

STATE OF LOUISIANA

NO. 07-KA-945

VERSUS

**COURT OF APPEAL,
FIFTH CIRCUIT**

FIFTH CIRCUIT

LARRY LEWIS

COURT OF APPEAL

FILED MAR 25 2008

STATE OF LOUISIANA



ON APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, STATE OF LOUISIANA
NO. 06-5377, DIVISION "G"
HONORABLE ROBERT A. PITRE, JR., JUDGE PRESIDING

March 25, 2008

**EDWARD A. DUFRESNE, JR.
CHIEF JUDGE**

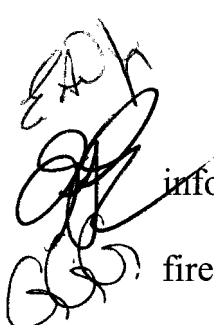
Panel composed of Judges Edward A. Dufresne, Jr., Marion F. Edwards,
and Greg G. Guidry

PAUL D. CONNICK, JR.
DISTRICT ATTORNEY
Twenty-Fourth Judicial District
Parish of Jefferson

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CONVICTIONS AND SENTENCES
AFFIRMED.



On October 17, 2006, the Jefferson Parish District Attorney, filed a bill of information charging defendant, Larry Lewis, with one count of possession of a firearm by a convicted felon, in violation of LSA-R.S. 14:95.1, and one count of possession of more than 28 but less than 200 grams of cocaine, in violation of LSA-R.S. 40:967F. At the October 18, 2006 arraignment, defendant pled not guilty. Thereafter, the defense filed various pre-trial motions, both counseled and pro se, including a motion to allow defendant to represent himself. The trial court conducted a hearing on the issue of self-representation on May 31, 2007. After asking defendant some questions, the trial judge informed him that he would be allowed to do a certain amount of defense himself, but that he would be assisted by counsel.

On August 21, 2007, defendant, represented by counsel, withdrew his pleas of not guilty and pled guilty to both counts, reserving his right to appeal pursuant to State v. Crosby, 338 So.2d 584 (La. 1976). The trial judge sentenced defendant

on each count to fifteen years at hard labor, the first two years without benefit of probation, parole, or suspension of sentence, to run concurrently with sentences imposed for other offenses. Defendant now appeals.¹

FACTS

According to the probable cause affidavit contained in the record, on September 29, 2006, investigators from the Jefferson Parish Sheriff's Office arrested defendant on an outstanding charge after conducting surveillance of his residence. A search incident to arrest revealed defendant to be in possession of marijuana. Agents then executed a search warrant at his residence and seized 58 grams of a rock-like substance that subsequently tested positive for the presence of cocaine and 2 grams of marijuana. Investigators also seized a firearm, paraphernalia associated with narcotics distribution, and \$880.00 in assorted United States currency. A criminal history check revealed that defendant had a 2003 conviction for illegal possession of crack cocaine.

WAIVER OF RIGHT TO COUNSEL

On appeal, defendant asserts that the trial court committed reversible error in allowing him to represent himself without first adequately ascertaining that he knowingly and voluntarily waived his right to counsel.

The Sixth Amendment to the United States Constitution and Article I, § 13 of the Louisiana Constitution give a defendant the right to counsel as well as the right to defend himself. A defendant may represent himself only if he makes an unequivocal request to represent himself and knowingly and intelligently waives his right to counsel. Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), and State v. Bridgewater, 00-1529 (La. 1/15/02), 823 So.2d

¹ Defendant has two appeals pending that are companion cases to this one: 07-KA-944 and 07-KA-947. Those appeals stem from other guilty pleas that defendant entered on August 21, 2007.

877, 894, cert. denied, 537 U.S. 1227, 123 S.Ct. 1266, 154 L.Ed.2d 1089 (2003).
State v. Bruce, 03-918 (La. App. 5 Cir. 12/30/03), 864 So.2d 854, 857.

Once the defendant has made an unequivocal request to represent himself, the trial court must determine whether the defendant is competent to waive counsel and is “voluntarily exercising informed free will.” State v. Santos, 99-1897 (La. 9/15/00), 770 So.2d 319, 321, quoting Faretta, 422 U.S. at 835, 95 S.Ct. at 2541. The competency at issue is a defendant’s competence to waive his right to counsel and not his competence to represent himself. State v. Santos, 770 So.2d at 321.

Before accepting a waiver of counsel, the trial court should advise the defendant of the nature of the charges, the penalty range for the charges, and the dangers and disadvantages of self-representation, such as the failure to recognize objections to inadmissible evidence and the inability to adhere to technical rules governing trials. In addition, the court should inquire into the defendant's age, education and mental condition, and should determine according to the totality of circumstances whether the accused understands the significance of the waiver. State v. Strain, 585 So.2d 540, 542 (La. 1991); State v. Moore, 06-875 (La. App. 5 Cir. 4/11/07), 958 So.2d 36, 44.

There is no inflexible criteria or a magic word formula for determining the validity of a defendant's waiver of the right to counsel. Rather, the validity of the waiver must take into account the totality of the circumstances in each case. The failure of the trial court to secure a valid waiver of counsel constitutes reversible error. State v. Bruce, 864 So.2d at 857.

In May of 2007, defendant, through counsel, filed a written motion requesting that defendant be allowed to represent himself. The trial court conducted a hearing of the issue of self-representation on May 31, 2007. At this

hearing, the trial judge first asked defendant whether he had any training that would allow him to represent himself. Defendant answered that he did not. The judge then asked defendant why he wanted to represent himself. Defendant indicated dissatisfaction with his attorney as well as confidence in his knowledge of and ability to handle his case. Lastly, the trial judge inquired of defendant whether he had ever selected a jury or tried a case. To both of these questions, defendant replied, “no.” Following this limited questioning, the court ruled that it would allow defendant to “do a certain amount of the defense” for himself, but that defense counsel would remain in the courtroom in the event defendant needed advice.

It is questionable whether this exchange was sufficient to constitute a valid waiver of defendant’s right to counsel. However, under the circumstances of this case, we do not find it necessary to make a determination on this issue. We first note that defendant did not object to the trial court’s ruling on the issue of self-representation. In fact, defendant acquiesced when the trial judge informed him that he could do a certain amount of defense for himself but that Mr. Benz, his court appointed IDB attorney, would be there to assist him.

Moreover, while the parties allege that defendant waived his right to counsel, the record indicates that Mr. Benz was present at all court proceedings subsequent to the trial court’s ruling on the issue of self-representation. Specifically, the minute entries indicate that Mr. Benz appeared for trial on June 18, 21, and 28, 2007. On each of those occasions, the trial was continued. Then, on August 20, 2007, defendant appeared, again with Mr. Benz, and requested a continuance of the trial which was denied by the trial judge. The transcript from the August 20, 2007 hearing is contained in the record, and it shows that Mr. Benz did, in fact, assist defendant. He prompted defendant to move for the continuance

and also objected on his behalf when it was denied. The next day, defendant, with the clear representation of counsel, withdrew his not guilty pleas and pled guilty to the charged offenses. At the beginning of the guilty plea proceedings, Mr. Benz advised the court that he had filled out the waiver of rights form with defendant and had explained those rights to him. Moreover, the waiver of rights was signed by defendant and Mr. Benz, as his attorney.² Mr. Benz also filed a motion for appeal on defendant's behalf.

Having reviewed the record, we find that defendant had the assistance of counsel throughout these proceedings and was fully represented by counsel at the time he entered his guilty pleas. We therefore conclude that defendant's rights were not violated by the trial court's ruling on the issue of self-representation.

ERROR PATENT DISCUSSION

We have also reviewed the record for errors patent pursuant to LSA-C.Cr.P. art. 920; State v. Oliveaux, 312 So.2d 337 (La. 1975); State v. Weiland, 556 So.2d 175 (La. App. 5 Cir. 1990). Our review reveals no error patent that would warrant reversal or require corrective action.

For the reasons set forth herein, we affirm defendant's convictions and sentences.

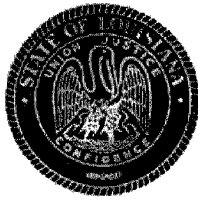
CONVICTIONS AND SENTENCES AFFIRMED.

² It is noted that the waiver of rights form is not in the instant appellate record. However, it is contained in the record of one of defendant's related appeals, No. 07-KA-944.

EDWARD A. DUFRESNE, JR.
CHIEF JUDGE

THOMAS F. DALEY
MARION F. EDWARDS
SUSAN M. CHEHARDY
CLARENCE E. McMANUS
WALTER J. ROTHSCHILD
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JUDGES



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**NOTICE OF JUDGMENT AND
CERTIFICATE OF MAILING**

PETER J. FITZGERALD, JR.
CLERK OF COURT

GENEVIEVE L. VERRETTE
CHIEF DEPUTY CLERK

MARY E. LEGNON
FIRST DEPUTY CLERK

TROY A. BROUSSARD
DIRECTOR OF CENTRAL STAFF

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I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN MAILED ON OR DELIVERED THIS DAY **MARCH 25, 2008** TO THE TRIAL JUDGE, COUNSEL OF RECORD AND ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

A handwritten signature in black ink, appearing to read "Fitzgerald", written over a horizontal line.

PETER J. FITZGERALD, JR.
CLERK OF COURT

07-KA-945

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