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NO. COA08-199

NORTH CAROLINA COURT OF APPEALS

Filed: 16 December 2008

STATE OF NORTH CAROLINA

v.

Henderson CountyNos.  
05 CRS 6239-42

DENNIS PATTON

# Court of Appeals

Appeal by defendant from an order entered 23 October 2007 by Judge Mark E. Powell in Henderson County Superior Court. Heard in the Court of Appeals 27 August 2008.

# Slip Opinion

*Attorney General Roy Cooper, by Assistant Attorney General Catherine F. Jordan, for the State.*

*North Carolina Prisoner Legal Services, by Hoang V. Lam, for defendant-appellant.*

CALABRIA, Judge.

Dennis Patton ("defendant") appeals the Honorable Mark E. Powell's ("Judge Powell") order denying defendant's Motion for Appropriate Relief. In the motion defendant was seeking an order to vacate his judgments because he believes he was deprived of his constitutional right to self-representation. Defendant argues that he was provided ineffective assistance of appellate counsel, who failed to raise this issue on appeal. We affirm.

Prior to defendant's trial, defendant complained to the presiding judge, the Honorable James U. Downs ("Judge Downs"), regarding his appointed counsel. After a lengthy statement regarding his counsel's alleged ineffective preparation, the defendant requested new counsel. When questioned in regard to his preparation, and his communication with the defendant, trial counsel indicated to the court that he provided discovery to defendant regarding these charges, met with defendant monthly for the nine months defendant had been incarcerated prior to trial, and discussed with defendant the evidence specific to the charges. Then the following colloquy took place:

DEFENDANT: Your Honor, can he go ahead and just, I'll just represent myself then?

THE COURT: Sir?

DEFENDANT: Because I'm talking about I'm more scared of him than I am the sentencing. I'm talking about the possibility of getting sentenced by the jury.

THE COURT: Do you want to represent yourself?

DEFENDANT: Yeah. I'm talking about I ain't got - I ain't got nothing. You sitting here and saying -

THE COURT: First of all, you better settle down.

DEFENDANT: Yes, sir.

THE COURT: And second of all, if you want to represent yourself I'll grant that wish, but I'm going to leave him there with you to at least discuss what to do before you put your foot in a deep hole.

DEFENDANT: Your Honor, I'm already in a deep hole. He haven't told me nothing.

THE COURT: Hold the jury.

DEFENDANT: He hasn't told me nothing, Mr. Downs. That's what I'm sitting here telling you. He hasn't told me nothing. That's what I'm saying. I'm talking about I ain't going to sit here and waste the courtroom's time while -

THE COURT: He will remain your counsel through this case. If you want to do the questioning and what not, I'll consider that at such time as when we come to your time to do it.

DEFENDANT: I can't do that. I don't even know the evidence that's been brought up against me.

THE COURT: Well, he said he discussed it with you.

DEFENDANT: I mean, he just discussed it with me today. That's my good word; he just discussed it with me today. I ain't got no reason to lie about nothing. I been here nine months. He just discussed it with me today. That's my good word. He just discussed it with me today.

. . . .

THE COURT: I've heard enough. Bring in the jury.

Assigned counsel continued to represent defendant throughout trial. On 1 June 2006, the jury returned verdicts finding defendant guilty of trafficking in methamphetamine by possession, trafficking in methamphetamine by transportation, trafficking in cocaine by possession, and trafficking in cocaine by transportation. The court imposed four consecutive sentences to

be served in the North Carolina Department of Correction: two sentences of 70 to 84 months, and two sentences of 35 to 42 months. Defendant appealed.

On appeal, appellate counsel argued that Judge Downs erred in denying defendant's request for new counsel. This Court overruled this assignment of error in an unpublished decision. *State v. Patton*, COA06-1710, slip op. at 4 (filed 3 July 2007). Appellate counsel did not assign as error the trial judge's denial of defendant's request to represent himself.

On 8 October 2007, defendant filed a motion for appropriate relief in Henderson County Superior Court asking the trial court to vacate his convictions because he was deprived of his constitutional right to self-representation. Defendant argued that his appellate counsel provided ineffective assistance in failing to raise this issue on appeal, and for this reason the motion was not subject to procedural default. The trial court denied the motion.

Defendant first argues that the trial court's finding that "when the trial judge stated that he would let the Defendant 'do the questioning and what not,' the Defendant replied 'I can't do that'" is not supported by competent evidence. We disagree.

"When a trial court's findings [of fact] on a motion for appropriate relief are reviewed, these findings are binding if they are supported by competent evidence and may be disturbed only upon a showing of manifest abuse of discretion." *State v. Lutz*, 177 N.C. App. 140, 142, 628 S.E.2d 34, 35 (2006). "[I]rrelevant

findings in a trial court's decision do not warrant a reversal of the trial court." *State v. Hernandez*, 170 N.C. App. 299, 305, 612 S.E.2d 420, 424 (2005).

The following evidence supports the challenged finding of fact: (1) defendant asked "[y]our Honor, can he go ahead and just, I'll represent myself then"; (2) the trial court stated "[i]f you want to do the questioning and what not, I'll consider that at such time as when we come to your time to do it"; and, (3) defendant stated "I can't do that." Competent evidence supported the court's finding of fact.

Defendant argues that while the finding states that the judge said he would let the defendant do the questioning, the judge had actually only said he would consider doing so. Defendant argues that this is reversible error. We disagree. Any discrepancy between whether the trial court stated defendant would be allowed to do the questioning or whether the court would consider allowing defendant to do the questioning is immaterial and irrelevant. Defendant failed to show a manifest abuse of discretion occurred when the trial court entered this finding. This assignment of error is overruled.

Defendant's remaining assignments of error require this Court to determine whether defendant clearly and unequivocally requested to proceed *pro se* and if so, did he later withdraw that request. If defendant clearly and unequivocally requested to proceed *pro se* and never withdrew that request, defendant's motion for appropriate relief was not subject to procedural default.

As an initial matter, defendant argues the court's finding of fact that defendant was not able to represent himself, is not a finding of fact, but instead a conclusion of law. Findings of fact are binding on appeal if supported by competent evidence. Conclusions of law are reviewed *de novo*. *Lutz*, 177 N.C. App. at 142, 628 S.E.2d at 35.

"As a general rule . . . any determination requiring the exercise of judgment or the application of legal principles is more properly classified a conclusion of law." *In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997) (internal citations and quotations omitted). The challenged finding states: "[t]hat the clear implication of the Defendant's statement is that he was not able to represent himself." This finding requires the exercise of judgment and the application of legal principles to reach its conclusion and is more accurately considered a conclusion of law and is reviewable *de novo* by this Court.

This Court has held that the statements by a defendant that he did not know how to question jurors or prepare an opening statement "though demonstrating [] lack of legal skills, do not equate to a motion or request to withdraw his previous waiver." *State v. Hyatt*, 132 N.C. App. 697, 701, 513 S.E.2d 90, 93 (1999). The United States Supreme Court has held that defendant's legal knowledge is not relevant to the determination of whether he knowingly exercises his right to self-representation. *Faretta v. California*, 422 U.S. 806, 836, 45 L. Ed. 2d 562, 582 (1975). To

the extent the trial court's conclusion relied on defendant's legal acumen, this was error.

Despite the trial court's erroneous reasoning we find no error in its ruling since defendant never clearly asserted his right to proceed *pro se*. The right to proceed *pro se* must be requested clearly and unequivocally. *Id.* at 835, 45 L. Ed. 2d at 582.

[T]his rule is required to prevent defendants from manipulating trial courts by recording an equivocal request at trial and then arguing on appeal, as appropriate, either that they have been denied the right to represent themselves or that they did not make a knowing waiver and have therefore been denied the right to counsel.

*State v. Williams*, 334 N.C. 440, 454, 434 S.E.2d 588, 596 (1993) (Vacated on other grounds).

Defendant argues that his wish to represent himself was clearly and unequivocally requested because during the trial and the appellate process different counsel and judges have made notes in their briefs and opinions that defendant asked to represent himself. *Williams* and *State v. McGuire*, 297 N.C. 69, 254 S.E.2d 165 (1979), are instructive on this issue.

In *Williams*, the defendant indicated that his lawyers had not communicated with him regarding the specifics of his case, and had not provided him information he needed to assist in his own defense. The trial judge provided him the option to either continue with appointed counsel or represent himself. Provided those choices the defendant responded "[y]ou stated that, that there is no other way that I could have no other lawyers . . . But

what if I choose to represent myself?" The judge then questioned the defendant on his ability to conduct his own defense, and advised defendant against self-representation. The defendant replied "I choose to represent myself." *Williams*, 334 N.C. at 452, 434 S.E.2d at 595. In the following session the judge again asked defendant if he wished to represent himself and the defendant again replied that he did. The defendant then went on to express his dissatisfaction with his appointed counsel. *Id.* at 453, 434 S.E.2d at 595-96.

The Court held that the defendant had not clearly and unequivocally requested to proceed *pro se* even though defendant had twice specifically stated "I choose to represent myself." The Court held "when this request is viewed in the context of his other statements, it is apparent that defendant's primary desire was to ensure adequate representation by counsel, and that he never took a firm position on whether to proceed *pro se*." *Id.* at 456, 434 S.E.2d at 597. The Court did not hold that defendant initially made a clear and unequivocal statement requesting to proceed *pro se*, and later withdrew his earlier request. The Court held that defendant's conduct over two sessions of the trial was not clear and unequivocal despite his statements during the first session.

In *McGuire*, the defendant, prior to the beginning of trial, made alternating requests to have new counsel and to represent himself. *McGuire*, 297 N.C. at 82-83, 254 S.E.2d at 173-74. Then again, in the middle of the trial defendant again asked to



represent himself. *Id.* at 84, 254 S.E.2d at 174. The Court held his requests were ambiguous and overruled his assignment of error. *Id.* at 84, 254 S.E.2d at 175.

The facts in the present case are not unlike those in *Williams* and *McGuire*. The defendant wavered between requesting new counsel and requesting to proceed *pro se*. If a defendant waivers between a request for new counsel and a request for self-representation, then his request for self-representation is not clear and unequivocal. "Of the [right to counsel and right to proceed *pro se*] the right to counsel is preeminent and hence, the default position." *State v. Walters*, 182 N.C. App. 285, 292, 641 S.E.2d 758, 762 (2007).

Since we find that defendant did not clearly and unequivocally request to proceed *pro se* we find that he was not prejudiced by appellate counsel's failure to raise this issue on appeal. The trial court did not err in dismissing defendant's motion for appropriate relief as procedurally barred and its order is affirmed.

Affirmed.

Judges TYSON and ELMORE concur.

Report per Rule 30(e).