NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2008 KA 0304

STATE OF LOUISIANA

VERSUS

CLAUDE COLLINS

Judgment Rendered: October 31, 2008

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Appealed from the
Twenty-First Judicial District Court
In and for the Parish of Tangipahoa
State of Louisiana
Trial Court Number 111899

Honorable Ernest G. Drake, Jr., Judge

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Claude Collins

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BEFORE: KUHN, GUIDRY, AND GAIDRY, JJ.

Kuhn, J., dissents and assigns reasons.

GUIDRY, J.

The defendant, Claude Collins, was charged by bill of information with one count of possession of cocaine, a violation of La. R.S. 40:967(C), and pled not guilty. Following a jury trial, he was found guilty as charged. He was sentenced to five years at hard labor. He now appeals, contending that the trial court erred in failing to inform him of the perils of self-representation and in failing to ensure that he was making a knowing and intelligent decision to represent himself. He also contends that the trial court abused its discretion in imposing a maximum sentence on him. We reverse the conviction, vacate the sentence, and remand for a new trial.

FACTS

On September 21, 2004, Hammond Police Department Officers responded to the area of Richardson and Rosewood Drive to investigate a complaint of a suspicious vehicle "circling the block." Officer O.B. Melvin, Jr., saw a vehicle fitting the description of the suspicious vehicle stopped at the intersection of Richardson and Rosewood Drive. The defendant was driving the vehicle with a female passenger, Lisa Hoyt. Officer Melvin also noticed that the vehicle had an expired inspection sticker and radioed another police officer that there was probable cause to stop the vehicle. The defendant did not immediately pull over after the police turned on their lights, but made two turns before stopping behind a funeral home.

After exiting the defendant's vehicle, Hoyt explained that she had taken a ride with the defendant. Hoyt stated that the defendant had thrown a large amount of crack cocaine out of the window when the police turned on their lights to stop him. Hoyt denied that the drugs thrown from the vehicle belonged to her.

Officer Michael Thompson found two packages of crack cocaine beside the road on which the defendant had traveled prior to stopping his vehicle. The drugs were in the same area where Hoyt had claimed the defendant had thrown drugs, and were on the side of the road that would have been facing the driver's side of the defendant's vehicle as he drove by. No other vehicles or people were in the area.

The defendant conceded he was driving the vehicle that the police pulled over on the night in question. He argued, however, that no drugs had been found on him, and the State had failed to produce fingerprint evidence tying him to the drugs located in the area.

FARETTA VIOLATION

In assignment of error number 1, the defendant argues the trial court failed to inquire about his educational background, mental condition, or other factors which might impair his ability to make an informed decision as to whether to waive his right to the assistance of counsel. He also argues that he did not make an unequivocal assertion of his right to self-representation.

The State contends that, when the trial court relieved the public defender, the defendant had to secure his own private counsel and, therefore, when the defendant came to court on January 9, 2007 without counsel, such conduct acted as an implied waiver of his right to counsel. The minutes of the court must show either that the defendant was represented by counsel or that he was informed by the court of his right to counsel, including the right to court-appointed counsel, and that he waived such right. La. C. Cr. P. art. 514.

A defendant in a State criminal trial has a Sixth Amendment right to proceed without counsel when he voluntarily and intelligently elects to do so. Faretta v. California, 422 U.S. 806, 807, 95 S.Ct. 2525, 2527, 45 L.Ed.2d 562 (1975). When

an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel. For this reason, in order to represent himself, the accused must knowingly and intelligently forgo those relinquished benefits. Although a defendant need not himself have the skill and experience of a lawyer in order to competently and intelligently 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 wide open. Faretta, 422 U.S. at 835, 95 S.Ct. at 2541.

Before an accused can choose the right to defend himself, he must make a knowing and intelligent waiver that shows he appreciates the possible consequences of mishandling the core functions that lawyers are more competent to perform. State v. Dupre, 500 So.2d 873, 878 (La. App. 1st Cir. 1986), writ denied, 505 So.2d 55 (La. 1987). The determination of whether there has been an intelligent waiver of right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused. Dupre, 500 So.2d at 878.

Before a trial judge can allow a defendant to represent himself, he must determine whether the defendant's waiver of counsel is intelligently and voluntarily made, and whether his assertion of his right to represent himself is clear and unequivocal. Dupre, 500 So.2d at 878. It is clear that Faretta cannot, and does not, contemplate that the propriety of granting a defendant the right to represent himself shall be judged by what happens in the subsequent course of that representation. Dupre, 500 So.2d at 879. It is the record made in recognizing that right that is determinative. Dupre, 500 So.2d at 879. Furthermore, the state has the burden of establishing that the defendant knowingly and intelligently waived his constitutional

right to the assistance of counsel. Dupre, 500 So.2d at 879. The failure of the trial court to secure a valid waiver of counsel constitutes reversible error. See State v. Bruce, 2003-918, p. 5 (La. App. 5th Cir. 12/30/03), 864 So.2d 854, 857; see also Dupre, 500 So.2d at 879.

The defendant was charged by bill of information filed November 3, 2004. On January 13, 2005, he appeared in court with counsel for arraignment. The defendant was advised of his rights, waived reading of the bill, and entered a plea of not guilty. The court appointed the office of the public defender to represent the defendant. Thereafter, the defendant appeared in court with counsel on February 16, 2005, March 15, 2005, March 24, 2005, August 17, 2005, and October 30, 2006.

On November 22, 2006, the defendant appeared in court with counsel, and the court set the trial for January 8, 2007. The defendant asked for a crime lab report. The State asked the defendant if he was representing himself, and he replied, "Yes. I got a private – 'cause he – he ain't did his job." Thereafter, the court relieved the public defender's office of any further representation and instructed the clerk to give the defendant notice to be back on January 8, 2007.

On January 8, 2007, the defendant appeared in court without counsel. The court asked the defendant if he had counsel, and the defendant replied that he had "plenty counsel[.]" When the court asked for the name of the defendant's counsel, he replied that he had "a lot of them." The court asked if the defendant had counsel with him that day, and the defendant replied, "No, Sir." The court asked if any of the defendant's lawyers would be in court to help him try the case the next day, and the defendant replied the case should be dismissed. The court instructed the clerk to give the defendant a ticket to be in court for 9:00 a.m. the next day. The court also personally told the defendant to be in court for 9:00 a.m. for jury selection.

On January 9, 2007, the defendant appeared in court without counsel. He did not question any prospective jurors, did not make any challenges for cause, and did not exercise any peremptory challenges. He also did not move for sequestration of the witnesses, resulting in Officer Thompson being present in the courtroom during the testimony of Officer Melvin and prior to being called to testify in his own right. The defendant made an opening statement, cross-examined State witnesses, objected to testimony, objected to evidence, and made a closing argument. He also testified in his defense.

There should be some indication that the trial court tried to assess defendant's literacy, competency, understanding and volition before he accepted the waiver of counsel. Dupre, 500 So.2d at 879. None of these indications are in the instant record nor is there any showing the trial court adequately informed the defendant of the dangers and disadvantages of representing himself. We can only conclude the trial court did not investigate these factors and the decision to allow the defendant to represent himself is not supported by the record. Compare State v. Brown, 2003-0897, pp. 30-32 (La. 4/12/05), 907 So.2d 1, 23-24 (before allowing the defendant to participate in his own defense, trial court advised the defendant that he would be subject to the rules of evidence and rules of procedure just as though he was an attorney, questioned the defendant concerning his legal training, formal education, and literacy, and made certain the defendant understood what was at stake); see also Dupre, 500 So.2d at 879 n.4 (setting forth certain suggestions on how to protect the record when a defendant chooses to proceed pro se).

This assignment of error has merit. Accordingly, the defendant's conviction must be reversed, the sentence vacated, and this case hereby is remanded to the trial court for a new trial.

EXCESSIVE SENTENCE

In assignment of error number 2, the defendant contends the record does not support the sentence because there was no showing that he was one of the worst offenders or that this was the worst offense. Our resolution of assignment of error number 1, causes us to pretermit consideration of this assignment of error.

CONVICTION REVERSED; SENTENCE VACATED; REMANDED FOR NEW TRIAL.

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KUHN, J., dissenting.

I respectfully disagree with the majority's decision to reverse defendant's conviction based on its conclusion that the trial court erred by failing to inform him of the perils of self-representation and to ensure that he was making a knowing and intelligent decision to represent himself.

A thorough review of the record reveals defendant attempted to use his right to counsel to obstruct court proceedings in this case. Defendant's conduct amounted to a waiver of his right to the assistance of counsel. Defendant was undoubtedly aware of his right to court-appointed counsel. He appeared in court numerous times with appointed counsel before claiming, approximately six weeks prior to trial, that he had retained an attorney. As late as the day before trial, he continued to claim that he had retained counsel and refused to answer the court's inquiry as to whether or not his retained counsel would appear for trial the next day. His refusal to accept the assistance of appointed counsel was a knowing and voluntary waiver of his right to the assistance of counsel. See ***State v. Jones***, 565 So.2d 1023 (La. App. 1st Cir. 1990), writ denied, 585 So.2d 565 (La. 1991); ***State ex rel. Johnson***, 449 So.2d at 548-50.

For these reasons, and finding that because defendant failed to either make or file a motion to reconsider sentence in accordance with La. C.Cr.P. art. 881.1 and, therefore, that his excessive sentence claim is procedurally barred, I would affirm the conviction and sentence. Accordingly, I dissent.