FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed December 18, 1985
vs.	)	
JERRY LEE BERRY,	)	5-496 84-1464
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Polk County - Louis A. Lavorato, Judge.

Defendant appeals his conviction for attempted murder asserting that he received ineffective representation and that he was deprived of his constitutional right to representation. **AFFIRMED.**

Charles Harrington, Chief Appellate Defender, and Deborah A. Goins, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Ann E. Brenden, Assistant Attorney General; Jim Smith, Polk County Attorney, and Catherine Thune, Assistant Polk County Attorney; for plaintiff-appellee.

Heard by Donielson, P.J., Hayden, and Sackett, JJ.

Defendant, Jerry Berry, appeals his conviction for attempted murder. He asserts 1) that he received ineffective representation, and 2) that he was deprived of his constitutional right to representation. We affirm.

Prior to trial, defendant's initial attorney, Alfredo Parrish, filed a motion to withdraw as counsel claiming that Berry was indigent and should be represented by appointed counsel. At a hearing on the matter Parrish raised another ground for withdrawal, asserting that he had information which he believed was inconsistent with the defense Berry wanted to pursue. However, he would not disclose the information because it was based on a privileged communication with defendant. The trial court refused to permit Parrish to withdraw, stating that it did not have sufficient evidence to rule otherwise.

Defendant subsequently held one or two inconclusive discussions with the trial court concerning the possibility of representing himself pro se. However, Parrish ultimately represented the defendant at trial. A different attorney represented the defendant for posttrial motions.

On appeal, Berry contends he was denied effective assistance of counsel by the trial court's refusal to permit Parrish to withdraw. He claims that Parrish was unable to give wholehearted and effective representation because of a conflict in interest. He also complains that Parrish did not adequately investigate defendant's alibi defense and did not call enough witnesses in support of the defense.

Upon reviewing the record, we conclude that it would be inappropriate to address the merits of defendant's claim of ineffective assistance. When examining such a claim, we must consider the totality of the circumstances and determine whether counsel's performance was within the normal range of competence. Meier v. State, 337 N.W.2d 204, 206 (Iowa 1983). The record

before this court is not adequate to make this determination. We are hesitant to make what would amount to an ex parte decision. "Even a lawyer is entitled to his day in court, especially when his professional reputation is impugned." State v. Coil, 264 N.W.2d 293, 296 (Iowa 1978); see also State v. Whitesel, 339 N.W.2d 149, 157 (Iowa 1983).

Berry also argues that the trial court deprived him of his constitutional right of self-representation. He alleges that he informed the court on two occasions that he was concerned about his legal representation. According to Berry, these conversations should have alerted the court that further inquiry was necessary in order to determine whether defendant wanted to appear pro se. The State argues that Berry waived this right since it was not "clearly and unequivocally" asserted.

In Faretta v. California, the United States Supreme Court held that criminal defendants have a right to represent themselves pursuant to the sixth amendment when the choice is made voluntarily and intelligently. 422 U.S. 806, 835-36, 95 S. Ct. 2525, 2541, 45 L. Ed. 2d 562, 581-82 (1975). Unlike the constitutional right to counsel, the right to appear pro se does not attach until asserted. State v. Grady, 231 N.W.2d 869, 873 (Iowa 1975). The Iowa Supreme Court has indicated that a defendant's request to represent himself must be unequivocally stated. Id.; State v. Smith, 215 N.W.2d 225, 226 (Iowa 1974). In the case before this court, we do not believe this standard has been met.

Both the trial judge and defendant's trial counsel, Alfredo Parrish, recalled one brief conversation concerning pro se representation. Parrish's testimony indicates that defendant inquired about the possibility of self-representation in the event that Parrish was allowed to withdraw; if he was not allowed to withdraw, it was Parrish's understanding that it was not going to be an issue.

The trial judge's recollections were consistent with Parrish's testimony:

> . . . I will be positive with you, Counsel, he said nothing to me that indicated to me at least that he was making an application for self-representation. There was brief discussion in the subject, which is quite different in my mind from making an application for self-representation . . . .
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> . . . It may have been at the same time that Mr. Parrish was seeking to withdraw from the case and may have been predicated on that, that his attorney was going to be withdrawing. And since he wasn't going to have the attorney he wanted, maybe that he wanted to represent himself. But I never did take it within a million miles as an application by the Defendant. If I had I would have made a record on it.

Berry's version of the conversation differed from that of the judge and trial counsel. He claims that there were two conversations regarding pro se representation and that the judge decided to let him represent himself. However, this testimony alone does not persuade us to conclude that Berry's constitutional rights were violated.

Viewing this evidence as a whole, we must conclude Berry's inquiry regarding his sixth amendment rights fell short of being an unequivocal assertion. The proceedings were not reported, and defendant made no attempt to make a record of the proceedings. We are hesitant to find a constitutional violation based merely upon recollections of the events that transpired, especially when such recollections are inconsistent.

Berry argues, however, whatever discussion took place should have been sufficient to alert the trial court that a hearing was necessary. In support of this argument he cites Snead v. State, 406 A.2d 98, 101 (Md. 1979). There the Court of Appeals of Maryland held that once defendant has indicated some desire to appear pro se, it was the trial court's duty to ascertain whether the defendant "clearly and unequivocally" wants to defendant himself. Id.

We decline to adopt this standard. Most jurisdictions, including Iowa, place the duty on the defendant to assert the right to self-representation clearly and unequivocally. Brown v. Wainwright, 665 F.2d 607, 610 (5th Cir.), cert. denied, 456 U.S. 910, 102 S. Ct. 1760, 72 L. Ed. 2d 168 (1982); United States v. Bennett, 539 F.2d 45, 51 (10th Cir.), cert. denied, 429 U.S. 925, 97 S. Ct. 327, 50 L. Ed. 2d 293 (1976); Andersen v. State, 370 N.E.2d 318, 320 (Ind. 1977); Smith, 315 N.W.2d at 226; see also Annot., 98 A.L.R.3d 13, 61-66 (1980). We see little reason to depart from this rule. Halfhearted expressions of dissatisfaction with counsel and general references to self-representation should not be sufficient to trigger the right to a hearing. A holding to this effect would only serve to unnecessarily burden our courts. At the very least, defendant's assertion should be clear enough that, if granted, he cannot turn around and urge that he was improperly denied counsel. Russell v. State, 383 N.E.2d 309, 313 (Ind. 1978).

We find no reversible error and therefore affirm.

AFFIRMED.