STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	FOR PUBLICATION March 3, 2009
v	No. 281375 Wayne Circuit Court
THOMAS HILL, Defendant-Appellant.	LC No. 07-011713-01 Advance Sheets Version

Before: Jansen, P.J., and Meter and Fort Hood, JJ.

JANSEN, P.J. (*dissenting*).

When defendant asked to represent himself in this case, the trial court summarily denied his request without ever inquiring into his reasons or attempting to establish whether his expressed desire for self-representation was unequivocal, knowing, intelligent, and voluntary. Therefore, I must respectfully dissent.

A criminal defendant's right to represent himself is implicitly guaranteed by the Sixth Amendment of the United States Constitution, US Const, Am VI;[1] *Faretta v California*, 422 US 806, 819-820; 95 S Ct 2525; 45 L Ed 2d 562 (1975), and explicitly guaranteed by the Michigan Constitution and Michigan statutory law, Const 1963, art 1, § 13; MCL 763.1. "The right to defend is personal," and it is therefore "the defendant . . . who must be free personally to decide whether in his particular case counsel is to his advantage. . . . [A]lthough he may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law.'" *Faretta*, 422 US at 834 (citation omitted). The right to self-representation is "fundamental" in nature,[2] and the erroneous denial of the right is a structural error requiring automatic reversal. *United States v Gonzalez-Lopez*, 548 US 140, 150; 126 S Ct 2557; 165 L Ed 2d 409 (2006); see also *People v Duncan*, 462 Mich 47, 52; 610 NW2d 551 (2000).

[1] The Sixth Amendment is applicable to the states through the Due Process Clause of the Fourteenth Amendment. *People v Willing*, 267 Mich App 208, 219; 704 NW2d 472 (2005); see also *Gideon v Wainwright*, 372 US 335, 341-342; 83 S Ct 792; 9 L Ed 2d 799 (1963).

[2] *Id.* at 817.

Before granting a criminal defendant's request to proceed pro se, the trial court must determine that the request is unequivocal and that the defendant's assertion of the right to self-representation is knowing, intelligent, and voluntary. *People v Russell*, 471 Mich 182, 190; 684 NW2d 745 (2004); *People v Williams*, 470 Mich 634, 642; 683 NW2d 597 (2004). The trial court must also substantially comply with MCR 6.005 by advising the defendant of the charge against him, the maximum possible prison sentence, any mandatory minimum sentence, and the risks of self-representation, and by offering the defendant the opportunity to consult with an attorney. *Russell*, 471 Mich at 190-191.

I fully acknowledge that the right to self-representation is not absolute and that the state may place reasonable conditions on a criminal defendant's right to represent himself. *Indiana v Edwards*, ___ US ___; 128 S Ct 2379, 2384; 171 L Ed 2d 345, 353 (2008). For instance, the state may appoint "standby counsel over [a] self-represented defendant's objection," may require a pro se defendant to "compl[y] with 'relevant rules of procedural and substantive law,'" and may insist, without violating the constitutional guarantee, that a pro se defendant refrain from "'abus[ing] the dignity of the courtroom'" and "'engag[ing] in serious and obstructionist misconduct.'" *Id.*, ___ US ___; 128 S Ct 2384; 171 L Ed 2d 353 (citations omitted). Indeed, the Michigan Supreme Court has specifically observed that before allowing a criminal defendant to continue without an attorney, the trial court must ensure that "the defendant's self-representation will not disrupt, unduly inconvenience, and burden the court and the administration of the court's business." *Russell*, 471 Mich at 190.

Moreover, I acknowledge that pro se representation is generally not "wise, desirable or efficient," *Martinez v Court of Appeal of California*, 528 US 152, 161; 120 S Ct 684; 145 L Ed 2d 597 (2000), and that there is a strong presumption against waiver of the right to counsel, *Michigan v Jackson*, 475 US 625, 633; 106 S Ct 1404; 89 L Ed 2d 631 (1986); see also *Johnson v Zerbst*, 304 US 458, 464; 58 S Ct 1019; 82 L Ed 1461 (1938).

Nonetheless, as noted previously, the trial court in this case made *no inquiry* into defendant's assertion of the right to self-representation. Without making any inquiry, it was *impossible* for the trial court to ascertain whether defendant was seeking to unequivocally, knowingly, intelligently, and voluntarily waive his right to an attorney. By summarily substituting its own decision for that of defendant—whether for the sake of expediency or for some other reason—the trial court effectively foreclosed any consideration of defendant's assertion of the right to proceed pro se, never reaching the merits of his request. If our trial courts are to be allowed to simply deny criminal defendants' requests to proceed pro se, without ever reaching the substance and merits of those requests, there will be little meaning left in the Sixth Amendment right to self-representation under *Faretta*, or in Michigan's constitutional guarantee that a litigant in the courts of this state may "defend his suit . . . in his own proper person . . . ." Const 1963, art 1, § 13.

I find persuasive the decision of the United States Court of Appeals for the Eleventh Circuit in *Dorman v Wainwright*, 798 F2d 1358, 1366 (CA 11, 1986). There, as in the case at bar, "the trial court never bothered to inquire whether [the defendant] was making a knowing and intelligent waiver of his right to counsel or was aware of the dangers and disadvantages of self-representation." *Id*. The *Dorman* Court explained that "[t]o invoke his Sixth Amendment right under *Faretta* a defendant does not need to recite some talismanic formula hoping to open the

eyes and ears of the court to his request." *Id*. Instead, the *Dorman* Court concluded that a defendant must simply state his request to the trial court and that the court "must then conduct a hearing on the waiver of the right to counsel to determine whether the accused understands the risks of proceeding pro se." *Id*.; see also *United States v McDowell*, 814 F2d 245, 250 (CA 6, 1987) (identifying a "model inquiry" to be made on the record "[i]n the future, whenever a federal district judge in this circuit is faced with an accused who wishes to represent himself in criminal proceedings"). Similarly, I conclude that the trial court was required to conduct a hearing on defendant's requested waiver of the right to counsel in the present case.

I recognize that the trial court in this case may have believed that defendant was merely seeking to delay trial or to obstruct the judicial process by requesting to represent himself. However, I conclude that the trial court was still under an obligation to honestly and reasonably entertain defendant's request and inquire into his reasons. Although the trial court's concerns in this regard may not have been without foundation, as the Iowa Supreme Court has observed, "'"even well-founded suspicions of intentional delay and manipulative tactics can provide no substitute for the inquiries necessary to protect a defendant's constitutional rights."'" *State v Martin*, 608 NW2d 445, 450 (Iowa, 2000), quoting *McMahon v Fulcomer*, 821 F2d 934, 943 (CA 3, 1987) (additional citation omitted).

Courts in several other jurisdictions have reached similar conclusions, holding that trial courts must at least minimally consider a criminal defendant's request to proceed pro se, even if the request is untimely or appears to be made for the purposes of delay. See *Tennis v State*, 997 So 2d 375, 379 (Fla, 2008) (holding that when a criminal defendant asserts the right to self-representation, "the trial court's failure to hold a *Faretta* hearing . . . to determine whether [the defendant can] represent himself is per se reversible error"); *Gladden v State*, 110 P3d 1006, 1010 (Alas App, 2005) (holding that even when the defendant merely "impliedly elected to proceed *pro se* by refusing to . . . hire an attorney," "that circumstance did not relieve the trial court of its obligation to ensure that [the defendant's] decision to forego the assistance of counsel was knowing and intelligent"); *State v Brown*, 342 Md 404, 414; 676 A2d 513 (1996) (stating that when a request for self-representation is made, "the court must conduct a waiver inquiry to ensure that any decision to waive the right to counsel is 'made with eyes open'") (citation omitted); *People v Windham*, 19 Cal 3d 121, 128; 560 P2d 1187; 137 Cal Rptr 8 (1977) (observing that even when a criminal defendant makes an untimely request for self-representation, "the trial court shall inquire *sua sponte* into the specific factors underlying the request thereby ensuring a meaningful record in the event that appellate review is later required"); *Rodriguez v State*, 982 So 2d 1272, 1274 (Fla App, 2008) (holding that "[w]here a defendant makes an unequivocal request to represent himself prior to the commencement of trial, a trial court is required to conduct a *Faretta* inquiry" and that "[t]he failure of the trial court to conduct such an inquiry constitutes reversible error"); *State v Weiss*, 92 Ohio App 3d 681, 685; 637 NE2d 47 (1993) (holding that "[e]ven when the waiver of counsel is implied by the defendant's purported delaying tactics, a pretrial inquiry as to the defendant's knowing and intelligent waiver of the right must be made").

I am compelled to conclude that the trial court's *failure* to consider defendant's request to represent himself in this case was tantamount to a *wrongful denial* of defendant's right to represent himself. Both the failure to consider a request to proceed pro se and the wrongful denial of a request to proceed pro se achieve the same result; both actions improperly foreclose a

defendant's fundamental constitutional right to self-representation. See *Faretta*, 422 US at 817, 819-820. I see no meaningful difference between the two. Because the trial court's wholesale failure to consider defendant's request to proceed without counsel in this case was tantamount to a wrongful denial of the right, I conclude that structural error occurred and automatic reversal is required. *Gonzalez-Lopez*, 548 US at 150; *McKaskle v Wiggins*, 465 US 168, 177 n 8; 104 S Ct 944; 79 L Ed 2d 122 (1984) (observing that the denial of the right to self-representation "is not amenable to 'harmless error' analysis" and that "[t]he right is either respected or denied; its deprivation cannot be harmless").

I would reverse.

/s/ Kathleen Jansen