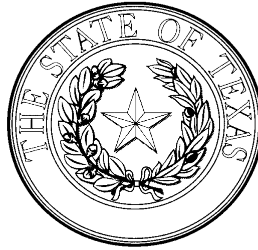
Opinion issued August 25, 2016



In The

Court of Appeals

For The

First District of Texas

NO. 01-15-00226-CR

WEYLIN W. ALFORD, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 177th District Court
Harris County, Texas
Trial Court Case No. 1450840

MEMORANDUM OPINION

Appellant, Weylin Wayne Alford, was indicted for aggravated assault against a public servant enhanced with a prior conviction. A jury convicted him of aggravated assault, found the enhancement allegation true, and sentenced him to 35

years in prison. In his sole issue on appeal, appellant argues that the trial court violated his constitutional right to self-representation.

We affirm.

Background

While appellant was an inmate in the Harris County Jail, the complainant, Detention Officer M. Lee, noticed that he could not see inside appellant's jail cell because the window had been covered by newspaper. Before entering the cell, the complainant summoned help from other officers. After opening the door to appellant's cell, the complainant saw appellant in the middle of the cell and noticed that the cell's lighting fixture had also been covered with newspaper. When the complainant entered the cell with pepper spray, appellant retreated to the corner of his cell and used his bed as cover. As the complainant attempted to remove the newspaper from the lighting fixture, appellant leaped and tried to tackle him to the ground. Appellant used a homemade knife, commonly referred to as shank, to stab the complainant multiple times.

The State indicted appellant for assault against a public servant enhanced with a prior conviction for possession of a controlled substance. Appellant pleaded not guilty and proceeded to trial. On February 20, 2015, before voir dire, appellant informed the trial court that he wanted to represent himself and the following exchange occurred:

Court: But, Mr. Alford, based on the way the last trial went, your admission to Deputy Ojeda that you had the shank on you—."

Appellant: That was the allegation, Your Honor.

Court: Okay. Based on—you represented yourself in the previous cause number. I don't have it in front of me. We can put that in the record later for appellate purposes, if necessary; but during that trial for burglary of a habitation, which is currently on appeal—and so the record is clear, too, so all parties who don't know, Mr. Youngblood, the appellate attorney for the defendant on the burglary of a habitation case—I don't know the status in front of the Court of Appeals—but recently filed an *Anders* brief on that there was no error, that there were no issues on appeal—on appeal. So I don't know if the Court has seen that, but an *Anders* brief was filed by Mr. Glenn Youngblood. That happened across my desk earlier, I believe, this week.

So, sir, based on the shank that was found on you in the holdover cell and your admission to Deputy Ojeda that you had it in here the day before, I revoked your ability to represent yourself and based on my—you waive your ability if you cannot handle yourself in the courtroom with proper decorum.

Appellant: Well, it didn't happen in the courtroom, Your Honor.

Court: Hold on, Mr. Alford. And based on your own admission to Deputy Ojeda that you

had it on you here in the courtroom while we were in trial—

Appellant: That's what he said.

Court: I understand that. Based on that admission, though, is why I revoked your ability to represent yourself, had Mr. Aguirre step in, who was standby counsel, to finish the trial. I am not comfortable with allowing you to represent yourself because you would potentially have more what are called weapons of convenience at your disposal, and you were not able to conduct yourself in what I believe was a proper way in the courtroom on the last trial. So I respectfully deny—

Appellant: May I say—

Court: —your request to represent yourself in this trial. Yes, sir?

Appellant: They searched me down day in/day out coming in this courtroom for the—like, the last maybe month and sometimes before then. I haven't had any shanks. I haven't had any problems, in like, the last two months, since the last previous allegation as far as this charge.

Court: Okay. Well, this charge is also about two months old and—actually almost three months old; and the allegation is that you threatened a public servant in the jail with a shank. That's the title of the—I mean, that's what's in the indictment. So based on the totality of the circumstances, I do not believe—as a security issue and also based

> on what happened in the last trial, I am not going to allow you to represent yourself, sir.

Self-Representation

In his sole issue on appeal, appellant argues that the trial court abused its discretion in denying his request for self-representation.

Standard of Review

We review the denial of an appellant's request for self-representation for an abuse of discretion. *See Chadwick v. State*, 309 S.W.3d 558, 561 (Tex. Crim. App. 2010) (discussing whether defendant was competent to proceed pro se). We view the evidence in the light most favorable to the trial court's ruling, and we will imply any findings of fact supported by the record and necessary to affirm the trial court's ruling when, as here, the trial court did not make explicit findings. *Id*. Because the trial court's decision to deny self-representation based on deliberately obstructive behavior turns on an evaluation of credibility and demeanor, we afford almost total deference to that decision. *See Chadwick*, 309 S.W.3d at 561.

Analysis

The Sixth and Fourteenth Amendments to the United States Constitution protect a defendant's right to self-representation in a criminal proceeding. *Moore v. State*, 999 S.W.2d 385, 396 (Tex. Crim. App. 1999) (citing *Faretta v. California*, 422 U.S. 806, 818–20, 95 S. Ct. 2525, 2532–33 (1975)). Once a defendant unequivocally asserts the right to self-representation, the trial court must admonish

the defendant about the dangers and disadvantages of waiving the right to counsel and proceeding pro se. *Blankenship v. State*, 673 S.W.2d 578, 583 (Tex. Crim. App. 1984) (citing *Faretta*, 422 U.S. at 835–36, 95 S. Ct. at 2541). It is "the trial court's duty to give the necessary explanations and warnings before ruling on his request." *Birdwell v. State*, 10 S.W.3d 74, 78 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd). When a trial court denies a defendant's "eleventh hour" request for new counsel, and "the accused unequivocally assert[s] his right to self-representation under *Faretta*, persisting in that assertion after proper admonishment, the court must allow the accused to represent himself." *Burgess v. State*, 816 S.W.2d 424, 428–29 (Tex. Crim. App. 1991).

"[A]n accused's right to self-representation is not absolute and unfettered."[1] *Wilson v. Mintzes*, 761 F.2d 275, 280 n.8 (6th Cir. 1985); *Kombudo v. State*, 148 S.W.3d 547, 553 (Tex. App.—Houston [14th Dist.] 2004), *judgment vacated on other grounds*, *Kombudo v. State*, 171 S.W.3d 888 (Tex. Crim. App. 2005). This "right to appear *pro se* exists to affirm the dignity and autonomy of the accused and to allow presentation of what may, at least occasionally, be the accused's best

---

[1] "Decisions of the federal courts of appeals and district courts do not bind Texas courts although they are received with respectful consideration." *Denton v. Department of Pub. Safety Officers Ass'n*, 862 S.W.2d 785, 791 n.4 (Tex. App.—Austin 1993, writ granted), *affirmed*, *Texas Dep't of Public Safety Officers Ass'n v. Denton*, 897 S.W.2d 757 (Tex. 1995). Texas courts are obligated to follow only higher Texas courts and the United States Supreme Court. *Penrod Drilling Corp. v. Williams*, 868 S.W.2d 294, 296 (Tex. 1993).

possible defense." *McKaskle v. Wiggins*, 465 U.S. 168, 176–77, 104 S. Ct. 944, 950 (1984). The right does not exist, however, to disrupt decorum of court, to abuse the judicial system, to manipulate the trial process, or to serve as a tactic for delay. *E.g.*, *United States v. Frazier–El*, 204 F.3d 553, 560 (4th Cir. 2000) (citing *Faretta*, 422 U.S. at 834 n.46, 95 S. Ct. at 2541 n.46); *see also United States v. Long*, 597 F.3d 720, 726 (5th Cir. 2010) (stating that right to proceed pro se may be waived by defendant's actions).

The U.S. Supreme Court has held that the "interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer." *Martinez v. Court of Appeal of Cal.*, 528 U.S. 152, 162, 120 S. Ct. 684, 691 (2000). And, as the U.S. Supreme Court has previously said in the context of the right to be present at trial, another important constitutional right:

> It is essential to the proper administration of criminal justice that dignity, order, and decorum be the hallmarks of all court proceedings in our country. The flagrant disregard in the courtroom of elementary standards of proper conduct should not and cannot be tolerated. We believe trial judges confronted with disruptive, contumacious, stubbornly defiant defendants must be given sufficient discretion to meet the circumstances of each case.

Illinois v. Allen, 397 U.S. 337, 343, 90 S. Ct. 1057, 1061 (1970). The Court held that, based on the record before it, removing the defendant from the courtroom was

"completely within" the trial court's discretion, given the defendant's disruptive behavior. *Id*. at 347, 90 S. Ct. at 1062–63.

Similarly, in the context of the right to self-representation, the U.S. Supreme Court has said that a defendant has the right "provided only that . . . he is able and willing to abide by rules of procedure and courtroom protocol." *McKaskle*, 465 U.S. at 173, 104 S. Ct. at 948. This is because, as is the case with other constitutional rights, "[t]he right to self-representation is not a license to abuse the dignity of the courtroom." *Faretta*, 422 U.S. at 834 n.46, 95 S. Ct. at 2541 n.46. Consequently, a defendant may forfeit the right to self-representation, and the court "may [thus] terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct." *Id*. A trial court may not deny the right to self-representation based simply on "predictions of likely recalcitrant behavior" or delay or disruption incidental to self-representation without a legal education. *Scarbrough v. State*, 777 S.W.2d 83, 92, 94 n.3 (Tex. Crim. App. 1989).

Appellant argues that the trial court abused its discretion when it denied him his right to self-representation because the trial court's "security concerns" are not a reason to deny self-representation. Appellant relies on *People v. Butler* to support this argument. *See* 219 P.2d 982 (Cal. 2009). In *Butler*, the trial court granted defendant's pretrial *Faretta* motion in a death penalty case but then revoked his self-represented status because of incidents of misconduct in jail that

created security risks. 219 P.3d at 986. On one occasion defendant had concealed a metal shank in his rectum prior to entering the courtroom. *Id*. at 989. The trial court subsequently granted defendant's renewed *Faretta* motion, but later revoked his self-represented status a second time after learning that jailhouse restrictions on defendant's privileges had prevented him from preparing for trial. *Id*. at 987. The second revocation was based on defendant's impaired ability to represent himself, not his prior misconduct. *Id*. The trial court even stated that defendant's instances of out-of-court misconduct were not a concern; the court could handle him in the courtroom. *Id*. at 989.

The Supreme Court of California concluded that restrictions on a pro se defendant to prepare for trial are not a "justification for depriving inmates of the right to represent themselves." *Id*. at 990. However, in finding the trial court had erred in terminating defendant's self-representation, the Supreme Court stated, "we need not and do not decide whether defendant's out-of-court misconduct might have justified the revocation of his *Faretta* right, because ultimately the court did not rely on that ground."[2] *Id*. at 989. Because the Supreme Court of California did

---

[2] In dicta, the Court majority acknowledged the trial court "had ample reason to be reluctant about defendant's self-representation" because he was "an obvious security risk, and safety precautions were justified both in the jail and the courtroom." *People v. Butler*, 219 P.3d 982, 989 (Cal. 2009). The Court further observed, however, "there was no showing that his [propria persona] status increased the risk in any way. Self-represented or not, defendant was going to be

not consider whether out-of-court misconduct would have justified a finding that appellant forfeited his right to self-representation, appellant's reliance on this case is misplaced.[3]

The State does not dispute that appellant unequivocally invoked his right to self-representation. Rather, the State argues that appellant does not have an absolute right to self-representation, and that because appellant had previously brought weapons inside the courtroom on multiple occasions, he forfeited his right to proceed pro se. We agree with the State.

Here, the trial court presided over appellant's previous trial[4] for burglary of a habitation,[5] which occurred four months before the instant trial for aggravated

---

housed in the jail, transported to and from the court and in attendance for his trial." *Id*.

[3] Notwithstanding the court's reluctance to address the issue in *Butler*, the Supreme Court of California had previously said that "serious and obstructionist out-of-court misconduct" that threatens to "subvert the 'core concept of a trial' or to compromise the court's ability to conduct a fair trial" may lead to forfeiture of the right to self-representation. *People v. Carson*, 104 P.3d 837, 484 (Cal. 2005).

[4] The State asks that we take judicial notice of the record from appellant's prior appeal for burglary of a habitation. *See Alford v. State*, 01–14–00822–CR, 2015 WL 5026147 (Tex. App.—Houston [1st Dist.] Aug. 25, 2015, pet. struck) (mem. op., not designated for publication). An appellate court may take judicial notice of its own records in a related proceeding involving the same or nearly the same parties. *See Turner v. State*, 733 S.W.2d 218, 221–22 (Tex. Crim. App. 1987); *Goodson v. State*, 221 S.W.3d 303, 304, n.2 (Tex. App.—Fort Worth 2007, no pet.). We take judicial notice of the prior appeal because appellant is the defendant in both appeals, the trial court's reasons for denying appellant's right to self-representation were based on events that happened during the previous appeal, and the events that the trial court relied on were testified to during both trials.

assault against a public servant. At the previous trial, the trial court allowed appellant to represent himself. After the jury began deliberations, the trial court stated:

> **Court**: All right. Mr. Alford, it's my understanding that when you were brought up this morning Deputy Ojeda, who is one of my regular court bailiffs, found on you what appears to be some pills, a piece of wire, about a, I would say, 5 to 6-inch homemade jail shank, in addition to some other torn clothing that was used to secure it to your leg and other things like that. In addition, speaking with Deputy Ojeda, he told me that your statement to him is that you've had it on you all of your court settings, which was—I don't know if that's true because I know, according to Deputy Ojeda, he personally searches you when he—when you've been on our docket, but you also stated that you had it on you yesterday. Based on that statement, sir, you have now forfeited your right to represent yourself. You are now in the courtroom as a regular defendant.
>
> . . .
>
> If you would like to take this issue up on appeal, you're welcome to do so. But at this time you are considered a very high risk and a very high threat to the safety of the people in this courtroom. I am not going to tolerate any outbursts from you, any movements that are not necessary or anything else.

---

[5] We affirmed appellant's conviction for burglary of a habitation. *See Alford*, 2015 WL 5026147.

The record from the punishment phase of appellant's trial for burglary of a habitation shows that Deputy R. Berrios testified that on January 27, 2014, he made a health and safety search inside appellant's jail cell. When he moved appellant's mattress, he noticed a hairbrush that had been made into a shank.

Deputy Ojeda, the bailiff for the trial court, explained that appellant would stay in a holding cell near the courtroom while waiting for his trial proceeding to begin. Before entering the courtroom, appellant would receive a quick pat-down. When Deputy Ojeda patted down appellant on October 2, 2014, he found a shank, some pills, and a sock with a hard, round end. Deputy Ojeda spoke with appellant, who said he had the shank "for his protection from other prisoners and other staff members in the jail," that he had the shank "on prior occasions, and yesterday was one of them," and that when appellant had come to court settings in the past, appellant had been very disruptive by "banging on the walls, banging on the doors, just being disruptive, being loud, talking loud. We have to go back there and just move him from the cell and send him back."

Sergeant Leachman testified that he searched appellant's jail cell on October 1, 2014, but did not find anything that appellant could have used to commit violence. After Deputy Ojeda discovered the shank on appellant's person, Sergeant Leachman searched appellant's cell on October 2 and found two shanks

hidden in the corner of appellant's "metal bunk." One of the shanks was 12 inches long.

During the punishment stage of the instant appeal, Deputy Ojeda testified again that on October 2, 2014, he retrieved appellant from the holding cell and conducted a pat-down search. The search revealed a large bulge near appellant's groin area, and appellant explained that he had a sore and bandaged it. After examining the area, Deputy Ojeda found a shank on the inside of appellant's clothes and an impact weapon fashioned from electronics, screws, and hard metal that had been rolled into a ball. According to Deputy Ojeda, appellant told him that he had brought the shank to the courtroom before. Sergeant Leachman also testified again during the punishment phase that he conducted a search of appellant's cell on October 2, 2014 and found two or three pieces of metal hidden in a corner. He believed the pieces of metal were intended to be used as homemade weapons.

The record shows that on October 2, appellant had been searched before entering the courtroom, and Deputy Ojeda discovered that appellant had concealed weapons. The trial court also heard from Deputy Ojeda that appellant had admitted to carrying weapons in the courtroom on previous occasions, and a subsequent search of appellant's jail cell revealed that appellant had additional homemade weapons.

Appellant's actions, both inside and outside the courtroom, demonstrate that he attempted to disrupt the decorum of the court and "abuse the dignity of the courtroom." *See Faretta*, 422 U.S. at 834 n.46, 95 S. Ct. at 2541 n.46. Appellant had been caught more than once with a weapon inside of his jail cell and later was found attempting to bring concealed weapons inside the courtroom. The trial court also heard that appellant admitted to bringing the concealed weapon inside the courtroom on other occasions. We conclude that appellant's act of bringing concealed weapons inside the courtroom shows that appellant "deliberately engage[ed] in serious and obstructionist misconduct" and that he abus[ed] the dignity of the courtroom." *See Faretta*, 422 U.S. at 834 n.46, 95 S. Ct. at 2541 n.46; *United States v. Vernier*, 381 F.App'x 325, 2010 WL 2340822, at *4 (5th Cir. 2010) (holding that trial court did not err when it found that defendant's attempts at escape and risk of violence posed threat to courtroom protocol of trial and thus defendant not unconstitutionally denied right to self-representation). We conclude that the trial court did not abuse its discretion in finding that appellant forfeited his right to self-representation.

Appellant also relies on *United States v. Dougherty* to argue that "[p]preemptive denial of the right to self-representation based on the fear of disruption that has not yet taken place was rejected pre-*Faretta*." *See* 473 F.2d 1113 (D.C. Cir. 1972). In *Dougherty*, the trial court initially appointed separate

counsel for multiple defendants. *Id.* at 1117. Five of the defendants later requested that they represent themselves, but the trial court denied the defendants' motions to proceed pro se. *Id*. at 1118–19. During the trial, disruptions occurred when one of the defendants mentioned the Vietnam War. *Id.* at 1120. The appellate court held that the trial court violated the defendant's right to self-representation because at the time that the trial court found that they did not have the right, no disruptions had occurred. *Id*. at 1126–27. However, the appellate court pointed out that "We assume, without deciding, that where there has been experience with the particular defendants that is plainly identifiable as disruptive in character, such as to overturn the premise of reasonable cooperation, and permit a finding of anticipatory breach and waiver, that would be a predicate for denying the *pro se* right." *Id*. at 1126.

Unlike in *Dougherty*, in which the trial court had no prior knowledge of the defendants and had only heard rumors of possible disruptions during the trial, the trial court here already had learned that appellant had carried weapons into the same courtroom a few months earlier. Thus, the trial court's decision to deny appellant his right to self-representation in the trial for aggravated assault of a public servant was not based on mere predictions of recalcitrant behavior, but rather it "witnessed this behavior firsthand." *See Lewis v. State*, 14–14–00779–CR, 2016 WL 93760, at *6 (Tex. App.—Houston [14th Dist.] Jan. 7, 2016, pet.

ref'd) (holding that trial court did not abuse its discretion in denying appellant's *Faretta* motion because trial court witnessed delay and calculated disruptions). We thus decline to hold that *Dougherty* is controlling here.

Finally, appellant argues that "the trial court should have taken extra security measures that would not have infringed on appellant's right to self-representation." Appellant gives multiple examples of what other trial courts have done to provide extra security. However, appellant cites no authority that the trial court must attempt extra security measures before it finds that appellant has forfeited his right to self-representation. Further, we agree with appellant's proposition that the trial court has "wide discretion in controlling the conditions of the courtroom," and therefore conclude that the trial court had discretion not to consider extra security measures before finding that appellant forfeited his right to self-representation.

We overrule appellant's sole issue on appeal.

Conclusion

We affirm the trial court's judgment.

Sherry Radack
Chief Justice

Panel consists of Chief Justice Radack and Justices Jennings and Lloyd.

Do not publish. TEX. R. APP. P. 47.2(b).