver of counsel is knowing, intelligent, and voluntary,] you should then say something to the following effect:

> "I find that the defendant has knowingly, intelligently, and voluntarily waived his right to counsel. I will therefore permit him to represent himself.

Terry at 824-25, citing *United States v. McDowell*, 814 F.2d 245, 251-52 (6th Cir. 1987)(Slightly modified for usage in Kentucky state courts rather than federal courts).

Sub judice, although the court gave Milsap repeated warnings that self-representation was ill-advised and informed him that he would be required to follow the rules of procedure, we cannot find that these warnings are sufficient to constitute a "hearing" as contemplated by *Farett,* nor do they rise to the level of the colloquy recently set forth by our Supreme Court in *Terry*. While there are no magic words or specific formula to be utilized by a court in holding a *Faretta* hearing, we do believe that some sort of hearing is required. Accordingly, we simply cannot conclude that Milsap's waiver of his right to counsel was knowing, intelligent, and voluntary in this instance.

Having so found, we need not address Milsap's remaining arguments concerning whether or not the court should have granted a directed verdict, or whether his current sentence should be reduced.

Wherefore, for the foregoing reasons, we hereby reverse the August 18, 2010, Judgment of Conviction on Jury Verdict, Waiver of Presentence Report, and Sentence entered by the Jefferson Circuit Court, and remand this matter back to the Jefferson Circuit Court for a new trial.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Linda Horsman
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Courtney J. Hightower
Assistant Attorney General
Frankfort, Kentucky