IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

LEWIS AARON COOK,	)	
Appellant,	)	
-vs.-	)	**M-2001-174**
THE STATE OF OKLAHOMA,	)	
Appellee.	)	

ACCELERATED DOCKET ORDER

Following a jury trial in the District Court of Tulsa County, Case No. CM-2000-3012, before the Honorable Allen Klein, Special Judge, Appellant was found guilty of Unlawful Possession of Paraphernalia (crack pipe). Pursuant to the jury's recommendation, Judge Klein sentenced Appellant to one year in jail and a $1,000.00 fine, the maximum punishment allowed for this offense. From his Judgment and Sentence, Appellant has perfected this appeal.

The appeal was regularly assigned to the Court's Accelerated Docket under Section XI of the *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2001). Oral argument was held on February 28, 2002, and the Court duly considered Appellant's six propositions of error raised upon appeal:

Proposition I

The trial court erred in changing the method used to select the jury in the middle of jury selection by allowing the State to waive a peremptory challenge and choosing the panel himself.

Proposition II

The trial court denied Appellant's Sixth Amendment rights by not allowing Appellant to represent himself pro se.

Proposition III

The trial court denied Appellant's Sixth Amendment rights by forcing him to choose between his constitutional right to bond or hiring private counsel and not allowing him to discharge his privately retained counsel.

Proposition IV

The trial court denied Appellant his Oklahoma constitutional rights, statutory rights and right to due process by failing to rule on Mr. Cook's application to proceed pro se on appeal.

Proposition V

The trial evidence was insufficient to prove beyond a reasonable doubt that Mr. Cook possessed drug paraphernalia.

Proposition VI

The trial court erred in failing to instruct the jury on the limited purpose of impeachment evidence by prior convictions.

After hearing oral argument and after a thorough consideration of Appellant's propositions of error and the entire record before us on appeal, by a vote of three (3) to two (2) (P.J. Lumpkin and J. Lile voting to affirm), the Court reverses Appellant's conviction and remands for a new trial. The Court bases its decision upon Appellant's Propositions II and III, which urge that Appellant was denied his right to self-representation.

It is a "settled rule that an individual has a fundamental right to self-representation at all stages of a criminal proceeding."[1] "Denial to the right to self-representation requires automatic reversal."[2] "The right is either respected or denied; its deprivation cannot be harmless."[3]

In Appellant's matter, formal prosecution began with the State's filing of the Information on August 18, 2000. The record indicates that from the time arraignment was held upon this Information, Appellant continuously requested to represent himself. The first transcribed proceeding was a September 13, 2000, hearing before the Honorable Todd Singer, Special Judge. The hearing was on a motion by the State to strengthen Appellant's bond. Appellant requested to

[1] *McClellan v. State*, 1988 OK CR 118, ¶ 13, 757 P.2d 397, 399.

[2] *Coleman v. State*, 1980 OK CR 75, ¶ 4, 617 P.2d 243, 247 (concurring opinion of Cornish, P.J.).

[3] *McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8, 104 S.Ct. 944, 951 n.8, 79 L.Ed. 2d 122 (1984)

proceed pro se. After hearing from the State as to why bond should be increased, Judge Singer briefly explained some of the criteria relevant to fixing a bail amount and then asked Appellant to respond.

In attempting to reply, Appellant began to testify as to matters that Judge Singer deemed irrelevant. After twice attempting to get Appellant back on track, Judge Singer declared:

> No. Once again, if you're going to be your own counsel, and that's why I think you probably need a lawyer and I'm probably going to refuse to let you go forward now. Because I'm convinced by the virtue of the way you've argued this case, that you would do yourself harm in front of a jury. I'm convinced of that.

(9-13-00 Tr. 13.) Judge Singer concluded, "I'm denying your request to have a—to represent yourself." Finding Appellant did not qualify for court-appointed counsel, Judge Singer directed Appellant to hire an attorney.

As ordered, Appellant retained counsel but continued to express his desire to represent himself. In a hearing upon a motion to suppress before the Honorable Millie Otey, Special Judge, her Honor denied Appellant's request to represent himself. Judge Otey's decision was based primarily upon the circumstance that Judge Singer had ordered Appellant to retain counsel and that retained counsel was present and ready to represent Appellant. At trial, Judge Klein would deny Appellant's right to represent himself based upon the prior rulings of Judges Singer and Otey.

For a defendant to waive his right to counsel and proceed pro se, it is necessary that the defendant be competent,[4] as well as fully informed about the ramifications of waiving his right to counsel.[5] Possession of legal prowess is not

---

[4] "[T]he competence that is required of a defendant seeking to waive his right to counsel is the competence to *waive the right*, not the competence to represent himself." *Godinez v. Moran*, 509 U.S. 389, 399, 113 S.Ct. 2680, 2687, 125 L.Ed. 2d 321 (1993).

[5] [T]he trial court should determine that the defendant is making a waiver of his right [to counsel] in a voluntary, knowing and intelligent manner. The trial judge must clearly explain

a requirement for a valid waiver.[6] Although leave granted a defendant to represent himself may be revoked when self-representation results in disorderly or disruptive conduct, refusal to grant leave from the start cannot be based upon just the possibility such conduct will occur.[7]

In Appellant's matter, Judge Singer made no finding that Appellant was intentionally being disruptive or disorderly, nor did he specifically find Appellant was unable to conform to relevant rules of law and procedure. Instead, Judge Singer denied Appellant of the right to represent himself upon a fear that Appellant would do himself harm. The foregoing reveals that such is not a valid ground for denying a defendant leave to proceed pro se.

---

to the defendant the inherent disadvantages in such a waiver, including a lack of knowledge and skill as to rules of evidence, procedure and criminal law."

Coleman at ¶ 8, 617 P.2d at 246 (citation omitted).

[6] In *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed. 2d 562 (1975), we held that a defendant choosing self-representation must do so "competently and intelligently," but we made it clear that the defendant's "technical legal knowledge" is "not relevant" to the determination whether he is competent to waive his right to counsel, and we emphasized that although the defendant "may conduct his own defense ultimately to his own detriment, his choice must be honored." Thus, while "[i]t is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts," a criminal defendant's ability to represent himself has no bearing upon his competence to choose self-representation.

Moran, 509 U.S. at 399-400, 113 S.Ct. at 2687 (citations omitted). "Lack of knowledge of the law is not a valid reason for the trial court to refuse to grant a defendant's motion [to represent himself]." *Coleman* at ¶ 5, 617 P.2d at 245. *See also, People v. Ward,* 567 N.E.2d 642, 649 (Ill. App. Ct. 1991) (The "right [to self-representation] may not be thwarted by the trial court's opinion that defendant's decision is ill-advised, unwise, or unsound, however correct that opinion may be.").

[7] "'The possibility that reasonable cooperation may be withheld, and the right later waived, is not a reason for denying the right of self representation at the start.'" *Coleman* at ¶ 5, 617 P.2d at 245 (quoting *United States v. Dougherty,* 473 F.2d 1113, 1126 (D.C. Cir. 1972)). *See also Faretta v. California,* 422 U.S. 806, 834 n.46, 95 S.Ct. 2525, 2541 n.46, 45 L.Ed. 2d 562 (1975) ("[T]he trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct. . . . The right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law.").

When a trial court is confronted with a pro se defendant who is engaging in disruptive behavior, the judge should warn the defendant that his behavior might result in a waiver of the right to represent himself.[8] The record before us does not reveal the trial court gave any such warning to Appellant.

In *People v. Ward,* 567 N.E.2d 642 (Ill. App. Ct. 1991), the court set forth a suggested list of ten areas about which a defendant should be informed if he is wanting to proceed pro se.[9] We would commend use of this list to trial judges

---

[8] "This is not to say that a criminal defendant may not be denied the right to self-representation if he persists in disorderly, disruptive, and disrespectful behavior after a judge has warned him that such conduct may constitute a waiver of his right." *Coleman* at ¶ 5, 617 P.2d at 245.

> Potentially disruptive defendants, like all defendants, have the right to represent themselves if counsel is validly waived. Whenever a defendant seeks to represent himself, and particularly when he may be disruptive, standby counsel should be appointed. The court should explain to the defendant the standards of conduct he will be expected to observe. If the defendant misbehaves, he should be warned that he will be removed from the court, his right to represent himself will be considered waived, and the trial will continue in his absence with standby counsel conducting the defense.

Commonwealth v. Africa, 353 A.2d 855, 864 (Pa. 1976) (footnotes omitted). *See also Dougherty,* 473 F.2d at 1125 ("a potentially unruly defendant may and should be clearly forewarned that deliberate dilatory or obstructive behavior may operate in effect as a waiver of his *pro se* rights").

[9] The list was abstracted from 2 Wayne R. LaFave & Jerold H. Israel, Criminal Procedure §§ 11.5(a), (b), (c), at 42-45 (1984). The Appellate Court of Illinois wrote:

> To ensure that a defendant's request for self-representation is an intelligent and knowing waiver of his right to counsel, we agree with Professors Wayne R. LaFave and Jerold H. Israel that it would be desirable for a trial court to inform defendant of the following matters:
>
> (1) presenting a defense is not a simple matter of telling one's story, but requires adherence to various technical rules governing the conduct of a trial;
>
> (2) a lawyer has substantial experience and training in trial procedure and the prosecution will be represented by an experienced attorney;
>
> (3) a person unfamiliar with legal procedures (a) may allow the prosecutor an advantage by failing to make objections to inadmissible evidence, (b) may not make effective usage of such rights as the *voir dire* of jurors, and (c) may make tactical decisions that produce unintended consequences;
>
> (4) the defendant proceeding *pro se* will not be allowed to complain on appeal about the competency of his representation;
>
> (5) the effectiveness of his defense may well be diminished by his dual role as attorney and accused;

who have before them a defendant who desires to represent himself in a criminal prosecution.

In Proposition V, Appellant argues the evidence was insufficient to establish that it was Appellant who possessed the crack pipe. The Court finds Appellant's cited authorities to be distinguishable from the circumstances presented at trial.[10] In Appellant's matter, testimony revealed the crack pipe was plainly visible in a motel room registered solely to Appellant. Additionally, Appellant testified that he knew one individual had been smoking crack inside his room. Appellant also stated that he knew the woman with him inside the motel room was a crack smoker. When this evidence is viewed in the light most favorable to the State, it is sufficient to support the jury's verdict.[11]

Accordingly, Appellant's Proposition V is without merit. However, as previously indicated, the Court finds reversal is warranted under Appellant's Propositions II and III, and that Appellant's matter should be remand for a new trial. Because none of Appellant's remaining three propositions of error, if proven,

---

(6) defendant will receive no special consideration from the court;

(7) defendant will receive no extra time for preparation or greater library time (if in prison);

(8) a lawyer can render important assistance (a) by determining the existence of possible defenses to the charges against defendant, (b) through consultations with the prosecutor regarding possible reduced charges or lesser penalties, and (c) in the event of a conviction, by presenting to the court matters which might lead to a lesser sentence;

(9) in the event the court accepts defendant's decision to represent himself, defendant will not be given an opportunity to change his mind during trial; and

(10) if the court in its discretion is not going to appoint standby counsel, to specifically inform the defendant that there will be no standby counsel to assist him at any stage during trial.

Ward, 567 N.E.2d at 647-48.

[10] Appellant relies upon *Miller v. State*, 1978 OK CR 54, 579 P.2d 200, and *Hishaw v. State*, 1977 OK CR 276, 568 P.2d 643.

[11] *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-04.

would entitle Appellant to any greater relief, it is unnecessary to address such propositions in this appeal.

IT IS THEREFORE THE ORDER OF THIS COURT that Appellant's Judgment and Sentence in Tulsa County District Court Case No. CM-2000-3012 is **REVERSED AND REMANDED FOR NEW TRIAL.**

The Clerk of this Court is directed to forward a copy of this Order to the Honorable Todd Singer and the Honorable Millie Otey, as well as to the Honorable Allen Klein, the judge who presided over Appellant's trial.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 26th day of March, 2002.

DISSENTS
GARY L. LUMPKIN, Presiding Judge

CHARLES A. JOHNSON, Vice Presiding Judge

CHARLES S. CHAPEL, Judge

RETA M. STRUBHAR, Judge

DISSENTS
STEVE LILE, Judge

ATTEST:

Clerk

RC