

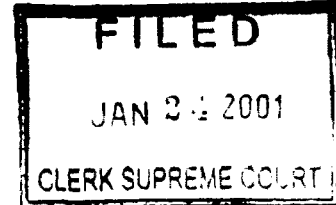
IN THE COURT OF APPEALS OF IOWA

No. 0-705 / 99-1611
Filed January 24, 2001

STATE OF IOWA,
Plaintiff-Appellee,

vs.

RICHARD WAYNE EVERHART,
Defendant-Appellant.



Appeal from the Iowa District Court for Clarke County, Darrell Goodhue,
Judge.

On appeal from his convictions for second-degree robbery and escape,
the defendant argues the trial court erred in failing to obtain a knowing and
intelligent waiver of his right to counsel before allowing him to represent himself.

REVERSED AND REMANDED FOR NEW TRIAL.

Linda Del Gallo, State Appellate Defender, and Martha J. Lucey, Assistant
State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney
General, and John D. Lloyd, County Attorney, for appellee.

Considered by Zimmer, P.J., and Hecht and Vaitheswaran, JJ.

VAITHESWARAN, J.

With the assistance of standby counsel, Richard Everhart represented himself in his robbery and escape trial. On appeal, he contends the district court did not ensure he knowingly and intelligently waived his right to counsel. We agree and, accordingly, reverse and remand for a new trial.

I. Background Facts and Proceedings

Everhart was housed at the Clarke County jail. On December 4, 1998, a jailer found himself handcuffed and injured and discovered his billfold and pager were missing. Also missing was Everhart.

The State charged Everhart with attempted murder, first-degree robbery and escape in violation of Iowa Code sections 707.11, 711.1, and 719.4(1) (1997). The district court appointed defense counsel to represent Everhart. His first attorney withdrew and a second attorney was appointed. On the eve of trial, the second attorney informed the court he and Everhart had a difference of opinion concerning an insanity defense Everhart had chosen to assert in a pro se filing. He also advised the court Everhart wished to represent himself, but the attorney would be willing to serve as standby counsel. The case proceeded to trial, with Everhart representing himself and defense counsel participating as standby counsel.

A jury convicted Everhart of second-degree robbery and escape. He was sentenced to an indeterminate term not to exceed ten years on the robbery count and a term not to exceed five years on the escape count, both to be served concurrently but consecutive to a sentence in another case. This appeal followed.

II. Waiver of Right to Counsel

Everhart's sole contention on appeal is that the district court did not ensure he knowingly and intelligently waived his right to counsel guaranteed by the Sixth Amendment to the United States Constitution. We review this constitutional claim de novo. *State v. Rater*, 568 N.W.2d 655, 657 (Iowa 1997).

The Sixth Amendment affords the accused in all criminal prosecutions the right to assistance of counsel. U.S. Const. amend. VI. This right applies to the states via the Fourteenth Amendment to the federal constitution. *Gideon v. Wainwright*, 372 U.S. 335, 341, 83 S. Ct. 792, 795, 9 L. Ed. 2d 799, 803 (1963). With this right comes a concomitant right of the accused to represent themselves. *Faretta v. California*, 422 U.S. 806, 807, 95 S. Ct. 2525, 2527, 45 L. Ed. 2d 562, 566 (1975). This right to self-representation is not effective until asserted. See *Reese v. Nix*, 942 F.2d 1276, 1280 (8th Cir. 1991). It attaches only after a defendant "knowingly and intelligently" waives the right to counsel. *Faretta*, 422 U.S. at 835; 95 S. Ct. at 2542, 45 L. Ed. 2d. at 581. The defendant must "clearly and unequivocally" express a desire for self-representation and the record must affirmatively show a voluntary exercise of an informed free will. *Id.* Before a district court may permit a defendant to proceed pro se, the court must engage in a colloquy with the defendant to satisfy itself on the record the defendant is "aware of the dangers and disadvantages of self-representation." *Id.* This colloquy must include a discussion of "the nature of the charges, the statutory offenses included within them, the range of allowable punishments hereunder, possible defenses to the charges and circumstances in mitigation

thereof, and all other facts essential to a broad understanding of the whole matter." *State v. Cooley*, 608 N.W.2d 9, 15 (Iowa 2000).

The State concedes the district court did not engage in this type of comprehensive colloquy.¹ The State nevertheless maintains the requirement to engage in such a colloquy did not attach because Everhart did not "clearly and unequivocally" invoke his right to self-representation. The State points to the following exchange between Everhart and his attorney:

[Defense Attorney]: Have you thought about an opening statement?

[Everhart]: [I]t wasn't my actual intention to come here today and represent myself, but it seems to be a good idea. I feel I'm capable of doing so, but I didn't know I was going to do this so I wasn't adequately prepared to do so."

¹ The court entered into the following exchange with Everhart:

THE COURT: Well, let me clarify that then. You do want to represent yourself in this matter, is that correct?

THE DEFENDANT: Yes, your Honor.

THE COURT: Very well. Again, I would emphasize what Mr. Wright has stated that you do have the right to remain silent, but if you do say something that is incriminating the jury can take that into consideration.

THE DEFENDANT: Although I'm not testifying?

THE COURT: You know, if you are making argument and you are stating something that is incriminating they are going to use it against you whether you are under oath or whether you are testifying or not testifying.

THE DEFENDANT: Okay.

THE COURT: I think that is a fair assumption. They are not going to draw any distinction of whether you are testifying or making argument or objecting to something. Whenever you speak it's going to be on the record and they are going to hear it.

THE DEFENDANT: It might be stipulated in the jury instructions.

MR. LLOYD: I think I am entitled to use it. If he says it on the record in the court room I'm entitled to use it.

THE COURT: That is totally correct. We are just advising you of that. We want you to be aware of that.

THE DEFENDANT: Okay.

THE COURT: I find some difficulty—I guess you do have the right to represent yourself, but when you filed an outstanding motion relative to insanity it seems to be putting the Court in a difficult position to say, yes, you can go ahead and represent yourself, even though you have claimed insanity. But I guess it's your call if you want to represent yourself.

We are not persuaded this exchange demonstrates Everhart was equivocal about representing himself. Before making this statement, Everhart affirmatively stated he wished to represent himself. After the making the statement, Everhart's attorney twice asked him again if he wished to represent himself and Everhart responded "yes." He also agreed with his attorney that he had thought about the decision and had talked about it for a number of weeks. Indeed, the record reflects he had already filed pro se motions to dismiss, to continue the pretrial conference and to obtain a transcript, in addition to an "amended and substituted motion in limine" filed the day after his attorney filed a motion in limine. We conclude Everhart's assertion of his right of self-representation was unequivocal.

The State next argues standby counsel's extensive participation in the trial cured any defects in Everhart's waiver of his right to counsel. We disagree. Our highest court recently addressed a virtually identical situation in *State v. Stephenson*, 608 N.W.2d 778, 781 (Iowa 2000). There, two court-appointed attorneys withdrew. Stephenson indicated he wished to represent himself but later vacillated on the issue. *Id.* at 682. He ultimately decided to go forward with standby counsel. *Id.* The court did not engage in a formal colloquy with Stephenson concerning his decision, but noted in a calendar entry it was the court's decision to appoint standby counsel. The Iowa Supreme Court stated the district court had "an absolute duty to indulge the accused in an on the record colloquy." *Id.* The court further noted the State could not overcome this procedure by asserting the omission was harmless error. *Id.* We believe this language is controlling here. See also *State v. Martin*, 608 N.W.2d 445 (Iowa 2000) (district court's appointment of standby counsel and counsel's participation

at trial did not cure defective waiver).² The language of *Stephenson* is particularly persuasive given the absence of any indication Everhart withdrew his decision to represent himself or affirmatively sought to reinstate standby counsel to his former role as primary counsel. *Cf. State v. Rater*, 568 N.W.2d 655, 661 (Iowa 1997) (finding repeated statements by defendant that he was unqualified to handle trial and it was a "travesty of justice" to be required to represent himself were attempts to elevate standby counsel to lead counsel role, thereby waiving his right to a *Faretta* colloquy).

In light of Everhart's clear and unequivocal assertion of his right to self-representation, we conclude the district court was obligated to ensure Everhart's waiver of his corresponding right to counsel was knowing and intelligent. As the court did not engage in the type of colloquy contemplated by *Faretta* and recent Iowa precedent, we reverse and remand for a new trial.

REVERSED AND REMANDED FOR NEW TRIAL.

² *But see State v. Ruesga*, ___ N.W.2d ___, --- (Iowa 2000) (holding Sixth Amendment right to self-representation not violated where defendant agreed to hybrid representation and invited counsel's substantial participation in cross-examination of expert witness). We conclude this case is distinguishable, as Everhart did not agree to hybrid representation.