2-14-2018

State v. Dougherty Appellant's Reply Brief Dckt. 43583

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**NO. 43583**
Plaintiff-Respondent,	)	
	)	**BENEWAH COUNTY NO. CR 2014-956**
v.	)	
	)	
WILLIAM PATRICK DOUGHERTY, III,	)	**APPELLANT'S REPLY BRIEF**
	)	
Defendant-Appellant.	)	
	)	

REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BENEWAH

HONORABLE JOHN T. MITCHELL
District Judge

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STATEMENT OF THE CASE

Nature of the Case

William Dougherty, III, was charged with a single count of eluding a police officer. Prior to his trial, Mr. Dougherty's counsel successfully moved to withdraw (based on a breakdown of the attorney-client relationship) and Mr. Dougherty was left unrepresented. Ultimately, he was forced to go to trial *pro se* and was found guilty as charged. He also appeared *pro se* at his sentencing.

Mr. Dougherty contends that because the district court never gave him a *Faretta*[1] warning, or otherwise made any effort to determine whether he was knowingly, intelligently, and voluntarily waiving his right to counsel and exercising his right to represent himself, the district court violated his Sixth Amendment rights.

In response, the State asks this Court to affirm Mr. Dougherty's conviction. The State primarily argues that Mr. Dougherty *forfeited* his Sixth Amendment right to counsel through his "dilatory" conduct. Alternatively, it argues Mr. Dougherty knowingly, intelligently, and voluntarily *waived* his right to counsel by stating that he did not wish to receive traditional representation (but rather "hybrid" counsel).

For the reasons detailed below, the State's arguments have no basis in law or fact and should be rejected by this Court.

Statement of the Facts and Course of Proceedings

The factual and procedural histories of this case were previously articulated in Mr. Dougherty's Appellant's Brief and, therefore, are not repeated herein.

[1] *Faretta v. California*, 422 U.S. 806 (1975).

ISSUE

Did the district court violate Mr. Dougherty's Sixth Amendment right to counsel when it allowed his counsel to withdraw, leaving Mr. Dougherty unrepresented for trial and sentencing, without first administering a *Faretta* warning or otherwise ensuring that Mr. Dougherty was knowingly, intelligently, and voluntarily waiving his right to counsel and choosing to represent himself?

ARGUMENT

The District Court Violated Mr. Dougherty's Sixth Amendment Right To Counsel When It Allowed His Counsel To Withdraw, Leaving Mr. Dougherty Unrepresented For Trial And Sentencing, Without First Administering A *Faretta* Warning Or Otherwise Ensuring That Mr. Dougherty Was Knowingly, Intelligently, And Voluntarily Waiving His Right To Counsel And Choosing To Represent Himself

Mr. Dougherty contends that his Sixth Amendment right to counsel was violated when he was forced to go to trial and sentencing without the assistance of counsel even though he had never knowingly, intelligently, and voluntarily waived his right to counsel. In response, although the State acknowledges that it "bears the burden of proving that the defendant voluntary *waived* his Sixth Amendment rights" (Resp. Br., p.7 (emphasis added)), its primary argument seems to be that Mr. Dougherty *forfeited* his right to counsel through his "dilatory" conduct. (*See* Resp. Br., pp.6-11.) Alternatively, it argues that Mr. Dougherty waived his right to counsel simply by making it clear he did not want to be represented in the traditional sense, and that he wanted hybrid representation. (*See* Resp. Br., pp.12-16.) Neither argument has merit.

A. The State's Primary Argument—That Mr. Dougherty Essentially Forfeited His Right To Counsel By Making His Request For Counsel Too Late—Is A Meritless "Straw Man" Argument, Untethered From The Issue Actually Presented On Appeal, And Inconsistent With Controlling Precedent

The State focuses primarily on Mr. Dougherty's request for the assistance of counsel at the outset of his trial, and argues his "morning-of-trial request was merely dilatory," and, thus, properly denied. (Resp. Br., p.8.) This is a "straw man" argument, as it seeks to refute an argument Mr. Dougherty never made. Mr. Dougherty's argument is not about the failure of the district court to continue his trial, or any particular denial of a specific motion to appoint counsel; his argument is that he never knowingly, intelligently, and voluntarily waived his right to counsel, and so his Sixth Amendment right to counsel was violated throughout this case. (*See*

App. Br., pp.14-20.) Because the State's primary argument on appeal is intended to undercut an argument not even made, it should be disregarded as irrelevant.

Additionally, the State's argument is contrary to the controlling Constitutional standard. As was explained in Mr. Dougherty's opening brief (*see* App. Br., p.14), and conceded by the State in response (*see* Resp. Br., p.7), in order for the conviction of an unrepresented defendant to stand, it is the State's burden to prove that the defendant knowingly, intelligently, and voluntarily waived his right to counsel and chose to represent himself. *Iowa v. Tovar*, 541 U.S. 77, 88 (2004); *State v. Dalrymple*, 144 Idaho 628, 633 (2007). Instead of trying to meet its burden, the State argues that Mr. Dougherty *forfeited* his right to counsel by making his request too late, *i.e.*, on the eve of trial. (*See* Resp. Br., pp.6-11.) However, a forfeiture is not a waiver, and it certainly does not satisfy the Constitutional standard.

The definition of "waiver" is well-settled:

> Waiver is defined as the voluntary relinquishment of a known right. Thus, the accused not only must voluntarily manifest his intention to waive his right or rights but it must clearly appear that he is completely aware of the nature of the charge against him and is competent to know the consequences arising from his waiver of these rights. In this connection this court will indulge every reasonable presumption against a waiver of fundamental constitutional rights, and will not presume acquiescence in their loss.

State v. Thurlow, 85 Idaho 96, 103 (1962). *Accord Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) ("A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege."). On the other hand, to "forfeit" a right is to lose that right by operation of law owing to "some error, fault, offense, or crime." BLACK'S LAW DICTIONARY 650 (6th ed. 1990). "Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of the right, waiver is the intentional relinquishment or abandonment of a known right." *State v. Perry*, 150 Idaho 209, 225 (2010) (quoting *United States v. Olano*, 507 U.S. 725, 732-33 (1993)). Since a forfeiture is not a waiver, the State's contention that Mr. Dougherty essentially

forfeited his right to counsel (by failing to sooner make a request for counsel) does not begin to address the controlling standard. The State's primary argument should be disregarded for this reason as well.

B. The State Has Failed To Meet Its Burden Of Proving That Mr. Dougherty Knowingly, Intelligently, And Voluntarily Waived His Sixth Amendment Right To Counsel

In the alternative, the State attempts to address the argument actually presented on appeal—whether Mr. Dougherty knowingly, intelligently, and voluntarily waived his right to counsel. (Resp. Br., pp.11-16.) As to this issue, the State presents a host of attempted justifications for its contention that Mr. Dougherty validly waived his right to counsel. (Resp. Br., pp.11-16.) None have merit.

The State first argues that despite *Faretta*'s holding that a defendant must be warned of the dangers and pitfalls of self-representation before he can knowingly, intelligently, and voluntarily waive his Sixth Amendment right to counsel,[2] a simple advisement of Mr. Dougherty of his right to counsel actually sufficed in this case. (Resp. Br., p.12.) The State bases this argument on its misleading use of two cases—*Patterson v. Illinois*, and *Montejo v. Louisiana*, 556 U.S. 778, 786 (2009). (Resp. Br., p.12.) The State's selective quotation of these cases suggest that a mere apprisal of the right to counsel, as is required for a custodial interrogation under *Miranda v. Arizona*, 384 U.S. 436, 479 (1966), is adequate for a defendant to validly waive his Sixth Amendment right to counsel for *all purposes*. (*See* Resp. Br., p.12.) However,

[2] "Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" *Faretta*, 422 U.S. at 835 (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942)). *Accord Tovar*, 541 U.S. at 89 ("Warnings of the pitfalls of proceeding to trial without counsel . . . must be 'rigorous[ly]' conveyed.") (quoting *Patterson v. Illinois*, 487 U.S. 285, 298 (1988)) (alteration in original).

neither case supports that proposition. The State fails to mention that *Patterson* and *Montejo* both dealt with waivers of counsel for purposes of *custodial interrogations*, not trials or sentencings. This is a critical distinction. As *Tovar* made clear, "at earlier stages of the criminal process, a less searching or formal colloquy may suffice." 541 U.S. at 89. In contrast, in order for a defendant to waive the right to counsel for *trial*, a more formal, more searching colloquy is required: "Warnings of the pitfalls of proceeding to trial without counsel . . . must be 'rigorous[ly]' conveyed." *Id.* (quoting *Patterson*, 487 U.S. at 298). Indeed, this much was made clear in *Patterson* itself, when it held: "recognizing the enormous importance and role that an attorney plays at a criminal trial, we have imposed the most rigorous restrictions on the information that must be conveyed to a defendant, and the procedures that must be observed, before permitting him to waive his right to counsel at trial." 487 U.S. at 298.

Next the State argues that Mr. Dougherty *did* receive an adequate *Faretta* warning. (Resp. Br., p.12.) In support of this argument, it selectively quotes from the transcript of Mr. Dougherty's district court arraignment. (Resp. Br., p.12 (quoting 9/12/14 Tr., p.15, L.12 – p.16, L.9).) At that hearing, which was held more than ten months before Mr. Dougherty's trial, the court appeared to misunderstand what Mr. Dougherty was asking for when he requested hybrid counsel and, during a period of cross-talk, started giving Mr. Dougherty a partial warning as to the risks of self-representation. The full context of the relevant portion of the exchange was as follows:

> THE COURT: Listen, listen, listen. Do you want me to appoint you an attorney or not? Yes or no.
>
> THE DEFENDANT: It depends on what capacity. I can only—
>
> THE COURT: As your attorney.
>
> THE DEFENDANT: As my—

THE COURT: Do you want an attorney or not?

THE DEFENDANT: It's not possible for me to accept an attorney. I can't accept a benefit.

THE COURT: That's fine. You understand the pitfalls of proceeding on your own?

THE DEFENDANT: I'm demanding assistance of counsel because—

THE COURT: Listen—

THE DEFENDANT: —I can't effectively—

THE COURT: —you said you didn't want me to appoint you an attorney. I'm not going to do it if you don't want one. I want to explain—

THE DEFENDANT: Let's clarify—

THE COURT: —to you that there are certain problems in you representing yourself. If you're not trained in the law, you can end up making procedural mistakes an attorney could help you with that you would not otherwise know you are making.

THE DEFENDANT: Yes. Let's clarify. I'm—I am asking you to provide assistance of counsel. I'm not—I cannot have an attorney re-present me or give power of attorney over to some other individual. I'm not allowed to do that.

(9/12/14 Tr., p.15, L.6 – p.6, L.9.) There are a host of reasons why this exchange was inadequate under *Faretta*. First, the warning given here was not as robust as that which was deemed to suffice in *Faretta* itself. (*Compare* 9/12/14 Tr., p.15, L.21 – p.16, L.4 (district court in this case cautioning only that Mr. Dougherty's lack of legal training could end up in him "making procedural mistakes" without realizing he was making those mistakes), *with Faretta*, 422 U.S. at 807-08 & n.2, 835-36 & n.47 (indicating Mr. Faretta, who was literate and competent, had a high school education and had previously represented himself, and had been warned that he was making a mistake by representing himself, as he would be required to follow all of the "'ground rules' of trial procedure" and would be held to the same standards as a lawyer even though he did not have the skills of a lawyer).) Although the Supreme Court has not "prescribed any formula

or script to be read to a defendant who states that he elects to proceed without counsel," *Tovar*, 541 U.S. at 88, that does not mean that just any warning will automatically suffice. The warning required in an individual case "will depend on a range of case-specific factors, including the defendant's education or sophistication, the complex or easily grasped nature of the charge, and the stage of the proceeding," and, as noted above, before a defendant can be left to his own devices for purposes of *trial*, "he must be warned *specifically* of the hazards ahead." *Id*. at 88-89 (emphasis added). Here, the court had virtually no information as to Mr. Dougherty's education or sophistication[3] when it gave its truncated warning and, in fact, wondered aloud whether it should order a mental health evaluation for him. (*See* 9/12/14 Tr., p.17, L.15 – p.18, L.10.) Further, the only warning he got was that he could make procedural mistakes; he was never told he would be held to the same standards as a lawyer, or that it was a mistake to proceed *pro se*. (*See* 9/12/14 Tr., p.15, L.21 – p.16, L.4.)

Second, the court's warning was not responsive to the request Mr. Dougherty was making of the court (for "the assistance of counsel"), and it was administered partially during a period of cross-talk. Thus, it is unlikely Mr. Dougherty even heard, much less understood, the court's truncated warning. Indeed, where the defendant believes the court is going down the wrong road, is focused on trying to redirect the court back to his actual concerns, and is even talking at the same time as the judge, he is not in a position to understand and process the court's warning even if he hears it.

Third, the court's partial warning was given more than four months before private counsel was allowed to withdraw (leaving Mr. Dougherty unrepresented), and more than ten

[3] At his first appearance, Mr. Dougherty told the presiding magistrate that he needed assistance in navigating the criminal justice system because he was "not sophisticated" and was "a high school dropout . . . ." (8/11/14 Tr., p.12, Ls.13-20.)

months before he was forced to go to trial *pro se*. Thus, the efficacy of any warning conveyed was diminished by the passage of time. The Idaho Supreme Court has held that the district court's warnings need not necessarily be contemporaneous with the waiver of the right to counsel (although "contemporaneous *Faretta* warnings are perhaps the most prudent means to ensure the defendant's grasp of the disadvantages of self-representation"), as the record will be evaluated as a whole to determine whether they were effective and the defendant's decision to proceed *pro se* was knowing, intelligent, and voluntary. *Dalrymple*, 144 Idaho at 634. In that case, it held that extensive *Faretta* warning given six weeks prior to trial were adequate to show a valid waiver at trial. *Id*. But here the warning was not extensive; it was abbreviated. And the warning was not given shortly before trial; it was given at the arraignment—more than ten months before trial. Under the totality of the circumstances, Mr. Dougherty did not receive an adequate warning of the risks of proceeding *pro se*, as is required by *Faretta* and its progeny.

The State's focus on *Faretta* though, misses the point. This is not a case where the defendant chose to go *pro se* and then later argued that he did not know what he was doing in making that decision because he was not warned of the dangers of self-representation. Here, Mr. Dougherty *never chose to go pro se at all*. Over and over again, he made it clear that he did not want to go without the assistance of counsel. Thus, the failure of the district court to give the warnings required by *Faretta* is just one small piece of the State's inability to show that Mr. Dougherty knowingly, intelligently, and voluntarily waived his Sixth Amendment right to counsel. Indeed, since Mr. Dougherty never waived his right to counsel at all, this Court need not even reach the question of whether any such waiver was sufficiently informed by an adequate *Faretta* warning. Never once did Mr. Dougherty say he wanted to represent himself.

In fact, he made it patently clear that was *not* what he wanted, as he requested (or demanded) "the assistance of counsel" at every single step of the way.

The State reasons that because Mr. Dougherty did not want to be "represented" by counsel owing to a religious objection, that sentiment, in and of itself, shows a knowing, intelligent, and voluntary waiver of his Sixth Amendment rights. (Resp. Br., pp.13-16.) This argument, however, misses the mark. First and foremost, it is illogical. While Mr. Dougherty clearly did not want to be represented in the traditional sense, it is equally apparent that he did not want to be left *pro se*. (*See, e.g.*, 9/12/14 Tr., p.14, L.15 – p.15, L.2 (explaining that he could not have an attorney represent him, but he desired "the assistance of counsel").) Where Mr. Dougherty clearly did not want either of the two options with which he was repeatedly presented, it cannot be said that by rejecting one option he necessarily embraced the other.

The fundamental problem overlooked by the State is that Mr. Dougherty apparently believed that the Sixth Amendment's guarantee of "the assistance of counsel" entitled him to hybrid counsel ("co-counsel"). While his belief that he had a Constitutional right to such hybrid representation may have been mistaken,[4] that belief nevertheless impacted his decisions and actions to the point where they cannot be construed as manifesting a knowing, intelligent, and

[4] In *dicta* in *McKaskle v. Wiggins*, the Supreme Court stated, "*Faretta* does not require a trial judge to permit 'hybrid' representation of the type Wiggins was actually allowed." 465 U.S. 168, 183 (1984). However, it also made it clear that such hybrid representation is constitutionally permissible if a court chooses to allow it: "Participation by counsel with a *pro se* defendant's express approval is, of course, constitutionally unobjectionable." *Id*. at 182. And such a practice is not unheard of in Idaho. *See, e.g., State v. Langley*, 110 Idaho 895, 896-97 (1986) (discussing the fact that the defendant was allowed to go *pro se* and was appointed an attorney as a "legal advisor," but that the "advisor" was allowed to address the court regarding a motion to continue the trial). *See also, e.g., Lira-Lopez v. State*, 2013 WL 6009148 (Idaho Ct. App. Jul. 25, 2013) (unpublished) (quoting Ninth Circuit precedent for the proposition that the decision to provide a defendant with a form of hybrid representation—co-counsel or advisory counsel—is reviewed for an abuse of discretion); *Johnson v. State*, 2012 WL 9490829 (Idaho Ct. App. Feb. 3, 2012) (unpublished) (same).

voluntary waiver. As far as Mr. Dougherty knew, he was not facing a binary choice—traditional representation or self-representation; he believed he had at least three options—traditional representation, hybrid representation, or self-representation. (*See, e.g.*, 8/11/14 Tr., p.9, Ls.19-22 (responding to the court's question of whether he wanted an attorney to represent him with, "Well, there's different capacities"); 9/12/14 Tr., p.15, Ls.6-18 (responding to the court's question of whether he wanted an attorney with, "It depends on what capacity," and going to explain that he could not accept traditional representation, but wanted "the assistance of counsel").) Thus, Mr. Dougherty's rejection of traditional representation cannot be viewed as an embrace of self-representation; as far as he knew, there was at least one remaining option (hybrid representation) and that was the option he was choosing.

The State has failed to show that Mr. Dougherty ever waived his Sixth Amendment right to counsel and chose to represent himself, much less that he did so knowingly, intelligently, and voluntarily.

CONCLUSION

For the reasons set forth above, and in his Appellant's Brief, Mr. Dougherty respectfully requests that this Court vacate his conviction and remand his case to the district court for a new trial.

DATED this 14th day of February, 2018.

_____/s/_____
ERIK R. LEHTINEN
Chief, Appellate Unit

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 14th day of February, 2018, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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